MISSISSIPPI CODE 1972

Annotated

U.S. Constitution

Constitution of the
State of Mississippi

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME ONE

CONSTITUTIONS

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2014 REGULAR LEGISLATIVE SESSION
AND THE 1ST AND 2ND EXTRAORDINARY SESSIONS

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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. Summer
Attorney General

PUBLISHER'S FOREWORD

This 2014 Replacement Volume 1 of the Mississippi Code of 1972 Annotated represents material appearing in the original 1973 bound volume, the 1998 replacement volume and the 2005 replacement volume, and reflects amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2014 Regular Legislative Session and the 1st and 2nd Extraordinary Sessions.

This volume contains the text of the Constitution of the United States of America and the Constitution of the State of Mississippi as amended through the 2014 Regular Legislative Session and the 1st and 2nd Extraordinary Sessions.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as soon as they are released by the courts. A consequence of this more current reading of cases, as soon as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series.
American Law Reports, Federal Series.
Mississippi College Law Review.
Mississippi Law Journal.

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

PUBLISHER'S FOREWORD

A comprehensive Index appears at the end of this volume.

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For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, 701 E Water Street, Charlottesville, VA 22902-5389.

September 2014 LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- — Advance Code Service
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If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, 701 E Water Street, Charlottesville, VA 22902-5389.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

Amendment notes are available online from 1991 until the present in the Mississippi Legislative Archive.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

ATTORNEY GENERAL OPINIONS

Opinions of the Attorney General for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading "Attorney General Opinions." The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooperation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States* and *Federal Aspects*.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor. Acts affecting voting rights and procedures take effect on the date the United States Attorney General interposes no objection under § 5 of the Voting Right Act of 1965.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States.*

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

SOURCE NOTES

Each section of the Code is followed by a brief note showing the acts of the Legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note. :

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

STATUTE HEADINGS

Headings or "catchlines" for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
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- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.

- Consolidated Tables of amendments and repeals of 1972 Code sections.

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MISSISSIPPI CODE 1972

ANNOTATED

VOLUME ONE

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I.	The Congress
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Preamble

WE, THE PEOPLE of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

JUDICIAL DECISIONS

1. In general.

As shown by the preamble to the Constitution, the purpose for which the state exists is to promote the peace, happiness and prosperity of its citizens. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. 2d, Constitutional Law § 62.

ARTICLE I.

THE CONGRESS

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10. Powers Prohibited to States

§ 1. Legislative Powers Vested in Congress

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. 2d, Constitutional Law §§ 214 et seq.

CJS. C.J.S. Census §§ 4, 11.

C.J.S. Commerce §§ 19, 37-50, 68-73, 99, 103, 111, 143, 145.

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C.J.S. Internal Revenue § 4.

C.J.S. Judges §§ 95-98, 112, 113.

C.J.S. Statutes §§ 407-431.

C.J.S. United States §§ 16-46, 156, 158.

§ 2. House of Representatives

1. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. [Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.] The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative, and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

Editor's Note — The clause in the third paragraph enclosed in brackets was amended, as to the mode of apportionment of Representatives among the several states, by the Fourteenth Amendment, § 2, and as to taxes on incomes without apportionment, by the Sixteenth Amendment.

Cross References — Appointment of Representatives, see USCS Const. Amend. XIV, § 2.

Commencement and end of terms, see USCS Const. Amend. XX, § 1.

Power to fill vacancies in Senate, see USCS Const. Art. II, § 2, cl.

RESEARCH REFERENCES

Am Jur. 3B Am. Jur. 2d, Aliens and Citizens § 1879.

3C Am. Jur. 2d, Aliens and Citizens § 2271.

16A Am. Jur. 2d, Constitutional Law § 247.

25 Am. Jur. 2d, Elections §§ 11, 20, 21.

26 Am. Jur. 2d, Elections §§ 238, 259.

63C Am. Jur. 2d, Public Officers and Employees § 218.

77 Am. Jur. 2d, United States §§ 8, 9.

§ 3. Senate

1. [The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.]

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; [and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.]

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President Pro Tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Editor's Note — The first paragraph and the bracketed portion of the second paragraph were superseded by the Seventeenth Amendment.

Cross References — Composition and vacancies Senate, see USCS Const. Amend. XVII.

Power of impeachment, House of Representatives, USCS Const. Art. I, § 2, cl 5.

Power of each House to judge qualifications of its own members, USCS Const., Art. I, § 5, cl. 1.

Incapacity and removal of President, see USCS Const. Amend. XXV.

RESEARCH REFERENCES

Am Jur. 3B Am Jur 2d, Aliens and Citizens § 1879.

3C Am Jur 2d, Aliens and Citizens § 2271.

16A Am Jur 2d, Constitutional Law § 247.

77 Am Jur 2d, United States § 8.

§ 4. Congressional Elections; Sessions of Congress

1. The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Cross References — Date for the annual meeting changed to the third day of January, see USCS Const. Amend. XX.

RESEARCH REFERENCES

Am Jur. 16A Am Jur 2d, Constitutional Law § 222.

25 Am Jur 2d, Elections §§ 3, 5, 10.

26 Am Jur 2d, Elections §§ 230, 267.

§ 5. Legislative Proceedings

1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Cross References — Qualifications of Representatives, generally, see USCS Const., Art. I, § 2, cl. 2.

Qualifications of Senators, generally, see USCS Const., Art. I, § 3, cl. 3.

RESEARCH REFERENCES

Am Jur. 26 Am Jur 2d, Elections § 399.

77 Am Jur 2d, United States §§ 3, 8, 15.

CJS. C.J.S. Armed Services §§ 1-41, 341-348.

C.J.S. Commerce §§ 2, 5.

C.J.S. Counterfeiting §§ 2, 8.

C.J.S. Customs Duties § 1.

C.J.S. District of Columbia §§ 9-12.

C.J.S. Federal Courts §§ 3-4.

C.J.S. Internal Revenue § 4.

C.J.S. International Law §§ 2 to 5.

C.J.S. Patents §§ 1, 6-9.

C.J.S. Postal Service and Offenses Against Postal Laws §§ 2, 3.

C.J.S. Statutes §§ 12, 13, 41, 43.

C.J.S. United States §§ 16-33, 153-162.

C.J.S. War and National Defense §§ 2, 16, 17-20, 23.

Lawyers' Edition. Federal court's power to determine election or qualifications of member of legislative body. 17 L Ed 2d 911.

§ 6. Members

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office.

Editor's Note — The text appearing after the semicolon in the second sentence of the first paragraph is popularly known as the "Speech or Debate Clause."

The second paragraph is popularly known as the "Incompatibility Clause" and also as the "Ineligibility Clause."

Cross References — Change in compensation of members of Congress, effective date, see USCS Const. Amend. XXVII.

RESEARCH REFERENCES

Am Jur. 5 Am Jur 2d, Arrest § 108.

16A Am Jur 2d, Constitutional Law § 258.

23 Am Jur 2d, Depositions and Discovery § 57.

62A Am Jur 2d, Privacy § 215.

62B Am Jur 2d, Process § 16.

63C Am Jur 2d, Public Officers and Employees §§ 64-66, 68-78, 271-279, 281, 284-298, 433, 435-439.

77 Am Jur 2d, United States §§ 5, 6, 7.

Lawyers' Edition. United States Senators' and Representatives' privileges and immunities relating to arrest and to speech or debate, under Art. 1, cl. 1 of Federal Constitution. 23 L. Ed. 2d 915.

Construction and application of speech or debate clause of United States Constitution (Art I, § 6, Cl 1)--Supreme Court Cases. 60 L Ed 2d 1166.

§ 7. Bills, Orders, Resolutions, or Votes

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Editor's Note — The first paragraph is popularly known as the "Origination Clause."

The second paragraph, often together with the third paragraph, is popularly known as the "Presentment Clause(s)."

In addition, the third paragraph is popularly known as the "Veto Clause" or the "Orders, Resolutions and Votes Clause."

RESEARCH REFERENCES

Am Jur. 16A Am Jur 2d, Constitutional Law § 247.

Lawyers' Edition. Supreme court's construction and application of Federal constitution's appropriations clause (Art I, § 9, cl 7). 110 L Ed 2d 773.

Supreme Court's construction and application of Federal Constitution's Art I, § 7, cl 2 and 3, concerning presentment of congressional bills, orders, resolutions, and votes to President and their approval or disapproval (veto) by President. 141 L Ed 2d 825.

§ 8. Powers of Congress.

The Congress shall have Power

1. To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by session of particular states, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;—And

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Editor's Note — Parts of the first paragraph are popularly known as the "Taxation Clause," the "General Welfare Clause," the "Spending Clause," and the "Uniformity Clause."

Parts of the third paragraph are popularly known as the "Commerce Clause," the "Interstate Commerce Clause," the "Indian Commerce Clause," and the "Dormant Commerce Clause."

Parts of the fourth paragraph are popularly known as the "Naturalization Clause" and the "Bankruptcy Clause."

Part of the fifth paragraph is popularly known as the "Coinage Clause."

The sixth paragraph is popularly known as the "Postal Clause."

The eighth paragraph is popularly known as the "Patent and Copyright Clause" or variations thereof.

The ninth paragraph is popularly known as the "Inferior Tribunals Clause."

Part of the tenth paragraph is popularly known as the "Offenses Clause."

The fifteenth and sixteenth paragraphs are popularly known as the "Militia Clauses."

The eighteenth paragraph is popularly known as the "Necessary and Proper Clause" or the "Sweeping Clause."

Cross References — Apportionment of taxes, see USCS Const., Art. 1, § 2, cl. 3.

Power of Congress to provide for punishment of counterfeiting, USCS Const., Art. 1, § 8, cl. 6.

Articles exported from any state, see USCS Const., Art. 1, § 9, cl. 5.

Right to bear arms, see USCS Const. Amend. 2.

Persons born or naturalized in United States as citizens, generally, USCS Const., Amend. 14, § 1.

Power to lay and collect taxes on incomes, see USCS Const., Amend. 16.

JUDICIAL DECISIONS

1. In general.
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12. Taxation—In general.
13. — Sales and use taxes.
14. — Income taxes.
15. — Carriers, taxation.
16. — Telegraph and telephones, taxation.
17. — Gas and petroleum products, taxation.
18. — Miscellaneous taxes.
19. Bankruptcy laws.
20. Post offices and post roads.
21. Copyright laws.

22. Regulation of land and naval forces.

1. In general.

The commerce clause of Constitution does not operate to commit to federal courts or withhold from state court, jurisdiction of all suits relating to regulation, or attempted regulation, of interstate commerce. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

Legislation by Congress under the commerce clause, and administrative orders made in pursuance to such legislation, are controlling both in the state and the Federal courts. Stoner & Co. v. Blocton Export Coal Co., 135 Miss. 390, 100 So. 5 (1924).

The commerce clause was designed to prevent each state from legislating with reference to its own interest regardless of the interest of others, and should be so construed as to accomplish that end, and should be limited to that. Stone v. Yazoo & Miss. V. Ry., 62 Miss. 607, 52 Am. R. 193 (1885).

Not every state action which may incidentally or consequentially affect interstate commerce may be held void. Stone v. Yazoo & Miss. V. Ry., 62 Miss. 607, 52 Am. R. 193 (1885).

2. Burden upon interstate commerce.

Miss. Code Ann. § 27-70-5 (2010) violated the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as it was internally inconsistent since: (1) if another state enacted an identical law and a distributor obtained cigarettes in Mississippi for sale outside of Mississippi, then Mississippi would impose a fee on a transaction and the other state would impose a fee on a transaction; (2) if the cigarettes acquired by the Mississippi distributor were sold intrastate, they would be subject to only one fee; and (3) if another state enacted an identical statute, interstate commerce would bear a burden that intrastate commerce would not. Commonwealth Brands v. Morgan, 110 So. 3d 752 (Miss. 2013).

The State Oil and Gas Board requirement that an interstate pipeline company take ratably the natural gas produced from a common source of supply was not an impermissible burden on interstate commerce under Article 1, § VIII. Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd. & Coastal Exploration of Miss., Inc., 457 So. 2d 1298 (Miss. 1984), probable jurisdiction noted, 470 U.S. 1083, 105 S. Ct. 1840, 85 L. Ed. 2d 140 (1985), rev'd on other grounds, 474 U.S. 409, 106 S. Ct. 709, 88 L. Ed. 2d 732 (1986), reh'g denied, 475 U.S. 1091, 106 S. Ct. 1485, 89 L. Ed. 2d 738 (1986).

Mississippi Board of Health Regulation, excluding milk from another state unless such other state accepted Mississippi milk on a reciprocal basis, unduly burdened interstate commerce and could not be justified either as a permissible exercise of state power in maintaining health standards, particularly since such milk was excluded regardless of whether it met health standards, or as a free trade provision promoting trade between the states. Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976).

The Mississippi Milk Products Sales Act (Code 1942 §§ 4560-101 et seq., Laws, 1960, ch 156) is not unconstitutional as a burden upon interstate commerce. State ex rel. Patterson v. Pure Vac Dairy Prods. Corp., 251 Miss. 457, 170 So. 2d 274 (1964), appeal dismissed, 382 U.S. 14, 86 S. Ct. 46, 15 L. Ed. 2d 9 (1965).

In an action for personal injuries sustained in Louisiana, contentions of a Georgia corporation, operating motor freight lines along a highway through the coastal counties of Mississippi, including the county of plaintiff's residence, and maintaining an agency and warehouse in Mississippi to solicit business and to facilitate its interstate business, that maintenance of the action against it in Mississippi would create an undue burden on interstate commerce in violation of the Federal Constitution, arising from the inconvenience of requiring the attendance of witnesses from outside the state of Mississippi was untenable since there could arise no conclusive presumption of an undue burden on interstate commerce from such circumstance. M. & A. Motor Freight Lines v. Villere, 190 Miss. 848, 1 So. 2d 788 (1941).

3. Incident to interstate commerce.

A statute making the sale of malt liquors unlawful does not, in invalidating a contract between a non-resident manufacturer and a local dealer for the exclusive right to make local sales involve the denial right of any incident to interstate commerce where such agreement contained no such suggestion that the contemplated resales were to be made in the original imported packages. Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 33 S. Ct. 44, 57 L.Ed. 184 (1912).

4. Law governing.

In an action for death of a railroad employee, earnings or income of deceased from business other than employment with defendant held entitled to be considered in determining damages, as against the contention that earnings having no relation to interstate commerce are not within the legislative power of Congress. Illinois Cent. R. Co. v. Humphries, 174 Miss. 459, 164 So. 22, 102 ALR 549 (1935).

5. Intrastate activities of foreign corporations.

Where business of foreign corporation is interstate in nature, state may not burden such business with state qualification requirements unless business of corporation includes distinct and separable intrastate focus, or corporation has "localized" its business within state. Radio WHKW, Inc. v. Yarber, 838 F.2d 1439 (5th Cir. Miss. 1988).

By contributing to unitary interstate transaction, radio station's remote broadcasting activities fell within governance, and hence protections, of commerce clause. Remote broadcasting from Mississippi area entailed transmission of live, promotional messages from premises of advertisers in Mississippi to Alabama station, from which messages were rebroadcast via FCC licensed interstate transmitter to listeners in Alabama and Mississippi. Such remote broadcasting is inseparable from underlying interstate sale of air time. Radio station's remote broadcasting from Mississippi was not localization where (1) only a single commercial transaction relating to remote broadcasts could be identified, and that was sale of air time to advertiser; (2) remote radio transmissions directly involved the delivery of services across state lines, and (3) services were essential to and inseparable from underlying interstate sales transactions themselves. Radio WHKW, Inc. v. Yarber, 838 F.2d 1439 (5th Cir. Miss. 1988).

Maintenance by Alabama radio station of substantial sales force in Mississippi is insufficient to establish either localization or distinct and separable business activity within Mississippi. Constitutional right to transact business in interstate commerce without obstruction from state regulation includes right to search out business opportunities. Radio WHKW, Inc. v. Yarber, 838 F.2d 1439 (5th Cir. Miss. 1988).

Alabama radio station's contractual relations with Mississippi merchants and citizens as business consumer did not support decision of localization where record indicated that all radio station's contacts with Mississippi businesses and citizens related to its sales operation. Foreign corporation must enjoy same access to domestically-provided goods and services required to complete its interstate business as is enjoyed by domestic corporations. Radio WHKW, Inc. v. Yarber, 838 F.2d 1439 (5th Cir. Miss. 1988).

Because Alabama radio station's business activities within state of Mississippi demonstrated pattern of unitary interstate transactions rather than of localized or separable intrastate focus, denial of access to Mississippi courts imposed impermissible burden on interstate commerce. Radio WHKW, Inc. v. Yarber, 838 F.2d 1439 (5th Cir. Miss. 1988).

A statute prohibiting any corporation from owning or operating any cotton gin where such corporation is interested in the manufacture of cottonseed oil or cottonseed meal does not, as applied to a nonresident corporation operating cotton gins in Mississippi from which it ships all of its cottonseed which may be purchased in connection with its ginning operation to its oil mill in its own state, violate the commerce clause. Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 42 S. Ct. 42, 66 L. Ed. 166 (1921).

A state statute making it a misdemeanor for an agent of a foreign insurance company which has not complied with the laws of the state, to come into the state and adjust a loss for such company, does not violate the commerce clause. Moses v. State, 65 Miss. 56, 3 So. 140 (1887).

6. Carriers, generally.

Whether the shipment of oil from a gathering point to railroad loading racks, both points being in the same state, is intrastate or interstate transportation, is a federal question, which the Supreme Court of the United States decides for itself from the undisputed facts in the record. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949), reh'g denied, 338 U.S. 839, 70 S. Ct. 32, 94 L. Ed. 513 (1949).

Code 1942 § 7785, requiring segregation of races on common carriers, referred to in a case involving the question whether a similar statute of Virginia violated the commerce clause. Morgan v. Virginia, 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A.L.R. 574 (1946).

Separate accommodations for white and colored passengers may be required of railroads without violating the commerce clause. Louisville, N.O. & T. Ry. v. Mississippi, 133 U.S. 587, 10 S.Ct. 348, 33 L. Ed. 784 (1890).

The state may require an interstate railroad to abolish at own expense highway grade crossing, without regard to financial ability, if reasonably required by public safety. New Orleans & N.E.R. Co. v. State Hwy. Comm'n, 164 Miss. 343, 144 So. 558 (1932).

An attachment proceeding against a nonresident interstate railroad in which traffic balances due defendant from other interstate railroads were impounded does not unlawfully burden interstate commerce. Clark v. Louisville & N.R. Co., 158 Miss. 287, 130 So. 302 (1930).

The attachment of railway cars which came into the possession of a railroad company in interstate commerce, does not unconstitutionally burden such commerce. Illinois Cent. R.R. v. Terry, 137 Miss. 371, 102 So. 391 (1924).

An order of the State Railroad Commission made in the exercise of its discretionary authority, requiring a railway company to stop its interstate mail trains at a specified county seat, unconstitutionally interferes with interstate commerce where proper and adequate railway passenger facilities are otherwise afforded station. Mississippi R.R. Comm'n v. Illinois Cent. R.R., 203 U.S. 335, 27 S. Ct. 90, 51 L. Ed. 209 (1906).

The state railroad commission may fix rates for intrastate transportation, so long as there is no discrimination against persons or property from other states. Stone v. Yazoo & Miss. V. Ry., 62 Miss. 607, 52 Am. R. 193 (1885).

Power to establish and regulate ferries is not taken from the states by the commerce clause. Marshall v. Grimes, 41 Miss. 27 (1866).

The sale, mortgage, and hypothecation of United States vessels employed in foreign or interstate commerce and the recording necessary to the validity of such instruments may be regulated by Congress under the commerce clause. Shaw v. McCandless, 36 Miss. 296 (1858).

7. Telegraph and telephones, generally.

The provision of the state constitution which declares telegraph companies to be common carriers and subject to liability as such does not conflict with the commerce clause. Postal Tel. & Cable Co. v. Wells, 82 Miss. 733, 35 So. 190 (1903).

Semble, that a state statute imposing a penalty for delay in the transmission of a telegram from one state to another would be an unconstitutional interference with interstate commerce, but that a statute penalizing delay in delivery by the office of destination would not. Marshall v. Western Union Tel. Co., 79 Miss. 154, 27 So. 614, 89 Am. St. R. 585 (1900).

A telegraph company engaged in domestic as well as interstate transmission of messages is subject to such reasonable police regulations as the state may impose. Western Union Tel. Co. v. Mississippi R.R. Comm'n, 74 Miss. 80, 21 So. 15 (1896).

8. Fish and game laws.

Laws regulating fishing, as applied to persons taking fish with intent to ship them out of the state, do not violate the commerce clause. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. R. 700 (1905).

9. Workers' compensation.

Since, under the circumstances, the exemption in Code 1942, § 6998-55(c), was inapplicable, the Mississippi Workmen's Compensation Act applied where an employee, employed in Georgia, sustained disability while operating his employer's truck upon a Mississippi highway, and received extensive medical treatment in the state for which payment had not been received, notwithstanding the Georgia employer's contention that the application of the Act would violate the full faith and credit clause of the United States Constitution, constitute an interference with, or impairment of, the right to contract, and interfere with interstate commerce. Mandle v. Kelly, 229 Miss. 327, 92 So. 2d 246 (1957).

10. Service of process.

Statute (Laws 1940 ch 246, 1942 code, §§ 1437-1440) providing for service on nonresidents by service of process on Secretary of State and making provision for reasonable notice and opportunity to defend, as applied to corporate citizen of another state engaged in levy construction work of large proportions in Mississippi, employing many men to operate trucks and other heavy and cumbersome machinery and equipment, is not unconstitutional as burdening interstate commerce where defendant was not engaged in interstate commerce. Sugg v. Hendrix, 142 F.2d 740 (5th Cir. 1944).

11. Letting of public contracts.

A statute prohibiting counties from letting contracts for blank books, printed forms, stationery or office supplies to any bidder who is not a bona fide resident of the state actually engaged in the printing business or who, being a nonresident, has not a printing plant in the state, does not violate the commerce clause. State ex rel. Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 76 So. 258, Am. Ann. Cas. 1918B,953 (1917).

12. Taxation—In general.

The four criteria that a taxing statute must satisfy to withstand a challenge under the commerce clause and due process clause of the United States Constitution are: (1) the tax must be applied to an activity with a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to services provided by the taxing state; the failure to meet any one prong of the test renders the tax invalid. Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).

For the purpose of determining the constitutionality of a state tax statute, the Supreme Court of the United States accepts as binding the interpretation given to it by the highest court of the state. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949), reh'g denied, 338 U.S. 839, 70 S. Ct. 32, 94 L. Ed. 513 (1949).

The fact that the imposition of a state tax adds to the cost of interstate commerce is not alone sufficient to invalidate the tax as an interference with such commerce. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949), reh'g denied, 338 U.S. 839, 70 S. Ct. 32, 94 L. Ed. 513 (1949).

The commerce clause in the Federal Constitution affords immunity to property from local taxation when, but only when, it is in transit as interstate or foreign commerce. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949), reh'g denied, 338 U.S. 839, 70 S. Ct. 32, 94 L. Ed. 513 (1949).

A state may require one whose property and business enjoys the protection of local laws to bear its proper share of the expense of state government, where the tax is nondiscriminatory and does not constitute a direct burden on interstate commerce. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949), reh'g denied, 338 U.S. 839, 70 S. Ct. 32, 94 L. Ed. 513 (1949).

A state statute is not invalidated by the commerce clause of the Federal Constitution merely because it imposes a direct tax on the privilege of engaging in interstate commerce. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949), reh'g denied, 338 U.S. 839, 70 S. Ct. 32, 94 L. Ed. 513 (1949).

It is well settled by the Federal Supreme Court that in imposing taxes for state purposes a state is not exercising any power which the Federal Constitution has conferred upon Congress, but it is only when the tax operates to regulate commerce between the states or with foreign nations, to an extent which infringes the authority conferred upon Congress, that the tax exceeds the limitations imposed by the Federal Constitution. State Tax Comm'n v. Memphis Natural Gas Co., 197 Miss. 583, 19 So. 2d 477 (1944), appeal dismissed, 323 U.S. 682, 65 S. Ct. 440, 89 L. Ed. 553 (1944).

The purpose of the commerce clause is to protect interstate commerce from discriminatory state action, but this purpose must be reconciled with the right of the state taxing power to cause interstate commerce to bear its share of state tax burdens to the end that there shall be no discrimination against intrastate commerce. Stone v. York Ice Mach. Corp., 193 Miss. 638, 10 So. 2d 380 (1942).

The present trend of judicial decisions in upholding state tax statutes is in favor of a more liberal construction and holding that unless the tax complained of tends to prohibit interstate commerce or place it at a disadvantage in competition with intrastate commerce, it does not violate the commerce clause of the Federal Constitution, and especially where the tax is not on the commerce but is levied on the right to engage in a local activity for the exercise of which local citizens are required to pay. Stone v. York Ice Mach. Corp., 193 Miss. 638, 10 So. 2d 380 (1942).

The commerce clause does not shield those carrying on interstate and foreign commerce from nondiscriminating state taxation. Stone v. Interstate Natural Gas Co., 103 F.2d 544 (5th Cir. 1939), aff'd, 308 U.S. 522, 60 S. Ct. 292, 84 L. Ed. 442 (1939), reh'g denied, 308 U.S. 639, 60 S. Ct. 381, 84 L. Ed. 530 (1940).

Impairment of the commerce power of Congress really arises only if the state by intention or in actual effect regulates commerce by license or other special taxation, or burdens it unduly so as to impede it; or if the state law imposing the tax conflicts with some regulation made by the Congress in its supreme right. Stone v. Interstate Natural Gas Co., 103 F.2d 544 (5th Cir. 1939), aff'd, 308 U.S. 522, 60 S. Ct. 292, 84 L. Ed. 442 (1939), reh'g denied, 308 U.S. 639, 60 S. Ct. 381, 84 L. Ed. 530 (1940).

13. — Sales and use taxes.

State sales tax on full price of ticket from taxing state to another state is consistent with Commerce Clause of United States Constitution because sale of interstate transportation services had sufficient nexus to state where ticket was purchased and service originated and tax was properly apportioned, did not discriminate against interstate commerce and was fairly related to services provided by state. Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995), rehearing denied 115 S.Ct. 2018, 514 U.S. 1135, 131 L.Ed.2d 1016, on remand 57 F.3d 1461 (8th Cir. 1995).

The imposition of use and excise taxes pursuant to § 27-67-7 et seq. on a pipeline company's use of natural gas taken from its interstate gas pipeline as fuel for its compressor engines located along the pipeline was permissible under the commerce clause and the due process clause of the United States Constitution since the activity taxed—the consumption of natural gas in compressor stations located in Mississippi—had a sufficient nexus with the State to justify the tax, the tax was fairly apportioned to assess only local activities and did not discriminate against interstate commerce by subjecting interstate taxpayers to a double taxation where similarly situated intrastate taxpayers would be subject to only single taxation, and the tax was fairly related to the benefits provided by the State to the pipeline company. Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).

An Alabama carpet store did not avail itself of the substantial privilege of carrying on business within Mississippi, so that there was no constitutional basis for a sales tax assessment, where the store's 2 local carpet installers were independent contractors rather than agents or employees of the store, the local installers received no compensation from the store, and they provided their own equipment and were not subject to the control of the store in the details or final results of their work. Mississippi State Tax Comm'n v. Bates, 567 So. 2d 190 (Miss. 1990).

Wholesale markup on liquor sold to federal military installations in Mississippi constituted a sales tax, the legal incident of which rested upon instrumentalities of the United States as the purchasers, and therefore the markup was unconstitutional as a tax imposed upon the United States and its instrumentalities. Since the legal incidence of the tax was upon the United States, the federal immunity with respect to sales of liquor to the two exclusively federal enclaves was preserved by § 107(a) of the Buck Act (4 USCS §§ 105-110). United States v. Mississippi Tax Comm'n, 421 U.S. 599, 95 S. Ct. 1872, 44 L. Ed. 2d 404 (1975).

Decision on former appeal of same case that Use Tax Law of this state is unconstitutional in its requirement that foreign seller collect and pay use tax on goods sold to Mississippi residents when seller is nondomesticated foreign corporation having no place of business or any agent in this state, its only intrastate activity being sending into state of non-resident solicitors to take orders effective only when approved at home office and sales being completed by delivery of goods to common carrier in foreign state, will be adhered to on subsequent appeal, and case does not become new case because state of Tennessee, from which state goods are shipped, is claimed to have relevant Sales Tax Law; because coming to rest in this state feature of original law has been eliminated; or because two salesmen of seller happen to reside in Mississippi for their own personal convenience and not that of employer, since principles controlling law of case doctrine are more binding upon courts than law of precedent. Stone v. Reichman-Crosby Co., 43 So. 2d 184 (Miss. 1949), appeal dismissed, cert. denied, 339 U.S. 917, 70 S. Ct. 625, 94 L. Ed. 1342 (1950).

Non-resident seller engaged exclusively in interstate commerce is neither subject to state's taxing power nor to state's jurisdiction to subject seller to personal liability for failure to collect and pay tax levied against citizens of this state. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

Use Tax Law, Chapter 120, Laws of 1942 (Code 1942 §§ 10146-10167), is unconstitutional as to its requirement that a non-resident seller shall collect and pay tax on sales consummated in Tennessee by delivery of property to a common carrier for transportation to purchasers in Mississippi, when the non-resident seller is not doing business in Mississippi and property was sold on orders taken by non-resident salesmen, as it violates the commerce clause by imposing a burden on interstate commerce and denies to seller equal protection and due process of law. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

Laws 1948 ch. 457, amending Code 1942 § 10148, levying Use Tax, by eliminating provision that tax imposed shall not apply to use of article of tangible personal property sold or processed outside of state until transportation is ended and article commingled with property within state does not affect former decision that statute is unconstitutional in its requirement that foreign seller must collect and pay tax on goods sold on orders given to non-resident solicitors, effective only when approved at home office, sales being completed by delivery to common carrier in foreign state by non-domesticated foreign corporation, having no place of business in this state. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

State has right to assess a use tax against its residents for use within state of property which has been transported to them in interstate commerce. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

14. — Income taxes.

Income of a business operating in interstate commerce is not immune from a fairly apportioned state taxation. However, for a state to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution require that the tax must be applied to an activity with a substantial nexus with the taxing state, the tax must be fairly apportioned, the tax must not discriminate against interstate commerce, and the tax must be fairly related to services provided by the taxing state. Marx v. Truck Renting & Leasing Ass'n, Inc., 520 So. 2d 1333 (Miss. 1987).

Section 27-65-23, which provides for a 6 percent tax on the gross income of a business which rents "transportation equipment with a situs within or without the State to common, contract or private commercial carriers," and is taxed on that part of the income derived from use within the State, violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution because the tax is imposed on an activity without a substantial nexus within Mississippi. Marx v. Truck Renting & Leasing Ass'n, Inc., 520 So. 2d 1333 (Miss. 1987).

A legislative delegation to the tax commission of the duty to determine the portion of taxable income of a given person or corporation which should be allocated to sources within the state is a delegation of a fact-finding duty, and where the legislature provided the standard to be followed in evaluating the taxpayer's earned income in Mississippi, as distinguished from its earned income from other sources, such a delegation is not unconstitutional. Columbia Gulf Transmission Co. v. Barr, 194 So. 2d 890 (Miss. 1967).

Laws 1934, ch. 120, § 3(1), as amended (Code 1942, § 9222 (1)(2)), and § 11(1)(a), as amended (Code 1942, § 9231(a)), imposing a tax on the net income of a foreign corporation attributable to its activities and ownership of property in Mississippi, although such property is used exclusively in the furtherance of the corporation's interstate business, do not violate the commerce clause of the Federal Constitution. State Tax Comm'n v. Memphis Natural Gas Co., 197 Miss. 583, 19 So. 2d 477 (1944), appeal dismissed, 323 U.S. 682, 65 S. Ct. 440, 89 L. Ed. 553 (1944).

A tax on net income does not unconstitutionally burden interstate commerce, although such income includes income derived from such commerce. State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

15. — Carriers, taxation.

An ad valorem tax on leased trucks domiciled in Mississippi did not violate the commerce clause because it was both internally and externally consistent. Thomas Truck Lease, Inc. v. Lee County, 768 So. 2d 870 (Miss. 1999).

A state license tax for the privilege of operating a cotton warehouse and compress which receives cotton having at the time no ascertainable destination without the state but afterward shipped, upon the orders of holders of warehouse receipts therefor, in interstate commerce, does not impose a forbidden burden on interstate commerce, even though cotton coming to the warehouse by rail is, on being reshipped, given the benefit of a through rate from the point of origin to destination, and the company operating the warehouse and compress has been designated by an interstate rail carrier as its agent to receive the cotton from and deliver it to the railroad and to load and unload cotton upon and from its cars, and the warehouse has been designated by the railroad as a cotton depot. Federal Compress & Whse. Co. v. McLean, 291 U.S. 17, 54 S. Ct. 267, 78 L. Ed. 622 (1934).

A privilege tax levied on a sleeping car company is for the privilege of doing intrastate business and does not violate the commerce clause. Miller v. Gulf, M. & N. R.R., 157 Miss. 69, 127 So. 690 (1930).

A statute imposing a privilege tax on railroad companies based upon mileage and gross earnings, without excepting earnings derived from interstate commerce, does not impose an unconstitutional burden upon interstate commerce. New Orleans, M. & C.R. Co. v. State, 110 Miss. 290, 70 So. 355 (1915).

Imposition on sleeping and palace car companies of a privilege tax of $100 and, in addition thereto, 25 cents per car mile, does not violate the commerce clause. Pullman Palace Car Co. v. Adams, 78 Miss. 814, 30 So. 757, 84 Am. St. R. 647 (1901), aff'd, 189 U.S. 420, 23 S. Ct. 494, 47 L. Ed. 877 (1903).

A privilege tax imposed by the state on sleeping car companies carrying passengers from one point to another within the state cannot be deemed an unconstitutional regulation of commerce because of the declaration in the state constitution that sleeping car companies are common carriers and so subject to liability as such where such provision is regarded by the state courts as imposing no obligation on the company to transport local passengers. Pullman Co. v. Adams, 189 U.S. 420, 23 S. Ct. 494, 47 L. Ed. 877 (1903).

16. — Telegraph and telephones, taxation.

Privilege taxes measured by the number of miles of telegraph line within the state, on the line and on the business carried, does not violate the commerce clause, such taxes being levied for the privilege of doing a domestic business. Postal Telegraph-Cable Co. v. Miller, 155 Miss. 522, 124 So. 434 (1929).

A charge levied by the state upon a foreign telegraph company doing business within the state and also doing interstate business in the form of a franchise tax—but arrived at with reference to, and graduated according to, the value of its property within the state, and in lieu of all other taxes, and held by the highest tribunal of the state to be a just equivalent for other taxes, does not amount to a regulation of interstate commerce nor put an unconstitutional restraint thereon. Stuart v. City of Easton, 156 U.S. 46, 15 S. Ct. 268, 39 L. Ed. 341 (1895).

17. — Gas and petroleum products, taxation.

Where a foreign corporation was engaged in constructing pipelines, and the work was new construction work and pipeline companies furnished right of way and pipe, and the pipelines had not become instrumentalities of interstate commerce, a sales tax imposed upon the foreign corporation was not invalid as a direct burden on interstate commerce. Anderson Bros. Corp. v. Stone, 227 Miss. 26, 85 So. 2d 767 (1956).

A privilege tax, imposed upon an interstate pipeline operator whose operations were wholly and exclusively in interstate commerce, violated the commerce clause of the Federal Constitution and was not proper subject of state taxation. Coleman v. Trunkline Gas Co., 218 Miss. 285, 63 So. 2d 73 (1953), cert. denied 346 U.S. 824, 74 S. Ct. 41, 98 L. Ed. 349 (1953).

Transportation of oil from places within the state to destinations outside the state, either by interstate trunk pipelines or railroads, on a continuous journey, constitutes that character of commerce "which the State of Mississippi is prohibited from taxing under the Constitution of the United States." Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949), reh'g denied, 338 U.S. 839, 70 S. Ct. 32, 94 L. Ed. 513 (1949).

State privilege tax, equal to 2 per cent of the gross income of its intrastate business, imposed by Code 1942 §§ 10105 and 10109 upon a foreign pipeline company transporting oil in its pipelines from lease tanks in various oil fields in Mississippi to loading racks adjacent to railroads in such state, does not offend the commerce clause of the Federal Constitution, notwithstanding that while there was no through bill of lading from the point of origin at the field to the destination outside the state, the oil, when delivered to the taxpayer, was accompanied by shipping orders from the producer or owner directing that it be transported to out-of-state destination. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949), reh'g denied, 338 U.S. 839, 70 S. Ct. 32, 94 L. Ed. 513 (1949).

Imposition of franchise tax (Code 1942 § 9314) measured by the value of capital used, invested or employed within the state held not unconstitutionally to burden interstate commerce in the case of an interstate natural gas pipeline company, a portion of whose line passed through the state but which did no local business therein. Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1948), but see, Western M.R.R. v. Goodwin, 167 W. Va. 804, 282 S.E.2d 240 (1981).

Laws 1934, ch. 120, § 3(1), as amended (Code 1942, § 9222), and § 11(1), as amended (Code 1942, § 9231), imposing a tax on the net income derived from the sale by foreign corporation of natural gas at wholesale to a nonresident-corporation doing business in Mississippi, delivered at various points in Mississippi along such corporation's main pipe line extending from gas field in Louisiana, through Arkansas and Mississippi, and terminating at Memphis, Tennessee, do not contravene the commerce clause of the Federal Constitution. State Tax Comm'n v. Memphis Natural Gas Co., 197 Miss. 583, 19 So. 2d 477 (1944), appeal dismissed, 323 U.S. 682, 65 S. Ct. 440, 89 L. Ed. 553 (1944).

A privilege tax on gasoline neither sold nor distributed in package in which it was shipped from a sister state, but only after it had been transferred therefrom and in broken quantities, held not objectionable as burden on interstate commerce. Treas v. Price, 167 Miss. 121, 146 So. 630 (1933).

The state privilege tax imposed upon foreign corporations selling to distributors in the state, natural gas, piped from another state, after reducing the pressure, unconstitutionally burdens interstate commerce. Mississippi Tax Comm'n v. Interstate Natural Gas Co., 284 U.S. 41, 52 S. Ct. 62, 76 L. Ed. 156 (1931).

18. — Miscellaneous taxes.

Appellants were not entitled to attorney's fees under 42 U.S.C.S. § 1988, even though they correctly alleged that Miss. Code Ann. 27-70-5 (2010) violated the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as they had an adequate remedy, which they invoked, declaratory relief under Miss. R. Civ. P. 57; under the Tax Injunction Act, 28 U.S.C.S. § 1341, the constitutionality of a state tax could not be challenged under 42 U.S.C.S. § 1983 in state court if an adequate remedy was available under state law. Commonwealth Brands v. Morgan, 110 So. 3d 752 (Miss. 2013).

Privilege tax (Laws 1944, ch. 137, § 143) imposed on persons taking photographs in the state and developing the same outside the state at a slightly higher rate than that imposed on resident photographers does not violate the commerce clause when construed as a tax only on the person who actually takes the pictures, the tax being payable in every county and municipality wherein he takes photographs. Craig v. Mills, 203 Miss. 692, 33 So. 2d 801 (1948).

The local activity of a foreign corporation, not qualified to do business in the state as such, performed in the installation, adjustment and testing of certain air conditioning systems in buildings located in the state and constituting a substantial part of the performance of the contract for the sale of the machinery and equipment which it manufactured outside the state and shipped into the state in interstate commerce for use in air conditioning such buildings, was subject to the tax imposed by state statute; and the imposition of such tax was not a violation of the interstate commerce clause of the United States Constitution. Stone v. York Ice Mach. Corp., 193 Miss. 638, 10 So. 2d 380 (1942).

Assuming that the mailing of securities from the office of a dealer in Mississippi to the office of a finance company outside the state should be deemed to transact the business of interstate commerce, a tax placed upon doing business of purchasing and acquiring promissory notes, etc., secured by liens, was not a tax on the particular transaction, whether they took place in the state in interstate commerce, or wholly without the state, but the tax is on the privilege of engaging in those activities which were defined in the statute as doing business in the state. C.I.T. Corp. v. Stone, 193 Miss. 344, 7 So. 2d 811 (1942), aff'd 317 U.S. 591, 63 S. Ct. 66, 87 L. Ed. 484 (1942).

A franchise or excise tax imposed on a foreign corporation, having qualified to do business in the state of Mississippi as such, and owning pipelines and telephone lines in such state, and measured by the amount of capital used, invested or employed within the state, did not violate the commerce clause regardless of whether such corporation was engaged solely in interstate commerce, where such tax was neither discriminatory against foreign corporations or against interstate commerce, the tax being imposed upon business corporations having capital in Mississippi just for being there with their capital and not directly affecting interstate transportation. Stone v. Interstate Natural Gas Co., 103 F.2d 544 (5th Cir. 1939), aff'd, 308 U.S. 522, 60 S. Ct. 292, 84 L. Ed. 442 (1939), reh'g denied, 308 U.S. 639, 60 S. Ct. 381, 84 L. Ed. 530 (1940).

Question whether ordinance imposing privilege tax on operator of steamers conducting pleasure excursions was invalid because operator's steamers were duly licensed by Federal Government to operate excursions on navigable streams could not be determined, where operator offered no evidence on such question. Streckfus Steamers v. Kiersky, 174 Miss. 125, 163 So. 830 (1935).

A tobacco tax statute requiring a retailer purchasing from a wholesaler not having permit to present tobacco to wholesaler having permit to have stamps affixed does not burden interstate commerce. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

A state privilege tax on express companies does not, as applied to a company doing both an intrastate and an interstate business, unconstitutionally burden interstate commerce. Robertson v. Southeastern Express Co., 130 Miss. 305, 94 So. 210 (1922), affirmed 264 U.S. 535, 44 S. Ct. 421, 68 L. Ed. 836 (1924).

A tax of three cents a barrel on oysters packed or canned in the state, or shipped raw by dealers, may constitutionally be applied to oysters taken from the waters of another state. Barataria Canning Co. v. State, 101 Miss. 890, 58 So. 769 (1912).

19. Bankruptcy laws.

The enactment of a Federal bankruptcy law supersedes all state laws and state constitutional provisions on the subject. McRaney v. Riley, 128 Miss. 665, 91 So. 399 (1922), cert. denied 260 U.S. 727, 43 S. Ct. 90, 67 L. Ed. 484 (1922).

In the field of bankruptcy, Federal legislation is supreme. Russell v. Cheatham, 16 Miss. 703 (1847).

20. Post offices and post roads.

That a telegraph company secured its right to erect its lines along the post roads in the state from the Federal government does not release it from any and all local police regulation. Western Union Tel. Co. v. Mississippi R.R. Comm'n, 74 Miss. 80, 21 So. 15 (1896).

21. Copyright laws.

Sale of home videotape recorders to general public does not constitute contributory infringement of copyrights on television programs since there is significant likelihood that substantial numbers of copyright holders who license their work for broadcast on free television would not object to having their broadcasts time-shifted by private viewers; furthermore, plaintiff copyright holders in this case did not demonstrate that time-shifting would cause any likelihood of non-minimal harm to potential market for, or value of, their copyrighted work. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574, 220 U.S.P.Q. 665 (1984), rehearing denied 465 U.S. 1112, 104 S.Ct. 1619, 80 L. Ed.2d 148, 224 U.S.P.Q. 736 (1984).

22. Regulation of land and naval forces.

Statute providing proceeds of adjusted service certificates should not be subject to attachment, levy, or seizure was passed by Congress under authority of war powers and is binding on State. De Baum v. Hulett Undertaking Co., 169 Miss. 488, 153 So. 513 (1934).

ATTORNEY GENERAL OPINIONS

A school district could make a direct sale of the property to the General Services Administration for use as a United States District Courthouse pursuant to Section 3-5-1, and was not required to follow the procedures and provisions of Sections 37-7-451 et seq. and 37-7-471 et seq., so long as fair market value was obtained for the property. Dukes, March 31, 2000, A.G. Op. #2000-0171.

RESEARCH REFERENCES

ALR. State tax in connection with transportation or distribution of oil or gas through pipe lines as affected by commerce clause. 154 A.L.R. 623.

License or excise tax on merchandise brokers or persons performing similar functions as affected by commerce clause. 155 A.L.R. 239.

Regulation of practice of photography. 7 A.L.R.2d 416.

Aircraft operated wholly within state as subject to Federal regulation. 9 A.L.R.2d 485.

Loading or unloading interstate freight in performance of obligation resting upon one other than interstate carrier as interstate carrier as regards local taxation. 10 A.L.R.2d 651.

Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking. 53 A.L.R.4th 801.

Maps or charts as protected by copyright under Federal Copyright Acts. 4 A.L.R. Fed. 466.

Copyright, under Federal Copyright Act (17 USCS §§ 1 et seq.), in advertising materials, catalogs, and price lists. 5 A.L.R. Fed. 625.

What are proceedings by governmental units to enforce police or regulatory powers which are excepted from operation of automatic stay provisions of Bankruptcy Code of 1978 (11 USCS § 362(b)(4), (5)). 58 A.L.R. Fed. 282.

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§ 9. Powers Prohibited to United States

1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or ex post facto law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Editor's Note — The second paragraph is popularly known as the "Suspension Clause."

Parts of the third paragraph are popularly known as the "Bill of Attainder Clause" and the "Ex Post Facto Clause."

The third paragraph of Article I, § 2, and the fourth paragraph of this section are popularly known as the "Direct Tax Clauses."

The fourth paragraph has been affected by the Sixteenth Amendment.

The fifth paragraph is popularly known as the "Export Clause."

The sixth paragraph is popularly known as the "Port Preference Clause."

Parts of the seventh paragraph are popularly known as the "Appropriations Clause" and the "Statement and Accounts Clause."

Cross References — Attainder of treason, see USCS Const. Art. III, § 3, cl. 2.

Apportionment of direct taxes, generally, see USCS Const., Art. I, § 2, cl. 3.

Federal income tax, see USCS Const. Amend. XVI.

Similar limitation of state power concerning ex post facto laws, see USCS Const. Art. I, § 10.

JUDICIAL DECISIONS

1. Habeas corpus.
2. Ex post facto law.

1. Habeas corpus.

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art. I § 9 of the United States Constitution and Art. 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. De La Beckwith v. Mississippi, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

Conditional grant of writ of habeas corpus by federal habeas corpus court simply requires state to release defendant from custody based upon invalid convictions unless he is retried within certain number of days or months; this allows state to retain person in custody pursuant to invalid conviction for this period without releasing him; conditional grant does not prevent state from retrying defendant after expiration of time set in order of court; it only requires that defendant be released from custody on basis of conviction that was vacated; thus, defendant was still properly in custody of State of Mississippi on basis of valid indictment lodged against him and detainers placed on him by other states and jurisdictions. Pruett v. State, 512 So. 2d 689 (Miss. 1987).

2. Ex post facto law.

The amendment to Miss. Code Ann. § 47-5-138.1 was not an ex post facto law; even though the amended statute held that an offender was not eligible for trusty status if the offender was convicted of trafficking in controlled substances, defendant continued to receive the 10 days for 30 days time benefit under the prior statute. Ross v. Epps, 922 So. 2d 847 (Miss. Ct. App. 2006).

No constitutional prohibition existed on the Mississippi Department of Corrections' new interpretation of Miss. Code Ann. § 99-19-21 where administrative correction of a prior misinterpretation of parole laws did not violate the ex post facto clause; because the Mississippi parole statutes used the word "may" rather than "shall," prisoners had no constitutionally recognized liberty interest in parole. Snow v. Johnson, 913 So. 2d 334 (Miss. Ct. App. 2005).

5 USCS § 8148(a), which concerns disability benefit eligibility, does not implicate the ex post facto clause of this section or violate the Eighth Amendment. Garner v. United States DOL, 221 F.3d 822 (5th Cir. 2000), writ of certiorari denied by 532 U.S. 906, 121 S. Ct. 1230, 149 L. Ed. 2d 140, 2001 U.S. LEXIS 2025, 69 U.S.L.W. 3592 (2001).

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§ 10. Powers Prohibited to States

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

2. No State shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Editor's Note — Parts of paragraph 1 are popularly known as the "Treaty or Alliance Clause", the "Ex Post Facto Clause" and the "Contracts Clause."

The part of paragraph 1 dealing with ex post facto laws and the part of paragraph 3 of Article I, § 9, dealing with the same are popularly known as the 'Ex Post Facto Clauses."

Paragraph 2 is popularly known as the "Import-Export Clause."

Parts of paragraph 3 are popularly known as the "Tonnage Clause" and the "Compact Clause."

Cross References — Power of Congress as to coinage and money, generally, see USCS Const., Art. I, § 8, cls. 2, 5.

Congress as prohibited from passing bills of attainder or ex post facto laws, USCS Const., Art. I, § 9, cl. 3.

Congress as prohibited from laying tax or duty on articles exported from any state, see USCS Const., Art. I, § 9, cl. 5

United States as prohibited from granting titles of nobility, see USCS Const., Art. I, § 9, cl. 8.

Attainder of treason, see USCS Const. Art. III, § 3, cl. 2.

JUDICIAL DECISIONS

1. State compacts.
2. Bills of credit.
3. Ex post facto laws — In general.
4. — Crimes and offenses, ex post facto laws.
5. — Sentences and punishment, ex post facto laws.
6. Impairment of contract obligations — In general.
7. — Change in judicial decision, impairment of contract obligations.
8. — Changing limitation period, impairment of contract obligations.
9. — Debtor's exemptions, impairment of contract obligations.
10. — Moratory legislation, impairment of contract obligations.
11. — Tax liability, impairment of con-

tract obligations.
12. — Tax sales, impairment of contractual obligations.
13. — Municipal corporations, impairment of contract obligations.
14. — State grants and contracts, impairment of contract obligations.
15. — Public indebtedness, impairment of contract obligations.
16. — Public office, impairment of contract obligations.
17. — Banks and banking, impairment of contract obligations.
18. — Corporate charter, impairment of contract obligations.
19. — Franchises and privileges, impairment of contract obligations.
20. — Retirement death benefits, impairment of contract obligations.
21. Imposts or duties.
22. Wharfage.

1. State compacts.

Where a parolee was arrested in Mississippi by agreement between Mississippi and sending state, pending his being retaken by authorities of the sending state under the statute which provides that parolee who is in receiving state by agreement between receiving and sending state may be retaken, this did not violate the parolee's constitutional right. Stone v. Robinson, 219 Miss. 456, 69 So. 2d 206 (1954).

The consent of Congress to a compact between states may be manifested by resolution as well as by formal act. State v. Cunningham, 102 Miss. 237, 59 So. 76, Am. Ann. Cas. 1914D,182 (1912).

Compact between Mississippi and Arkansas, that the jurisdiction of each over criminal offenses shall extend from shore to shore of the Mississippi river, sustained. State v. Cunningham, 102 Miss. 237, 59 So. 76, Am. Ann. Cas. 1914D,182 (1912).

2. Bills of credit.

Warrants on the state treasury, issued by the auditor of public accounts, are not bills of credit within the meaning of this provision. Pagaud v. State, 13 Miss. 491 (1845).

3. Ex post facto laws — In general.

The retroactive application of the 1995 amendment to the statute, which substantively changed the elements of the crime by deleting the requirement of proving that the children were left in destitute and necessitous circumstances and raising the age of the children protected, violated the constitutional prohibition against ex post facto laws. Knowles v. State, 708 So. 2d 549 (Miss. 1998).

When there is state constitutional entitlement to some due process right, state may not enact legislation to impede that right under ex post facto analysis. Christmas v. State, 700 So. 2d 262 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997).

Statutes regulating the selection of grand and petit jurors are not ex post facto as applied in the case of one charged with homicide committed before their enactment. Gibson v. Mississippi, 162 U.S. 565, 16 S. Ct. 904, 40 L. Ed. 1075 (1896).

Retrospective legislation, other than that undertaking to punish as a crime an act which was indifferent at the time of its performance, does not violate the provision against ex post facto laws. Carson v. Carson, 40 Miss. 349 (1866).

4. — Crimes and offenses, ex post facto laws.

Trial court erred in summarily dismissing a prisoner's motion for post-conviction relief; an evidentiary hearing was necessary to decide whether application of the amended version of Miss. Code Ann. § 47-5-138.1 to the prisoner, who had pleaded guilty to the crime of sale and transfer of cocaine, constituted an ex post facto violation. Gray v. State, 13 So. 3d 283 (Miss. Ct. App. 2008), writ of certiorari denied by 2009 Miss. LEXIS 344 (Miss. July 23, 2009).

Defendant's conviction for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) arising from alleged scheme to defraud Mississippi casino did not violate ex post facto clause to extent that underlying offenses occurred prior to Mississippi's enactment of statutes that prohibited cheating at gambling games and marking or altering of gaming equipment or devices, given absence of showing that cheating at gambling was legal in Mississippi prior to statutes' enactment. United States v. Vaccaro, 115 F.3d 1211 (5th Cir. 1997), cert. denied, 522

U.S. 1047, 118 S. Ct. 689, 139 L. Ed. 2d 635 (1998).

Prosecution for fondling under amendment to statute of limitations extending limitation period in effect at time of crime was not ex post facto violation; statute of limitations is procedural and does not come within recognized exception creating substantive right as fondling statute is separate from limitations period statute, defendant's acts were criminal at time of their commission, and defendant was not subjected to longer punishment by prosecution under lengthier limitations period. Christmas v. State, 700 So. 2d 262 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997).

Section 97-3-95(c) was not applied retroactively to defendant where subsection (c) was added to statute in 1983 to be effective from and after March 29, 1983, and incident giving rise to prosecution occurred in August, 1983. Cantrell v. State, 507 So. 2d 325 (Miss. 1987).

An administrative correction of a prior misinterpretation of parole laws is not a change in the law so as to violate the ex post facto clause of the United States or Mississippi Constitutions; even if the correction of a former mistaken interpretation of parole law did reach the level of a change in law, administrative decisions with regard to parole law eligibility are not "laws annexed to the crime when committed." Taylor v. Mississippi State Probation & Parole Bd., 365 So. 2d 621 (Miss. 1978).

No indictment may be brought under a statute for an offense committed before the statute was a law. Barton v. State, 94 Miss. 375, 47 So. 521 (1908).

An amendment eliminating a qualifying clause from a statute making it an offense to carry concealed weapons, and fixing a minimum penalty, is, as applied to conduct prior to its enactment, unconstitutional as an ex post facto law. Lindsey v. State, 65 Miss. 542, 5 So. 99 (1888).

5. — Sentences and punishment, ex post facto laws.

After the supreme court remanded defendant's matter for resentencing and the circuit court resentenced defendant to life imprisonment without the possibility of parole, defendant challenged the applicability of Miss. Code Ann. § 99-19-107; however, defendant's challenge was procedurally barred because defendant failed to raise the issue before the matter was remanded, and further, application of that statute as opposed to Miss. Code Ann. § 97-3-21, which was in effect at the time of the commission of the offense, did not violate ex post facto provisions. Foster v. State, 961 So. 2d 670 (Miss. 2007).

The application of the amended capital sentencing statute, § 97-3-21, ameliorated the stark options that were presented to pre-amendment juries, and, therefore, the retroactive application of the statute does not give rise to an illegal ex post facto law. West v. State, 725 So. 2d 872 (Miss. 1998).

The amendment of § 97-3-21 to include life imprisonment without parole as a possible sentence was ameliorative and not onerous as the amendment did not increase the possible penalty for murder; thus, the application of the amended statute in the prosecution of a defendant for a murder that occurred before the effective date of the amendment did not violate the ex post facto clause of the federal constitution. Tavares v. State, 725 So. 2d 803 (Miss. 1998).

Application of amendment to state statute which allows decrease in frequency of parole suitability hearings to prisoners who committed their crimes before enactment of statute does not violate Ex Post Facto Clause of United States Constitution. California Dep't of Cors. v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), on remand 56 F.3d 46 (9th Cir. 1995).

In a capital murder prosecution arising from a murder committed in 1976, the application of § 99-19-81 in sentencing the defendant constituted an ex post facto law in violation of Art. I, § X of the United States Constitution and Art. 3, § 16 of the Mississippi Constitution because § 99-19-81 was not yet in effect at the time the murder was committed; the defendant should have been sentenced pursuant to § 97-3-21, which governed the penalty for capital murder in 1976. Johnston v. State, 618 So. 2d 90 (Miss. 1993).

A 7-year sentence for armed robbery committed with a knife in 1980 in violation of § 97-3-79 was not an unconstitutional application of an ex post facto law, even though § 47-7-3 denied eligibility for parole prior to 1982 only when a robbery was committed with the display of a firearm, where the sentencing order merely established that the defendant serve 7 years and made no mention of "mandatory" or "without parole." Additionally, the sentencing chapter and the parole chapter are separate and distinct; the granting of parole or denial of parole under § 47-7-3 is the exclusive responsibility of the state parole board, which is independent of the circuit court's sentencing authority. Thus, sentencing authority was provided for under § 97-3-79, rather than § 47-7-3, and the defendant was not "sentenced" under the parole statute, which was later amended. Mitchell v. State, 561 So. 2d 1037 (Miss. 1990).

A petitioner who enters a guilty plea to armed robbery pursuant to plea bargain agreement upon erroneous advice of counsel that petitioner will be eligible for earned good time and will be subject to release after serving 7 years of sentence is not subjected to ex post facto law when Mississippi Department of Corrections changes administrative policy to comply with §§ 47-5-139 and 47-7-3, causing petitioner to serve minimum of 10 years. Coleman v. State, 483 So. 2d 680 (Miss. 1986).

Defendant's argument, after being sentenced as a habitual offender to 15 years in prison without eligibility for probation or parole following his conviction for uttering a forged check, that the enhancement statute (§ 99-19-81) constituted an ex post facto law in violation of the United States Constitution, Art. I, § 10, inasmuch as his prior convictions had occurred before the enhancement statute became effective, was without merit, where defendant's sentence as a habitual criminal was not to be viewed as either a new jeopardy or an additional penalty for his earlier crimes, but rather, as a stiffened penalty for his latest crime, which was an aggravated offense in that it was a repetitive one. Smith v. State, 465 So. 2d 999 (Miss. 1985).

Application of sentencing enhancement statute (§ 99-19-81) to convicted defendant whose prior convictions occurred before January 1, 1977, date § 99-19-81 became effective, does not violate ex post facto clause of United States Constitution. Smith v. State, 465 So. 2d 999 (Miss. 1985).

Defendant who committed capital murder and was originally tried prior to enactment of current death penalty statute (§§ 99-19-101 et seq.) may nonetheless be sentenced to death under that statute, which does not affect substance of capital murder law but merely changes procedure by which capital cases are to be tried. Jordan v. State, 464 So. 2d 475 (Miss. 1985), vacated, 476 U.S. 1101, 106 S. Ct. 1942, 90 L. Ed. 2d 352 (1986), on remand, 518 So. 2d 1186 (Miss. 1987).

A defendant convicted of armed robbery after 1977 and sentenced to serve less than 10 years in the penitentiary, and who was therefore not eligible for parole pursuant to § 47-7-3, was not subjected to enforcement of an ex post facto law by a policy of the Department of Corrections administratively barring him from earning good time after January, 1981, although good time earned prior to that date was not taken away, notwithstanding the provisions of § 47-5-139(7), since the statutory provisions regarding good time remained unchanged, and since administrative interpretation of a clearly worded statute is not a "law" within the scope and contemplation of the ex post facto clauses of the federal and state Constitutions. Tiller v. State, 440 So. 2d 1001 (Miss. 1983).

An inmate was properly denied credit for time served upon her original sentence for time spent out of prison on parole prior to its revocation, even though credit is allowed for time spent on work release, which is functionally similar to parole; nor did denying her credit for time served while on parole deprive her of rights secured under the double jeopardy clause, deny her due process of law, or subject her to an ex post facto law. Segarra v. State, 430 So. 2d 408 (Miss. 1983).

Where sale of marijuana for which appellant was convicted occurred when maximum penalty for such sale was four years imprisonment or a fine of two thousand dollars, or both, trial court erred in sentencing appellant to a term of ten years and fining him five thousand dollars under provisions of Code 1972, § 41-29-139, which did not become effective until after sale in question had occurred; punishment for a crime may not be increased after the crime has been committed under the provisions of Miss. Const. § 16 and U.S. Const. Art. 1 § 10 Cl. 1. King v. State, 304 So. 2d 650 (Miss. 1974).

Where a new law gave condemned a choice as to the method of infliction of death penalty, the law was not an ex post facto law as to persons who were sentenced to death before the enactment of statute. Wetzel v. Wiggins, 226 Miss. 671, 85 So. 2d 469 (1956), appeal dismissed, cert. denied, 352 U.S. 807, 77 S. Ct. 80, 1 L. Ed. 2d 39 (1956), reh'g denied, 352 U.S. 919, 77 S. Ct. 217, 1 L. Ed. 2d 125 (1956).

6. Impairment of contract obligations — In general.

Miss. Const. Art. 3, § 16 and U.S. Const. Art. 1, § 10, cl. 1 were violated when a decision was retroactively applied to releases executed in a personal injury case; the law in effect at the time the releases were executed stated that the release of an agent had no effect on a principal's vicarious liability. The validity and obligation of a contract could not have been impaired by a court decision altering the construction of the law. Whitaker v. T & M Foods, Ltd., 7 So. 3d 893 (Miss. 2009).

Section 25-11-103(f), which provides that the spouse of a member of the Public Employees' Retirement System shall be the member's beneficiary unless the member has designated another beneficiary subsequent to the date of marriage, does not constitute an unreasonable impairment of an employee's contractual right contrary to the United States and Mississippi Constitutions because it provides protection to those whose spouse fails to redesignate due to "inadvertence" while allowing an employee to make a "conscious decision" to redesignate if he or she does not want his or her spouse to receive the death benefits. Dillon v. Beal, 632 So. 2d 1298 (Miss. 1994).

A college, consumer of electricity, was not denied due process when it was given an opportunity to be heard (which it utilized fully) in a proceeding in which the public service commission issued a cease and desist order against one utility company which was furnishing service to the college within the certificated area of another utility; nor did the issuance of the order impair the contract between the college and the first utility company, for the contract was not paramount to the legislative authority vested in the commission at the time the contract was made. Ford v. State, 218 So. 2d 707 (Miss. 1969).

In an eminent domain action where both a mortgagor and mortgagee were parties defendant it was error to grant an instruction that under Article 1, § 10, of the United States Constitution, no state should enact a law impairing the obligation of prior contracts, for the reason that such an instruction had no place in the action. Mississippi State Hwy. Comm'n v. Nixon, 253 Miss. 636, 178 So. 2d 680 (1965).

Where, under the law of Georgia where the contract was made, the workmen's compensation carrier was not obligated to pay to any person any benefits under any compensation law except the Georgia Act, the liability of the carrier might not be extended by application of the Mississippi Workmen's Compensation Act contrary to the express terms of the policy. Mandle v. Kelly, 229 Miss. 327, 92 So. 2d 246 (1957).

Where the circuit court reversed an order of the state oil and gas board integrating all interest in gas under lands in two drilling units as authorized by statute, and where on appeal it was argued that the statute and order violated due process and the impairment of contract clause of the state and federal constitutions, the supreme court must decide the question of constitutionality of statute although the judgment was not based on any constitutional grounds. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d 85, 37 A.L.R.2d 415 (1952), error overruled 214 Miss. 857, 59 So. 2d 844 (Miss. 1952).

The constitutional provision that "laws impairing the obligation of contract shall not be passed" is qualified by proper exercise of the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d 85, 37 A.L.R.2d 415 (1952), error overruled 214 Miss. 857, 59 So. 2d 844 (Miss. 1952).

Where on former appeals, terminating in a decision by the Federal Supreme Court, the point raised by demurrer to insurer's plea involved the question whether a provision in a fidelity bond requiring any claim thereunder to be made within 15 months after the termination of the suretyship, was subject to the law of Tennessee where the contract was made at a time when the insured was then located in Tennessee, or subject to the laws of Mississippi, to which insured had removed and where the defalcation occurred, and resulted in a determination that the laws of Tennessee governed, such determination did not preclude subsequent litigation as to the effect of such provision under Tennessee decisions as being a condition precedent to liability of the insurer or merely a postponement of the right to sue. Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 189 Miss. 496, 195 So. 667 (1940), cert. denied, appeal dismissed, 311 U.S. 610, 61 S. Ct. 25, 85 L. Ed. 387 (1940).

Constitution is not violated by statute where rights existing thereunder are neither taken away nor diminished and reasonable time is provided in which they may be enforced. Russell Inv. Corp. v. Russell, 182 Miss. 385, 178 So. 815 (1938), suggestion of error overruled, 182 Miss. 385, 182 So. 102 (1938).

"Obligation of contract" within constitutional provisions means law under which contract was made as well as all remedies for its enforcement or after provided remedies equally adequate. Tucker Printing Co. v. Board of Supvrs., 171 Miss. 608, 158 So. 336 (1934).

Legislation of State impairing obligation of contract made under its authority is void, and courts in enforcing contract will pursue same course and apply same remedies as though such void legislation had never existed. Tucker Printing Co. v. Board of Supvrs., 171 Miss. 608, 158 So. 336 (1934).

A duty arising by operation of law is not a contract in the constitutional sense. Love v. Mangum, 160 Miss. 590, 135 So. 223 (1931).

The inhibition of state legislation impairing the obligation of contracts does not apply to acts of Congress dealing with interstate matters. W.M. Carter Planing Mill Co. v. New Orleans, M. & C. R.R., 112 Miss. 148, 72 So. 884, 22 ALR 685 (1916).

A statute providing that contracts for the payment of money entered into between certain dates shall be presumed to have intended Confederate money, does not unconstitutionally impair the obligation of such contracts. Cowan v. McCutchen, 43 Miss. 207 (1870).

Statutes allowing, increasing, or diminishing the rate of, interest may not constitutionally be given a retrospective operation. Eastin v. Vandorn, 1 Miss. 214 (1826).

7. — Change in judicial decision, impairment of contract obligations.

The validity of a sale of state land pursuant to the law as expounded by the state supreme court, cannot be impaired by any subsequent decision altering the construction of the law. Wisconsin Lumber Co. v. State, 97 Miss. 571, 54 So. 247 (1911).

The contract clause cannot be invoked against a change of decision by a state court. National Mut. Bldg. & Loan Ass'n v. Brahan, 193 U.S. 635, 24 S. Ct. 532, 48 L.Ed. 823 (1904).

8. — Changing limitation period, impairment of contract obligations.

Shortening a limitation period without giving reasonable time for the preservation of existing rights, unconstitutionally impairs contract obligations. Bell v. Union & Planters' Bank & Trust Co., 158 Miss. 486, 130 So. 486 (1930), motion denied, 161 Miss. 275, 131 So. 257 (1930).

The periods of limitation of actions may be shortened, and new rules of evidence and judicial procedure may be adopted, without unconstitutionally impairing the obligations of existing contracts, so long as such changes do not deprive the party of all remedy, or destroy the validity of the proof on which his claim rests. Briscoe v. Anketell, 28 Miss. 361, 61 Am. Dec. 553 (1854).

9. — Debtor's exemptions, impairment of contract obligations.

H.B. 997, clarifying Miss. Code Ann. §§ 77-3-13, 77-3-17, and 17-3-21 did not violate the Contracts Clause of the federal and state constitutions because the regulation of the state's public utilities fell within the legislature's authority, and where a city failed to secure Mississippi Public Service Commission approval for an acquisition from a power company, its contractual rights had not vested. City of Starkville v. 4-County Elec. Power Ass'n, 909 So. 2d 1094 (Miss. 2005).

In a proceeding to distribute the surplus fund remaining after a foreclosure sale of real property, the trial court erred in concluding that the defaulting landowners were entitled to a $15,000 homestead exemption where all but one of their creditors had obtained and enrolled judgments against them prior to the effective date of the law increasing the homestead exemption from $5,000 to $15,000; nor did the increased exemption apply to the remaining creditor where its claim was pending on the effective date of the new law. Thus, the $15,000 exemption was applicable to all of the creditors' claim. Builders Supply Co. v. Pine Belt Sav. & Loan Ass'n, 369 So. 2d 743 (Miss. 1979).

A tort action does not come within the constitutional provision prohibiting impairment of existing contracts, and statute increasing the homestead exemption could properly be applied to judgment which was rendered after the passage of the act, even though the cause of action arose before the statute was passed. Odom v. Luehr, 226 Miss. 661, 85 So. 2d 218 (1956).

Where an amendment to the statute raised homestead exemption from $3,000 to $5,000, if applied to creditors whose claims arose out of contracts entered into prior to the passage of amendment, this application would violate constitutional provision against impairment of obligation of contract by state law. Fidelity & Deposit Co. v. Lovell, 108 F. Supp. 360 (S.D. Miss. 1952), aff'd, 214 F.2d 565 (5th Cir. 1954).

A material increase of the amount of an exemption over the amount allowed when a debt was incurred, as where a homestead exemption is increased from 160 acres of land not exceeding $1500 in value, to 240 acres of land regardless of its value, materially impairs the contract obligation. Lessley v. Phipps, 49 Miss. 790 (1874).

10. — Moratory legislation, impairment of contract obligations.

In considering the moratoria enacted by the legislature every two years, before the legislature would be authorized to invoke the police power, under the Federal Constitution the public emergency must be urgent within the state; and when the emergency ceases, the statute permitting the court to enjoin the enforcement of a perfectly valid contract immediately ceases; and its enforcement after the emergency no longer exists violates the contract clause of the Federal Constitution. Jefferson Standard Life Ins. Co. v. Noble, 185 Miss. 360, 188 So. 289 (1939).

The Mississippi Moratorium Act of 1938, passed after the Public Emergency for which it was enacted originally to meet had ceased, was unconstitutional as violating this constitutional provision. Jefferson Standard Life Ins. Co. v. Noble, 185 Miss. 360, 188 So. 289 (1939).

Holders of deed of trust could not complain of delay in fixing benefits to be paid by mortgagor under Act providing for postponement of mortgage foreclosure sales, where holders moved for dissolution of injunction restraining foreclosure sale on ground that Act was unconstitutional without claiming benefits under Act which are properly determinable on final hearing. Wilson Banking Co. Liquidating Corp. v. Colvard, 172 Miss. 804, 161 So. 123 (1935).

Act authorizing postponement of mortgage foreclosure sales and extension of time for redemption from such sales with certain limitations held not violative of Federal Constitution prohibiting impairment of obligations of contracts. Wilson Banking Co. Liquidating Corp. v. Colvard, 172 Miss. 804, 161 So. 123 (1935).

State moratory legislation closing the courts as to all remedies for a period of two years was held an unconstitutional impairment of the obligation of existing contracts. Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311 (1866).

11. — Tax liability, impairment of contract obligations.

The Federal courts have general jurisdiction of an action by a foreign corporation seeking to enjoin administrative officers of the state of Mississippi from assessing its real and personal property for ad valorem taxes for years during which such corporation was granted, under Mississippi law, exemption from ad valorem taxation as a new enterprise, because, among other things, plaintiff alleged in good faith and upon reasonable grounds that the state was attempting to violate a contractual obligation. Interstate Natural Gas Co. v. Gully, 4 F. Supp. 697 (S.D. Miss. 1933), rev'd on other grounds, 292 U.S. 16, 54 S. Ct. 565, 78 L. Ed. 1088 (1934).

Liquor licenses may constitutionally be taxed under a statute enacted after they were granted. C.H. Reed & Co. v. Beall, 42 M 472; Coulson v. Harris, 43 M 728.

The Federal courts have general jurisdiction of an action by a foreign corporation seeking to enjoin administrative officers of the state of Mississippi from assessing its real and personal property for ad valorem taxes for years during which such corporation was granted, under Mississippi law, exemption from ad valorem taxation as a new enterprise, because, among other things, plaintiff alleged in good faith and upon reasonable grounds that the state was attempting to violate a contractual obligation. Interstate Natural Gas Co. v. Gully, 4 F. Supp. 697 (S.D. Miss. 1933), rev'd on other grounds, 292 U.S. 16, 54 S. Ct. 565, 78 L. Ed. 1088 (1934).

12. — Tax sales, impairment of contractual obligations.

Rights of parties to contract of sale of land by State for taxes thereon are determined by statute under which sale was made and cannot thereafter be substantially impaired. Reid v. Federal Land Bank, 166 Miss. 392, 148 So. 392 (1933); Russell Inv. Corp. v. Russell, 182 Miss. 411, 182 So. 102 (1938).

In absence of constitutional limitation if thing which constitutes defect, irregularity or illegality in tax sale proceedings is something legislature might have dispensed with by prior statute, legislature may dispense with it by subsequent statute, provided, there has not been a total departure from statutory method. Russell Inv. Corp. v. Russell, 182 Miss. 385, 178 So. 815 (1938), suggestion of error overruled, 182 Miss. 385, 182 So. 102 (1938).

Statute providing that action attacking validity of tax sale of land to State must be brought within two years after land is sold or forfeited to State, does not cure or validate defects, irregularities and illegalities in assessment, levy and sale, nor take away any vested rights, but fixes a reasonable time in which they may be asserted, and leaves former owner the right to sue and have sale declared void because of such defects, etc. Russell Inv. Corp. v. Russell, 182 Miss. 385, 178 So. 815 (1938), suggestion of error overruled, 182 Miss. 385, 182 So. 102 (1938).

State's obligation under 1922 Act, on sale of land for unpaid taxes, to notify lienholders of record since 1915 of such sale, was not impaired by 1930 Act, which required State to notify only those lienholders who recorded liens within six years prior to land sale. Reid v. Federal Land Bank, 166 Miss. 392, 148 So. 392 (1933).

13. — Municipal corporations, impairment of contract obligations.

A municipal charter is not a contract in the sense of the Federal Constitution; but this statement is subject to the qualification that under authority conferred by the charter the municipality may come under such duties or engagements with third persons as to create the sanctity of contract. Accordingly, a municipality may be deprived of its rights to the proceeds of liquor licenses. State Bd. of Educ. v. City of Aberdeen, 56 Miss. 518 (1879).

14. — State grants and contracts, impairment of contract obligations.

The state could not invalidate sixteenth section leases that were entered into before the ratification of the 1890 Mississippi Constitution on the ground that the rental and renewal terms were invalid because they perpetuated rents that were now nominal in violation of the prohibition of the donation of public property to private parties as such an invalidation would impair the renewal terms of the lease contracts. Lipscomb v. Columbus Mun. Separate Sch. Dist., 269 F.3d 494

(5th Cir. 2001), writ of certiorari denied by 535 U.S. 988, 122 S. Ct. 1541, 152 L. Ed. 2d 467, 2002 U.S. LEXIS 2388, 70 U.S.L.W. 3639 (2002).

The contract clause prevents state action which would impair obligation of contracts of the state and its political subdivisions as well as those of persons, partnerships, and corporations engaged in private business. Pryor v. Goza, 172 Miss. 46, 159 So. 99 (1935).

State grants and executed contracts of a state are within the inhibition of legislation impairing the obligation of contracts. Swann v. Buck, 40 Miss. 268 (1866).

15. — Public indebtedness, impairment of contract obligations.

Statute providing for scaling down of indebtedness of a drainage district when assessed benefits received are less than its bonded or other indebtedness, and providing for issuance of liquidation certificates, which may be made payable at dates different from original obligations, and providing that payment of such certificates would prevent further levy on lands for the benefits received, held unconstitutional as impairing obligation of contracts evidenced by bonds issued before enactment of the statute. Pryor v. Goza, 172 Miss. 46, 159 So. 99 (1935).

Where statute repealing game and fish laws did not expressly repudiate indebtedness incurred by county in enforcing repealed laws, and interpretation of statute to repudiate such debt would make statute unconstitutional as impairing obligation of contract, legislature would be presumed not to have intended to repudiate debt. Tucker Printing Co. v. Board of Supvrs., 171 Miss. 608, 158 So. 336 (1934).

Interpretation of statute repealing game and fish laws as abrogating obligation incurred by county for printing licenses and copies of game and fish law used in carrying out repealed law would impair obligation of contract and make repealing Act void to extent it impaired obligation of contract. Tucker Printing Co. v. Board of Supvrs., 171 Miss. 608, 158 So. 336 (1934).

A statute requiring the holders of outstanding county bonds to present them within a prescribed time for registration, with an affidavit showing the names of the different persons through whom the holder derives his title, as a condition of future payment of interest and principal, unconstitutionally impairs the obligation of existing unmatured bonds payable to bearer. Priestly v. Watkins, 62 Miss. 798 (1885).

No legislative alteration of the security for the payment of levee district bonds is permissible. Gibbs v. Green, 54 Miss. 592 (1877).

16. — Public office, impairment of contract obligations.

Public officer possesses contract right to his earned fees while holding office, and the legislature cannot deprive him of them, though he has no contract right to office. United States Fid. & Guar. Co. v. Gully, 168 Miss. 740, 150 So. 828 (1933).

Salaries due board of supervisors of county in class five for services rendered prior to November 1, 1930, not exceeding $1,250, could be allowed after November 1, though in excess of $1,000, maximum compensation allowable after that time. United States Fid. & Guar. Co. v. Gully, 168 Miss. 740, 150 So. 828 (1933).

Laws prescribing for the future the duties to be performed by or the salaries or other compensation to be paid to public officers, enacted during their term of office, are not precluded by the contract clause. Mississippi ex rel. Robertson v. Miller, 276 U.S. 174, 48 S. Ct. 266, 72 L. Ed. 517 (1928).

The unconstitutional impairment of a contract results from the enactment of a statute permitting the successor of a revenue agent to report on the merits attending suits for collection of delinquent taxes and share in the commissions allowed on the amount collected by such suits, where the prior statute under which the suits were brought permitted the agent to continue suits brought by him in the name of successor and enjoy the resulting compensation. Mississippi ex rel. Robertson v. Miller, 276 U.S. 174, 48 S. Ct. 266, 72 L. Ed. 517 (1928).

Appointment to office does not create a contract obligation in such sense that the office may not be abolished during the term of an incumbent. Kendall v. City of Canton, 53 Miss. 526 (1876).

An office is not a contract within the constitutional provision against legislation impairing contract obligations. Hyde v. State, 52 Miss. 665 (1876).

The right of a public officer to recover compensation is not a contract, and therefore a resolution of the legislature suspending the drawing of warrants upon the state treasurer does not offend this prohibition. Swann v. Buck, 40 Miss. 268 (1866).

17. — Banks and banking, impairment of contract obligations.

A statute empowering the court of chancery to reopen a closed bank in accordance with a plan proposed by at least three fourths of the creditors and recommended by the superintendent of banks, if the court is satisfied after hearing that the plan is feasible and just, and the superintendent is satisfied that the bank is solvent and can repay its depositors, providing that assenting and nonassenting creditors shall be required to accept payment in accordance with the terms of the approved plan and that the superintendent shall have no power to diminish to the prejudice of creditors any assets otherwise available for payment, does not impair contractual rights. Doty v. Love, 295 U.S. 64, 55 S. Ct. 558, 79 L. Ed. 1303, 96 A.L.R. 1438 (1935).

A state bank guaranty statute providing for the issuance of non-interest-bearing guaranty certificates does not unconstitutionally impair the contract obligation of existing interest-bearing guaranty certificates of deposit issued under an earlier statute. Love v. Mangum, 160 Miss. 590, 135 So. 223 (1931).

Regulations warranted by the police power do not unconstitutionally impair the contract created by a bank's charter. Bank of Oxford v. Love, 111 Miss. 699, 72 So. 133, 8 A.L.R. 894 (1916), aff'd, 250 U.S. 603, 40 S. Ct. 22, 63 L. Ed. 1165, 17 Ohio L.R. 410 (1919).

A statute providing that the liability of debtors of a bank shall not be released by the forfeiture of the bank's charter, but that they shall continue liable to its liquidating trustees, does not, as applied to existing debtors, unconstitutionally impair any contract obligation. Nevitt v. Bank of Port Gibson, 14 Miss. 513 (1846).

18. — Corporate charter, impairment of contract obligations.

The obligation of the state's undertaking in a special act incorporating a bank that "the business of said bank shall be confided to and controlled by its stockholders under such rules of laws and regulations as said company may see fit to adopt, provided the same may not be in conflict with the Constitution of the United States or of this state," was not unconstitutionally impaired by the subsequent enactment of legislation providing for reasonable examinations and reports by duly authorized officers of the state banking department created by such legislation, and for an enforced annual contribution to the expenses of such department, of a specified fraction of the bank's total assets. Bank of Oxford v. Love, 17 Ohio Law Rep. 410, 250 U.S. 603, 40 S. Ct. 22, 63 L. Ed. 1165 (1919).

The grant by the state to a corporation of power to acquire and hold real estate is a contract which the state may not impair by a statute prohibiting corporations from acquiring agricultural lands. Southern Realty Co. v. Tchula Co-operative Stores, 114 Miss. 309, 75 So. 121 (1917).

The imposition of an additional privilege tax on railroads claiming exemption, under charter, from state rate control, unconstitutionally impairs a contract right. Gulf & S.I.R.R. v. Adams, 90 Miss. 559, 45 So. 91 (1907).

A legislative grant to a railroad company of the right to fix rates, within maximum limits, may not be impaired by subsequent legislation. Stone v. Yazoo & M. Valley R. Co., 62 M 607; Gulf & Ship Island R.R. v. Adams, 90 Miss. 559, 45 So. 91, 8 ALR 895 (1907).

The charter of the Mobile and Ohio Railroad Co. by which it is empowered from time to time to fix, regulate and receive the tolls and charges to be received by it for transportation contains no contract the obligation of which is in any way impaired by the Mississippi statute of March 11, 1884, creating a commission to provide for the regulation of freight and passenger rates, to prevent unjust discrimination, and to enforce certain police regulations affecting railroad companies doing business in that state. Stone v.

Farmers' Loan & Trust Co., 116 U.S. 307, 6 S. Ct. 388, 29 L. Ed. 636 (1886).

A charter granted by the state to a corporation is a contract within the meaning of this provision; and the contract subsisting between the stockholders and the corporation is equally within the protection of the Constitution. New Orleans, Jackson & Great N. R.R. v. Harris, 27 Miss. 517 (1854).

The obligation of the contract between the state and a bank chartered by it whereby it was allowed to take negotiable notes, and to sell or to transfer them, and that with the maker enabling the bank to assign his note and a recovery to be had on it by the assignee, are unconstitutionally impaired by a statute declaring that it shall not be lawful for any bank of a state to transfer by endorsement or otherwise any note, bill receivable, or other evidence of debt, and if it shall appear in evidence upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant. Planters' Bank v. Sharp, 47 U.S. 301, 6 How. 301, 12 L. Ed. 447 (1848).

19. — Franchises and privileges, impairment of contract obligations.

For a case holding that a telephone and telegraph company had acquired vested rights under Chapter 38, Laws of 1886, SO that Chapter 372, Laws of 1956, to the extent that it authorizes municipalities to impose charges on such company for the use of the highways and streets, is unconstitutional, see City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 79 S. Ct. 455, 3 L. Ed. 2d 562 (1959). However, the judgment in this case was vacated by the Supreme Court of the United States and the case remanded to the District Court with directions to hold the cause until the parties repaired to a state tribunal for an authoritative declaration of applicable state law.

A contract fixing rates which is protected against impairment by the contract clause could be made by the city of Vicksburg under the authority of the Mississippi Laws of 1886, c. 358, § 5, empowering it to provide for the erection and maintenance of a system of waterworks to supply that city with water, and to that end to contract with a party or parties who shall build and operate waterworks. City of Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496, 27 S. Ct. 762, 51 L. Ed. 1155 (1907).

The privilege of conducting a lottery bestowed upon a corporation by its charter does not preclude the state from thereafter outlawing lotteries. Moore v. State, 48 M 147, (writ of error dismissed in 21 Wall (US) 636, 22 L Ed 653); Stone v. Mississippi, 101 U.S. 814, 25 L. Ed. 1079 (1880).

The contract obligation of a nonexclusive franchise is not unconstitutionally impaired by granting a franchise to a competitor. Collins v. Sherman, 31 Miss. 679 (1856).

20. — Retirement death benefits, impairment of contract obligations.

Section 25-11-114(2)(a), which mandates that the pre-retirement death benefits of a Mississippi Public Employees' Retirement System member must go to the member's surviving spouse, regardless of whom the member has duly designated as his or her beneficiary, was unconstitutional as applied as it impaired a contractual right that the deceased employee acquired when he became a member of the public retirement system. Public Emples. Retirement Sys. v. Porter, 763 So. 2d 845 (Miss. 2000).

21. Imposts or duties.

A tax of three cents a barrel on oysters packed or canned in the state, or shipped raw by dealers, may constitutionally be applied to oysters taken from the waters of another state. Barataria Canning Co. v. State, 101 Miss. 890, 58 So. 769 (1912).

An ad valorem tax imposed by a city on boats wherein goods, wares, and merchandise are sold within the city limits, is not "an impost or duty" within these provisions. Harrison v. Mayor of Vicksburg, 11 Miss. 581, 41 Am. Dec. 633 (1844).

22. Wharfage.

The exaction by a port, of wharfage on vessels landing there, is not repugnant to this provision. O'Conley v. President of Natchez, 9 Miss. 31, 40 Am. Dec. 87 (1843).

ATTORNEY GENERAL OPINIONS

The amendment to subsection (1), denying certain offenders eligibility for the Intensive Supervision Program has no effect on the length of incarceration and consequently does not violate the ex post facto clause when applied to those convicted prior to its passage. Eads, Nov. 16, 2001, A.G. Op. #01-0673.

RESEARCH REFERENCES

ALR. Statute providing for apportionment between lessor and lessee of a tax imposed upon the producer of oil, gas, or other natural production as violation of the constitutional provision against impairment of the obligation of contracts. 160 A.L.R. 980.

Comment note—Tax exemptions and the contract clause. 173 A.L.R. 15.

Constitutionality, construction, and application of statute or ordinance providing for reduction of pension or retirement benefit of public officer or employee because of independent income. 7 A.L.R.2d 692.

Am Jur. 4 Am. Jur. 2d, Ambassadors, Diplomats and Consular Officials § 1.

7A Am Jur 2d, Automobiles and Highway Traffic § 142.

9 Am. Jur. 2d, Bankruptcy § 11.

9A Am. Jur. 2d, Bankruptcy §§ 1405, 1522.

15A Am. Jur. 2d, Civil Service § 5.

16A Am. Jur. 2d, Constitutional Law §§ 222, 382, 392-394.

16B Am. Jur. 2d, Constitutional Law §§ 689-734, 753-789.

21 Am Jur 2d, Criminal Law § 503.

21A Am Jur 2d, Custom Duties and Import Regulations §§ 1, 153.

23 Am. Jur. 2d, Descent and Distribution § 41.

26 Am. Jur. 2d, Eminent Domain §§ 8, 96.

32A Am. Jur. 2d, Federal Courts § 919.

36 Am. Jur. 2d, Foreign Corporations §§ 174, 185.

39 Am. Jur. 2d, Highways, Streets, and Bridges § 264.

42 Am. Jur. 2d, Insolvency § 3.

44A Am. Jur. 2d, Insurance § 1689.

45 Am Jur 2d, Intoxicating Liquors § 30.

49 Am. Jur. 2d, Landlord and Tenant § 835.

59A Am. Jur. 2d, Partnership § 120.

60 Am. Jur. 2d, Peddlers, Solicitors, and Transient Dealers § 62.

64 Am. Jur. 2d, Public Securities and Obligations § 325.

67B Am Jur 2d, Sales and Use Taxes §§ 9, 10, 146.

70 Am Jur 2d, Shipping § 77.

82 Am. Jur. 2d, Workers' Compensation § 9.

CJS. C.J.S. Commerce § 120.

C.J.S. Constitutional Law §§ 409-413, 421-431.

C.J.S. Payment § 10.

C.J.S. States §§ 31-34, 143, 251.

C.J.S. Treaties § 4.

C.J.S. United States § 162.

Lawyers' Edition. Effect on state or local taxes of Federal Constitution's import-export clause (Art I, § 10, cl 2)--Supreme Court cases. 122 L Ed 2d 853.

Supreme Court's construction and application of Federal Constitution's Art. I, § 10, cl. 3 provision that no state, without consent of Congress, shall lay any duty of tonnage. 174 L Ed 2d 637.

Article II.

The President

Sec.
1. Executive power, term; Presidential elections; Time of election; etc
2. Powers of President
3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Executive Laws; Commission Officers
4. Impeachment

RESEARCH REFERENCES

CJS. C.J.S. Ambassadors and Consuls §§ 1-9.

C.J.S. Armed Services §§ 1-5, 21, 23.

C.J.S. Constitutional Law §§ 134-136, 203, 204, 215-227.

C.J.S. Judges §§ 20-27, 58-77.

C.J.S. Pardon and Parole §§ 3, 4, 11-33.

C.J.S. Treaties § 4.

C.J.S. United States §§ 45-53, 56, 57.

§ 1. Executive power, term; Presidential elections; Time of election; etc

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. [The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the President, the votes shall be taken by States, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the Vice President.]

4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

5. No person except a natural-born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Editor's Note — Clause 3, enclosed in brackets, was superseded by the Twelfth Amendment.

Cross References — Manner of election, see USCS Const. Amend. XII.

Commencement of term, see USCS Const. Amend. XX, § 1.

Death of or failure of President-elect or Vice President-elect to qualify, see USCS Const. Amend. XX, § 3.

Death of person chosen by Congress to act, see USCS Const. Amend. XX, § 4.

Limitation as to term, see USCS Const. Art. XXII.

Presidential and Vice Presidential electors for District of Columbia, see USCS Const., Amend. XXIII.

Removal, inability, death, or resignation of President, see USCS Const. Amend. XXV.

Vacancy in the office of Vice President, see USCS Const. Amend. XXV, § 2.

JUDICIAL DECISIONS

1. Presidential electors.

The provisions of Code 1942 § 3107 which provide a method whereby the state political party conventions may select two slates of presidential electors, one slate pledged to support the nominee of the national political party, and one slate unpledged offends no provision of the United States Constitution, for this section expressly provides that nothing therein shall prohibit a slate of electors pledged to support the national party candidate from running on the same general election ballot, and Code 1942 § 3260 enables such a slate to get on the ballot upon the petition of 1,000 voters. Gray v. State of Mississippi, 233 F. Supp. 139 (N.D. Miss. 1964).

The United States Constitution does not require all states to provide voters with an opportunity to vote for pledged electors running under a national party label. Gray v. State of Mississippi, 233 F. Supp. 139 (N.D. Miss. 1964).

RESEARCH REFERENCES

ALR. Presidential and vice-presidential electors. 153 A.L.R. 1006.

Executive privilege with respect to presidential papers and recordings. 19 A.L.R. Fed. 472.

Am Jur. 16 Am Jur 2d, Constitutional Law §§ 216-218.

3B Am Jur 2d, Aliens and Citizens § 1879.

3C Am Jur 2d, Aliens and Citizens §

2271.

25 Am Jur 2d, Elections § 6.

63C Am Jur 2d, Public Officers and Employees §§ 111, 113, 118, 122.

77 Am Jur 2d, United States §§ 17-20.

Lawyers' Edition. Treaty or international executive agreement as limiting recovery available to United States citizens or businesses. 80 L Ed 2d 871.

Supreme Court's views as to extent, under Federal Constitution, of privileges and immunities of United States President or former President, by reason of that office, as to judicial proceedings or process. 137 L Ed 2d 1135.'

Supreme Court's construction and application of federal constitutional provisions (Art II, § 1, cl 2, 4; Amendments 12, 23) concerning appointment of, or voting by, Presidential electors. 148 L Ed 2d 1087.

§ 2. Powers of President

1. The President shall be the Commander-in-Chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Editor's Note — Parts of clause 1 are popularly known as the "Commander in Chief Clause," the "Opinion Clause" and the "Pardon Clause."

Parts of clause 2 are popularly known as the "Treaty Clause" and the "Appointments Clause."

Clause 3 is popularly known as the 'Recess Appointments Clause."

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Ambassadors, Diplomats and Consular Officials §§ 2, 5.

16 Am. Jur. 2d, Constitutional Law § 57.

16A Am. Jur. 2d, Constitutional Law §§ 247, 325.

21A Am. Jur. 2d, Custom Duties and Import Regulations § 16.

32 Am. Jur. 2d, Federal Courts § 19.

35 Am. Jur. 2d, Federal Tax Enforcement §§ 603, 604.

46 Am. Jur. 2d, Judges § 9.

77 Am. Jur. 2d, United States § 24.

Lawyers' Edition. Treaty or international executive agreement as limiting recovery available to United States citizens or businesses. 80 L Ed 2d 871.

Supreme Court's construction and application of appointments clause of Art. II, § 2, cl. 2, of Federal Constitution. 101 L. Ed. 2d 1072.

§ 3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Executive Laws; Commission Officers

He shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Editor's Note — Parts of this clause are popularly known as the "State of the Union Clause," the "Recommendation Clause" and the "Take Care Clause."

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Ambassadors, Diplomats and Consular Officials § 1.

16A Am. Jur. 2d, Constitutional Law § 247.

77 Am. Jur. 2d, United States § 20.

Lawyers' Edition. Supreme Court's views as to extent, under Federal Constitution, of privileges and immunities of United States President or former President, by reason of that office, as to judicial proceedings or process. 137 L Ed 2d 1135.

Supreme Court's construction and application of Federal Constitution's Art. II, § 3 provision that President shall take care that laws be faithfully executed. 170 L Ed 2d 1045.

§ 4. Impeachment

The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 218-222.

Article III.

The Judiciary

Sec.

1. Judiciary; powers; tenure; compensation
2. Jurisdiction of Courts; Supreme Court, Original and Appellate Jurisdiction; Criminal Trial by Jury
3. Treason; Punishment of Treason

RESEARCH REFERENCES

CJS. C.J.S. Admiralty §§ 1 to 89, 228.

C.J.S. Convicts § 4.

C.J.S. Federal Civil Procedure §§ 313-340, 398, 522, 534.

C.J.S. Federal Courts §§ 3, 4, 89-102, 104-112, 116-157.

C.J.S. Treason §§ 2-9.

§ 1. Judiciary; powers; tenure; compensation

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

RESEARCH REFERENCES

ALR. Executive privilege with respect to presidential papers and recordings. 19 A.L.R. Fed. 472.

Am Jur. 2 Am. Jur. 2d, Administrative Law § 63.

9 Am. Jur. 2d, Bankruptcy §§ 741, 825, 826.

16 Am. Jur. 2d, Constitutional Law §§ 219-226.

24 Am. Jur. 2d, District of Columbia § 21.

32 Am. Jur. 2d, Federal Courts §§ 1, 5, 18-20, 469, 470, 537.

32A Am. Jur. 2d, Federal Courts § 582.

46 Am. Jur. 2d, Judges §§ 11, 50, 57.

Lawyers' Edition. Validity, under Federal Constitution, of arbitration statutes. 87 L Ed 2d 787.

Supreme Court's views as to state court's concurrent jurisdiction over federal cause of action in absence of federal legislation expressly granting such jurisdiction. 107 L Ed 2d 1182.

Supreme Court's view as to when congressional enactment violates separation-of-powers principles through directing case's result in--or through providing for executive or legislative suspension or revision of judgment by--federal court established under Article III of Federal Constitution. 147 L Ed 2d 1137.

Supreme Court's views as to validity, construction, and application of 28 USCS § 1367, concerning supplemental jurisdiction of federal courts. 162 L Ed 2d 1031.

Supreme Court's views concerning common-law doctrine of forum non conveniens with respect to lower federal courts. 167 L Ed 2d 1179.

§ 2. Jurisdiction of Courts; Supreme Court, Original and Appellate Jurisdiction; Criminal Trial by Jury

1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Editor's Note — The part of clause 1 related to controversies "between a State and Citizens of another State" has been affected by Amendment 11.

Parts of clause 1 are popularly known as the "Arising Under Clause" and the "Case or Controversy Clause" or "Case and Controversies Clause."

Part of clause 2 is popularly known as the "Exceptions Clause."

Cross References — Right to impartial jury, see USCS Const. Amend. VI.

Right to jury trial in civil cases, see USCS Const. Amend. VII.

Suits between a state and citizens of another state, see USCS Const. Amend. XI.

JUDICIAL DECISIONS

1. In general.
2. Guilty plea.
3. Admiralty.
4. Venue.
5. Others; standing not found.

1. In general.

Facial challenges brought by church against city's ordinance under which church had been denied renovation permit were easily ripe because, first, they were fit for judicial decision because they raised pure questions of law, and second, church would have suffered hardship, including probable losing of its lease and curtailment of its religious exercise rights, if review were delayed. Opulent Life Church v City of Holly Springs, Miss. 697 F.3d 279, U.S. App. LEXIS 20283 (5th Cir. 2012).

Lawsuit brought by church challenging city's ordinance under which it had been denied renovation permit did not become moot when on eve of oral argument that city repealed ordinance and replaced it with one which would have banned church altogether from using building it had leased; furthermore, church seeking actual damages and attorney fees ensured actual live controversy. Opulent Life Church v City of Holly Springs, Miss. 697 F.3d 279, U.S. App. LEXIS 20283 (5th Cir. 2012).

Requirements of U.S. Const. Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights; plaintiff political party's attempts to demonstrate actual or threatened injury by (a) declaring its intention, were the statute not in place, to hold closed primaries, (b) asserting a threat of prosecution against it for violating state election law, and (c) protesting its inability to modify party rules without legislative sanction, failed to satisfy its burden to show a case or controversy. Although the party contended its executive committee's decision to authorize a suit was sufficient to give it standing to challenge the statute, without concrete plans or any objective evidence to demonstrate a "serious interest" in a closed primary, the party suffered no threat of imminent injury. Miss. State Democratic Party v. Barbour, 529 F.3d 538 (5th Cir. 2008).

Although plaintiff political party unquestionably pleaded a constitutional injury by alleging that Mississippi's semi-closed primary statute required it to associate with members of the other party during its candidate-selection process, it took no internal steps to limit participation in its primaries to party members and thus could not claim that Miss. Code Ann.

§ 23-15-575 actually had an unconstitutional effect; this lack of "actual controversy" made the case too remote and abstract an inquiry for the proper exercise of the judicial function under U.S. Const. Art. III. Miss. State Democratic Party v. Barbour, 529 F.3d 538 (5th Cir. 2008).

Plaintiffs who showed that challenged statutes either impinged upon their protected rights to register to vote or burdened organizational efforts to assist prospective voters in registering had standing to sue to challenge Mississippi's dual registration requirement and prohibition on satellite registration as violative of their rights and all persons similarly situated. Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd sub nom. Mississippi State Chapter, Operation Push v. Mabus, 932 F.2d 400 (5th Cir. 1991).

A motion brought by the State of Ohio for leave to file a bill of complaint for abatement of a nuisance, alleging that the defendants, Wyandotte Chemicals Corporation and Dow Chemical Company, both out-of-state corporations, and Dow Chemical Company of Canada, Limited, were responsible for contaminating Lake Erie by the dumping of mercury into tributaries outside of Ohio, was denied, even though the complaint stated a cause of action within the court's original jurisdiction, and notwithstanding the public importance of the matters at issue, on the ground that the court has discretion to decline jurisdiction in order to protect itself from abuse of the opportunity to resort to its original jurisdiction in the enforcement by states of claims against citizens of another state or country, particularly in controversies based upon complex questions of fact but involving no difficult or important problems of federal law. Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 91 S. Ct. 1005, 28 L. Ed. 2d 256, 57 Ohio Op. 2d 351 (1971).

Where, after making contract of employment in Louisiana between citizens of that State for work on dredge, operations were subsequently carried on in Mississippi where employee was injured while at work on dredge without own motive power and engaged in making channel through point to shorten Mississippi river, employee's remedy held not that afforded by Federal Seamen's Act, but by Louisiana Compensation Act, if employer had complied with it, otherwise that afforded by Mississippi law. Orleans Dredging Co. v. Frazie, 173 Miss. 882, 161 So. 699 (1935), cert. denied 296 U.S. 653, 56 S. Ct. 383, 80 L. Ed. 465.

2. Guilty plea.

A guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial, and the right that the prosecution prove each element of the offense beyond a reasonable doubt. Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

3. Admiralty.

To hold that one taking possession of a barge swept down the Mississippi by a flood, but not abandoned by its owner, is not entitled to retain possession as against the owner, is not to invade the exclusive admiralty jurisdiction of the Federal courts. Mengel Box Co. v. Joest, 127 Miss. 461, 90 So. 161 (1921).

4. Venue.

Defendant's convictions for attempting a burglary, arson, and a murder, were proper where venue was proper in the county where defendant attempted to burn the structure; venue was proper pursuant to U.S. Const. Art. III, § 2 cl. 3, U.S. Const. amend. VI, and Miss. Const. Art. 3, § 26 because there was nothing conceptually outrageous or bizarre in bringing charges in the county for an attempt to burn a building in that county. Holbrook v. State, 877 So. 2d 525 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 865 (Miss. 2004), writ of certiorari denied by 543 U.S. 1166, 125 S. Ct. 1340, 161 L. Ed. 2d 141, 2005 U.S. LEXIS 1746, 73 U.S.L.W. 3496 (2005).

5. Others; standing not found.

In the context of standing, while any person may file a complaint with the Mississippi Ethics Commission under Mississippi law, only local district attorneys, the Mississippi Attorney General, or the Commission itself may file direct actions in court challenging the ethical conduct of public officials. As a result, where the parents sought reversal of the confirmations of two school board members by the city council, alleging that certain council members were required to have recused themselves due to conflicts of interest, the parents were not "persons aggrieved" for purposes of Miss. Code Ann. § 11-51-75, and they did not meet the statutory requirements to file a bill of exceptions under the facts presented; their sole remedy was to file a complaint with the Commission. City of Jackson v. Greene, 869 So. 2d 1020 (Miss. 2004).

RESEARCH REFERENCES

ALR. Right to jury trial in stockholder's derivative action. 32 ALR4th 1411.

Right to jury trial in action for declaratory relief in state court. 33 A.L.R.4th 146.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury. 37 A.L.R.4th 304.

Small claims: jury trial rights in, and on appeal from, small claims court proceeding. 70 A.L.R.4th 1119.

Applicability of maritime law rule of comparative negligence to strict products liability cases brought in admiralty. 74 A.L.R. Fed. 316.

Am Jur. 2 Am. Jur. 2d, Administrative Law § 419.

2 Am. Jur. 2d, Admiralty §§ 2, 4-6, 8, 91.

3C Am. Jur. 2d, Aliens and Citizens §§ 2110, 2119.

4 Am. Jur. 2d, Ambassadors, Diplomats and Consular Officials § 17.

4 Am. Jur. 2d, Appellate Review §§ 1, 7, 8, 17, 39.

5 Am. Jur. 2d, Appellate Review §§ 557, 597, 806.

9 Am. Jur. 2d, Bankruptcy §§ 603, 707.

16 Am. Jur. 2d, Constitutional Law § 131.

17 Am. Jur. 2d, Contempt § 179.

22A Am. Jur. 2d, Declaratory Judgments § 30.

24 Am. Jur. 2d, District of Columbia § 10.

32 Am. Jur. 2d, Federal Courts §§ 470, 471, 495.

32A Am. Jur. 2d, Federal Courts §§ 582, 584, 618, 622, 653, 884, 935.

39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies § 97.

44B Am. Jur. 2d, International Law § 171.

54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 379, 510.

61C Am. Jur. 2d, Pollution Control § 989.

70 Am. Jur. 2d, Shipping § 13.

77 Am. Jur. 2d, United States § 61.

Lawyers' Edition. Validity and construction of Federal Criminal Procedure Rule 23, dealing with trial by jury or by the court. 13 L Ed 2d 1119.

Noncompliance with state procedural rule as constituting "adequate state ground" for denial of relief so as to preclude Supreme Court review of federal question. 24 L Ed 2d 837.

Construction and application of 28 USCS § 1253 permitting direct appeal to Supreme Court from order of three-judge District Court granting or denying injunction. 26 L Ed 2d 947.

Construction and application of 28 USCS § 1254(2) authorizing appeal to Supreme Court from Court of Appeals judgment invalidating state statute. 27 L Ed 2d 840.

What judgment or decree of state court in civil cases is final for purpose of review by United States Supreme Court under 28 USCS § 1257 and similar predecessors. 29 L Ed 2d 872.

Considerations affecting grant, continuance, reduction, or revocation of bail by individual Justice of Supreme Court. 30 L Ed 2d 952.

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act (28 USCS § 2201). 40 L Ed 2d 783.

What circumstances render civil case, or issues arising therein, moot so as to preclude Supreme Court's consideration of their merits. 44 L Ed 2d 745.

Supreme Court's views as to when, in litigation, to allow exception to general rule that party does not have standing to assert third party's rights or interests. 50 L Ed 2d 902.

Original jurisdiction of United States Supreme Court in suits between states. 68 L Ed 2d 969.

Requirements of Article III of Federal Constitution as affecting standing to challenge particular conduct as violative of federal law—Supreme Court cases. 70 L Ed 2d 941.

Supreme Court's views as to scope of "arising under" clause of Article III § 2, Clause 1 of Federal Constitution. 76 L Ed 2d 831.

Accused's constitutional right to public trial held applicable to suppression hearing. 81 L. Ed. 2d 31.

Validity, under Federal Constitution, of arbitration statutes. 87 L Ed 2d 787.

Distinction between "petty" and "serious" offenses for purposes of federal constitutional right to trial by jury—Supreme Court cases. 103 L. Ed. 2d 1000.

Supreme Court's construction and application of Federal Constitution's Art III, § 2, cl. 2 provision that Supreme Court's appellate jurisdiction is subject to such exceptions and regulations as Congress shall make. 133 L Ed 2d 965.

Taxpayer's standing to raise federal constitutional question in federal court—Supreme Court cases. 136 L Ed 2d 963.

Supreme Court's views as to extent, under Federal Constitution, of privileges and immunities of United States President or former President, by reason of that office, as to judicial proceedings or process. 137 L Ed 2d 1135.

Supreme Court's views concerning its original jurisdiction, under Art III, § 2, cl. 2 of Federal Constitution, over "all cases affecting Ambassadors, other public Ministers and Consuls". 140 L Ed 2d 1163.

Supreme Court's view as to when congressional enactment violates separation-of-powers principles through directing case's result in--or through providing for executive or legislative suspension or revision of judgment by--federal court established under Article III of Federal Constitution. 147 L Ed 2d 1137.

Supreme Court's views concerning ripeness, for adjudication, of claim that regulatory taking violated just compensation clause of Federal Constitution's Fifth Amendment. 150 L Ed 2d 893.

Supreme Court's views as to validity, construction, and application of 28 USCS § 1367, concerning supplemental jurisdiction of federal courts. 162 L Ed 2d 1031.

Supreme Court's views as to what, in federal-court patent litigation, is case or controversy, within meaning of Article III of Federal Constitution, or actual controversy, within meaning of Declaratory Judgment Act (28 USCS § 2201, or similar predecessor). 166 L Ed 2d 1047.

Supreme Court's views as to what changes in circumstances render moot (so as to preclude consideration of merits) habeas corpus case, or issues in such case, concerning criminal proceedings. 169 L Ed 2d 975.

Intervention or joinder of parties in proceeding in Supreme Court under its original jurisdiction. 175 L Ed 2d 1145.

§ 3. Treason; Punishment of Treason

1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.

Cross References — Attainder and ex post facto laws, see USCS Const. Art. 1, § 9, cl. 3 and Art. 1, § 10, cl. 1.

JUDICIAL DECISIONS

1. In general.

A statute which, as construed by the state courts, makes it a criminal offense to communicate to others views and opinions respecting governmental policies, and prophesies concerning the state of this and other nations, irrespective of whether the communication was with an evil or sinister purpose or advocated or incited subversive action against the nation or state, or threatened any clear and present danger to American institutions or government, denies the liberty guaranteed by the Fourteenth Amendment. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d 663 (1943).

A statute making it a criminal offense to indoctrinate any creed, theory, or any set of principles which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag of the United States or of the state, denies the liberty guaranteed by the Fourteenth Amendment. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d 663 (1943).

RESEARCH REFERENCES

Am Jur. 3C Am Jur 2d, Aliens and Citizens § 2212.

23 Am Jur 2d, Descent and Distribution § 37.

70 Am Jur 2d, Sedition, Subversive Activities, and Treason §§ 4, 29, 58, 61, 62, 64-66, 71.

ARTICLE IV.

STATES; RECIPROCAL RELATIONSHIP BETWEEN STATES AND WITH UNITED STATES

§ 1. Full faith and credit

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Federal Aspects — Full faith and credit to protection orders, 18 USCS § 2265.

Full faith and credit to arbitral tribunal awards under Convention Establishing the Multilateral Investment Guarantee Agency, 22 USCS § 290k-11.

Full faith and credit to tribal actions under certain tribal ordinances, 25 USCS § 2207.

Full faith and credit to Acts, records, and judicial proceedings of states, territories, and possessions, 28 USCS § 1738.

Full faith and credit to child custody determinations, 28 USCS § 1738A.

Full faith and credit to child support orders, 28 USCS § 1738B.

Full faith and credit to nonjudicial records kept in public office, 28 USCS § 1739.

Extension of Art. IV, Sec. 1 to Guam, 48 USCS § 1421b.

Extension of Art. IV, Sec. 1 to Virgin Islands, 48 USCS § 1561.

JUDICIAL DECISIONS

1. Construction and application.
2. Jurisdiction of court.
3. Venue.
4. Nonfinal judgment.
5. Law governing.
6. Evidentiary matters.
7. Fraud or mistake.
8. Divorce and support.
9. Child custody and visitation.
10. Probate proceedings.
11. Limitation of actions.
12. Contracts violative of Mississippi law.
13. Workers' compensation.
14. Foreign guardianship.

1. Construction and application.

Comity, which gives effect to laws and judicial decision of other courts beyond that mandated by full faith and credit clause, should not be applied when its application would render meaningless substantial rights of non-moving party. Harrison v. Boyd Mississippi, Inc., 700 So. 2d 247 (Miss. 1997).

"Comity" suggests that forum courts, as matter of judicial courtesy, should give effect to laws and judicial decisions of other courts beyond that mandated by full faith and credit clause of United States Constitution. Harrison v. Boyd Mississippi, Inc., 700 So. 2d 247 (Miss. 1997).

Mississippi is required by the United States Constitution, Art. IV, Sec. 1, to give full faith and credit to all final judgments of other states and federal courts unless (1) the foreign judgment was obtained as a result of some false representation without which the judgment would not have been rendered, or (2) the rendering court did not have jurisdiction over the parties or the subject matter; however, in order to challenge a foreign judgment on this ground, it is necessary that the challenge be timely and properly filed in Mississippi pursuant to § 15-1-45. Davis v. Davis, 558 So. 2d 814 (Miss. 1990).

2. Jurisdiction of court.

Doctor enrolled the New Mexico judgment on March 3, 1999, and the clerk mailed notice of the enrollment on that date, and the attorney then had 20 days to contest the enrollment of the judgment; where the attorney's response was filed on April 28, 1999, outside the 20-day limit, the attorney's defenses to the enrollment which alleged false representations by the doctor were not properly before the trial court. Schwartz v. Hynum, 933 So. 2d 1039 (Miss. Ct. App. 2006).

Doctrine of comity, which gives effect to laws and judicial decision of other courts beyond that mandated by full faith and credit clause, would not be considered, where non-forum court lacked subject matter jurisdiction. Harrison v. Boyd Mississippi, Inc., 700 So. 2d 247 (Miss. 1997).

In order for full faith and credit to apply, the foreign court must have addressed the merits of the case in rendering its judgment. However, this general rule does not apply if the rendering court did not have jurisdiction over the parties or the subject matter or if the foreign judgment itself was obtained as a result of some false representation without which the judgment would not have been rendered. If a foreign judgment is collaterally attacked on subject matter grounds, the court may consider extrinsic evidence only to show that the foreign judgment is void. When the attack is on grounds of extrinsic fraud, a distinction must be made between fraud involving the merits and fraud which enables a party to procure a judgment that he or she otherwise would not have obtained. Davis v. Davis, 558 So. 2d 814 (Miss. 1990).

Chancery Court has jurisdiction to hear and adjudicate controversy involving validity and effect of power of attorney, which has not been acknowledged and recorded in manner of conveyance of land, with respect to conveyance of real property situated in Republic of Greece where all parties reside in Mississippi and have been effectively subjected to in personam jurisdiction of Chancery Court; court may enter personal judgment, even though controlling substantive law is that of Greece; final adjudication would effectively bind parties in Mississippi and presumably in all other states even though adjudication may not be enforceable in Greece as matter of right and maybe not even as matter of comity. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Where jurisdiction of a foreign court or that of a state is brought into question in a suit in courts of another state or sovereignty, the law of the forum is controlling upon the question of jurisdiction of the court rendering the judgment. Wheeler v. Kight, 233 Miss. 425, 102 So. 2d 374 (1958).

Where at the time of rendering judgment assessing certain policy holders, the Texas court had jurisdiction of the subject matter of the class suit by the statutory receiver for an unincorporated reciprocal insurance exchange, but did not have territorial jurisdiction of the person of the defendant who then lived in Mississippi, and who was not served with process except by mailing of the same to him at his place of residence, the court did not err in refusing to give full faith and credit to the judgment when defendant was sued in Mississippi. Wheeler v. Kight, 233 Miss. 425, 102 So. 2d 374 (1958).

Records and proceedings of courts of other states are entitled to full faith and credit only insofar as such courts have jurisdiction of the subject matter and the parties, and facts necessary to give jurisdiction to the court rendering judgment may be inquired into. Hopkins v. Hopkins, 174 Miss. 643, 165 So. 414 (1936); American Cas. Co. v. Kincade, 219 Miss. 653, 69 So. 2d 820 (1954).

Where the full faith and credit clause is invoked to compel enforcement of a judgment or decree in another state, the question of jurisdiction in the court of rendition is always open to inquiry. Steele v. Steele, 152 Miss. 365, 118 So. 721 (1928).

Full faith and credit does not require the admission in evidence of a judgment of a court of a sister state, rendered in a suit commenced by attachment against the property of a person who was without such state and was not personally served with process. Chew & Relf v. Randolph, 1 Miss. 1 (1818).

3. Venue.

A Mississippi resident who went into Tennessee and contracted with a Tennessee corporation providing placement services to seek employment for him in any one of 3 states, one of which was Tennessee, was amenable to personal jurisdiction in the Tennessee courts, and the Mississippi court could not decline to give full faith and credit to the Tennessee court judgment on ground that venue was not proper in the Tennessee court. Educational Placement Services v. Wilson, 487 So. 2d 1316 (Miss. 1986).

4. Nonfinal judgment.

A Louisiana judgment was a valid final one entitled to full faith and credit in the courts of Mississippi, notwithstanding the contention that it was not final since a copy of the notice of the signing of the judgment had not been mailed to the attorney of record, where the Louisiana case had not been taken under advisement and no written request for a notice of judgment had been filed; thus no such notice was required under Louisiana law. Marsh v. Luther, 373 So. 2d 1039 (Miss. 1979).

A judgment which is not final and which is subject to change and modification at any time when a change of conditions demands it, and has no conclusive effect in the state where rendered, has no constitutional claim under the full faith and credit clause of the Constitution to final conclusive effect in the state of the forum. Latham v. Latham, 223 Miss. 263, 78 So. 2d 147 (1955).

5. Law governing.

Section 75-1-105 authorizes application of Mississippi substantive law on privity, disclaimers and limitations of remedies in warranty action only when transaction giving rise to warranty claim bears some reasonable and appropriate relationship to Mississippi, and in absence of such relation, application of Mississippi substantive warranty law violates constitutional guarantees. Price v. International Tel. & Tel. Corp., 651 F. Supp. 706 (S.D. Miss. 1986).

Where on former appeals, terminating in a decision by the Federal Supreme Court, the point raised by demurrer to insurer's plea involved the question whether a provision in a fidelity bond requiring any claim thereunder to be made within 15 months after the termination of the suretyship, was subject to the law of Tennessee where the contract was made at a time when the insured was then located in Tennessee, or subject to the laws of Mississippi, to which insured had removed and where the defalcation occurred, and resulted in a determination that the laws of Tennessee governed, such determination did not preclude subsequent litigation as to the effect of such provision under Tennessee decisions as being a condition precedent to liability of the insurer or merely a postponement of the right to sue. Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 189 Miss. 496, 195 So. 667 (1940), cert. denied, appeal dismissed, 311 U.S. 610, 61 S. Ct. 25, 85 L. Ed. 387 (1940).

6. Evidentiary matters.

Congress cannot make promissory notes lacking an internal revenue stamp inadmissible evidence in state courts. Wilson v. State, 80 Miss. 388, 31 So. 787 (1902).

7. Fraud or mistake.

One qualification to rule requiring Mississippi Courts to give full faith and credit to final judgments of all other states and federal courts is that if foreign judgment itself was obtained as result of some false representation without which judgment would not have been rendered, and of such nature that court of that state would relieve judgment debtor from its effect, court of Mississippi may refuse to enforce it; it is not fraud involving merits of case which may be attacked, but fraud that enables party to procure judgment he otherwise would not have obtained. Reeves Royalty Co. v. ANB Pump Truck Serv., 513 So. 2d 595 (Miss. 1987).

Full faith and credit would not be afforded to an Oklahoma judgment against a Mississippi corporation where the Oklahoma court, if it had been advised of the jurisdictional facts before the Mississippi courts, would not have asserted in personam jurisdiction over the Mississippi corporation. Galbraith & Dickens Aviation Ins. Agency v. Gulf Coast Aircraft Sales, Inc., 396 So. 2d 19 (Miss. 1981).

8. Divorce and support.

An ex-husband's filing of a suit in tort against his ex-wife was not a proper response to her attempt to enforce foreign judgments for unpaid child support and attorney's fees, in spite of his argument that the law suit was a consolidated answer to the efforts to enroll and execute on the 4 judgments. Even if the law suit were a timely and proper response, it would otherwise fail because the record reflected proper notice in accordance with § 11-7-301 et seq., and the "response" collaterally attacked the validity and amounts of the underlying judgments which may not be attacked in Mississippi. Thus, the judgments were entitled to full faith and credit in Mississippi. Davis v. Davis, 558 So. 2d 814 (Miss. 1990).

A chancery court abused its discretion in exercising jurisdiction over a divorce action brought by the wife where a divorce had been granted by a Maine court in an action filed by the husband; the wife was estopped from asserting the invalidity of the Maine decree since she remarried soon after the decree became final, thereby indicating her reliance on its validity. Scribner v. Scribner, 556 So. 2d 350 (Miss. 1990).

The trial court correctly ordered the payment of past due child support pursuant to a Louisiana divorce decree, notwithstanding defendant husband's contention that the decree was not final and was thus not entitled to full faith and credit, where Louisiana case law held that past due alimony was not subject to annulment or alteration. Hinds v. Primeaux, 367 So. 2d 925 (Miss. 1979).

Recovery of past due installments for support of minor child under a divorce decree was permitted under the full faith and credit clause where the foreign court has no authority to modify decree as to past due installments, notwithstanding the foreign court reserved jurisdiction to modify the decree as to future installments. Hatrak v. Hatrak, 206 Miss. 239, 39 So. 2d 779 (1949).

Divorce decree of foreign state directing payments in installments for support of minor child may not be modified by Mississippi courts as to future installments under the full faith and credit clause, where jurisdiction to amend such future installments was retained by the court granting the divorce. Hatrak v. Hatrak, 206 Miss. 239, 39 So. 2d 779 (1949).

A Louisiana judgment as to past due installments of alimony is final, and consequently is enforceable in Mississippi under the full faith and credit clause. Compton v. Compton, 188 Miss. 670, 196 So. 635 (1940).

While one State may, on principles of interstate comity, recognize and give effect to divorce granted in another State, but not within protection of full faith and credit provision of Federal Constitution, such recognition will not be given to divorce granted on constructive service of process in State other than that of matrimonial domicile, and in which neither party is domiciled. Miller v. Miller, 173 Miss. 44, 159 So. 112 (1935).

Full faith and credit clause of Federal Constitution held not to require recognition and enforcement of Arkansas divorce decree in Mississippi court, where Arkansas court had no jurisdiction of marriage status or of person of wife, who was only constructively served with process. Miller v. Miller, 173 Miss. 44, 159 So. 112 (1935).

A decree of another state awarding alimony which may be annulled, varied, or modified by the court rendering it, is not enforceable in Mississippi by virtue of the full faith and credit clause. Gallant v. Gallant, 154 Miss. 832, 123 So. 883 (1929).

9. Child custody and visitation.

Mother's petition to terminate father's visitation rights with minor on the ground that he had sexually abused child was dismissed, because Mississippi court would give full faith and credit to the judgment of the Ohio court that father had not abused child. In re K.M.G., 500 So. 2d 994 (Miss. 1987).

Where temporary custody of the child had been vested in the mother by virtue of an order entered by a Pennsylvania court pursuant to a stipulation between the mother and father, and the courts of Pennsylvania had jurisdiction of an indisposed of proceeding between the parties regarding the custody of the child and of the father's suit for divorce at the time suit was brought in the Mississippi court solely seeking custody of the child, any complaint that the father had as to the mother's delay in presenting evidence as to her fitness to have custody of the child should have been addressed to the Pennsylvania court, and the Mississippi court should have declined to take jurisdiction of the proceeding and dismissed the father's bill of complaint. Cox v. Cox, 233 Miss. 747, 102 So. 2d 799 (1958).

In a proceeding for the custody of a minor child who had lived with his maternal grandparents in Mississippi since the death of its mother, the Mississippi court would not give full faith and credit to a decree of a Texas court awarding custody of the child to its natural father where process was obtained upon the maternal grandparents, who did not appear in the Texas court, by having process mailed by the clerk of the Texas court to the sheriff of the Mississippi county where the maternal grandparents and child resided, although under a Texas law the domicile of a child reverts to the father at the time of the mother's death. Hutchins v. Moore, 231 Miss. 772, 97 So. 2d 748 (1957).

Where the father invoked the jurisdiction of a Texas court to obtain custody of his children, after the mother, to whom custody had been largely awarded by the Mississippi court, had taken the children to that state, the judgment of the Texas court, awarding exclusive custody of the children to the mother, superseded the earlier decree of the Mississippi court, and was entitled to full faith and credit, and was res adjudicata of the facts and circumstances existing at the time of the rendition of the judgment. Logan v. Rankin, 230 Miss. 749, 94 So. 2d 330 (1957).

A Tennessee court which had awarded custody of child to maternal grandparents residing in Mississippi by divorce decree leaving open question of further custody had no jurisdiction to award custody to father, where father had abandoned child, and child had never been domiciled in Tennessee, and decree awarding custody to father was not binding on Mississippi courts under full faith and credit clause of Federal Constitution, since that clause does not apply to the judgment of a court of another State having no jurisdiction. McAdams v. McFerron, 180 Miss. 644, 178 So. 333 (1938).

Court having control of custody of children may permit their removal beyond limits of State and require proper bond for their return, but such power should be exercised with caution. Campbell v. Lovgren, 175 Miss. 4, 166 So. 365 (1936).

10. Probate proceedings.

Question of whether beneficial interest in trust constitutes real or personal property is not subject to full faith and credit as judgment of sister state because Mississippi courts may intervene when disposition of decedent's interests involve property interests which are subject to Mississippi's jurisdiction. Estate of Waitzman, 507 So. 2d 24 (Miss. 1987).

That certificate of probate court of sister State appointing administratrix de bonis non did not comply with Federal statute held not to preclude this State from giving effect thereto. Mobile & O.R. Co. v. Swain, 164 Miss. 825, 145 So. 627 (1933).

A dismissal in another state of a probate claim for late filing is not required by the full faith and credit clause to be treated as a bar to the claim in ancillary probate proceedings in Mississippi. Buckingham Hotel Co. v. Kimberly, 138 Miss. 445, 103 So. 213 (1925).

The judgment of another state establishing an instrument as a will, is not rendered, by the full faith and credit clause, conclusive as to real estate in Mississippi. Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919).

11. Limitation of actions.

A dismissal for expiration of a statute of limitations is not an adjudication upon the merits and, therefore, such a dismissal is not entitled to full faith and credit in sister states under Art. 4 § 1 of the United States Constitution even if the dismissal is "with prejudice." Lee v. Swain Bldg. Materials Co., 529 So. 2d 188 (Miss. 1988).

A statute prescribing a limitation period of three years for bringing suit upon a foreign judgment against a citizen of the state who was a resident of the state when suit was filed in the foreign state, is not in conflict with the full faith and credit clause. Bosich v. Skermetti, 146 Miss. 491, 112 So. 385, 52 A.L.R. 564 (1927).

A statute providing that judgments recovered in other states against citizens of Mississippi shall not be enforced in the tribunals of that state if the cause of action which was the foundation of the judgment would have been barred in its tribunals by its statute of limitations, is unconstitutional. Christmas v. Russell, 72 U.S. 290, 18 L. Ed. 475, 5 Wall. 290 (1866).

A statute providing that judgment obtained in any other state prior to its passage should be barred unless suit is brought on the judgment within two years after the passage of the act, does not deny full faith and credit to the judgment. President of the Bank of Alabama v. Dalton, 50 U.S. 522, 9 How. 522, 13 L. Ed. 242 (1850).

12. Contracts violative of Mississippi law.

A judgment of another state may not be denied full faith and credit because it grew out of a transaction in "futures," unlawful under Mississippi law. Armstrong v. Minkus, 93 Miss. 621, 47 So. 467 (1908); Fauntleroy v. Lum, 210 U.S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908).

13. Workers' compensation.

The full faith and credit clause does not go so far as to require this state to withhold the application of its workmen's compensation laws because they conflict with the workmen's compensation laws of another state. Mandle v. Kelly, 229 Miss. 327, 90 So. 2d 645 (1957).

Where, under the law of Georgia where its contract was executed, the workmen's compensation carrier was not obligated to pay to any person any benefit under any compensation law except the Georgia Act, the liability of the carrier could not be extended by application of the Mississippi Workmen's Compensation Act contrary to the express terms of the policy. Mandle v. Kelly, 229 Miss. 327, 90 So. 2d 645 (1957).

Where, under the circumstances, the exemption in Code 1942 § 6998-55(c), did not apply, the Mississippi Workmen's Compensation Act was applicable to a situation where an employee, employed in Georgia, sustained injuries while operating his employer's truck upon a Mississippi highway, and received extensive medical treatment while in the state for which payment had not been received, notwithstanding the Georgia Employer's contention that the application of the Act would violate the full faith and credit clause of the United States Constitution, would constitute an interference with, or impairment of, the right to contract, and would interfere with interstate commerce. Mandle v. Kelly, 229 Miss. 327, 90 So. 2d 645 (1957).

14. Foreign guardianship.

Where a natural mother and maternal grandmother of an adopted child were afforded their due process rights in an Arizona guardianship termination proceedings, and Arizona law provided that a guardianship established by consent of the natural parent was terminable upon revocation of that consent, the Mississippi Supreme Court was obliged to give full faith and credit to an Arizona judgment terminating the grandmother's guardianship over the child. C.T. v. R.D.H. (In re D.N.T.), 843 So. 2d 690 (Miss. 2003).

RESEARCH REFERENCES

ALR. Judgment subject to appeal as entitled to full faith and credit. 2 A.L.R.3d 1384.

Full faith and credit "last-in-time" rule as applicable to sister state divorce or custody judgment which is inconsistent with the forum state's earlier judgment. 36 A.L.R.5th 527.

Am Jur. 4 Am Jur 2d, Alternative Dispute Resolution § 204.

6 Am Jur 2d, Attachment and Garnishment § 544.

16 Am Jur 2d, Conflict of Laws § 14.

16A Am Jur 2d, Constitutional Law § 222.

16A Am Jur 2d, Constitutional Law § 222.

19 Am Jur 2d, Corporations § 2145.

20 Am Jur 2d, Courts § 90.

22A Am Jur 2d, Death § 268.

23 Am Jur 2d, Desertion and Nonsupport §§ 74, 80, 81.

24A Am Jur 2d, Divorce and Separation §§ 1073, 1075, 1083, 1086-1088, 1090, 1093, 1098, 1100, 1105, 1114, 1126, 1130.

27 Am Jur 2d, Eminent Domain § 624.

29 Am Jur 2d, Evidence § 229.

29A Am Jur 2d, Evidence §§ 1323, 1339.

36 Am Jur 2d, Foreign Corporations §§ 19, 49, 186, 248, 377, 434.

47 Am Jur 2d, Judgments § 764.

57 Am Jur 2d, Municipal, County, School, and State Tort Liability § 31.

63B Am Jur 2d, Product Liability §§ 1430, 1441.

80 Am Jur 2d, Wills § 894.

82 Am Jur 2d, Workers' Compensation § 567.

Law Reviews. Hoffheimer, Mississippi Conflict of Laws. 67 Miss. L. J. 175, Fall, 1997.

§ 2. Privileges and immunities; Extradition; Fugitives Slaves

1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Editor's Note — The third clause was affected by the Thirteenth Amendment.

Cross References — Privileges and immunities of citizens of the United States, see USCS Const. Amend. XIV, § 1.

Federal Aspects — States as precluded from making or enforcing laws abridging privileges or immunities, USCS Constitution, Amendment 14.

Privileges and immunities in Puerto Rico, 48 USCS § 737.

Extension of Art. IV, Sec. 2, Cl. 1 to Guam, 48 USCS § 1421b.
Extension of Art. IV, Sec. 2, Cl. 1 to Virgin Islands, 48 USCS § 1561.

JUDICIAL DECISIONS

1. Privileges and immunities generally.
2. Taxes.
3. Child custody.
4. Long-arm statute.
5. Extradition.

1. Privileges and immunities generally.

Nonresident who engages in business in this state which is subject to state control is subject to suit for damages in this state on cause of action accruing here out of business transacted in this state and is properly brought into court by service of process upon secretary of state in manner provided by Code 1942 § 1438, and statutes so providing do not violate due process or immunities and privileges clauses of Federal Constitution. Condon v. Snipes, 205 Miss. 306, 38 So. 2d 752 (1949).

A statute prohibiting counties from letting contracts for blank books, printed forms, stationery, or office supplies, to any bidder who is not a bona fide resident of the state actually engaged in the printing business, or who, being a nonresident, has not a printing plant in the state, does not infringe upon the privilege and immunities of citizens of the several states. State ex rel. Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 76 So. 258, Am. Ann. Cas. 1918B,953 (1917).

2. Taxes.

A privilege tax (Laws 1944, chap. 137, § 143) imposed on persons taking photographs in the state for development of the same outside the state, when construed as a tax only on the person who actually takes the pictures, is not unconstitutionally discriminatory in favor of local photographers by reason of the slight difference in the amount of tax as between the two classes. Craig v. Mills, 203 Miss. 692, 33 So. 2d 801 (1948).

Classification of property for inheritance tax purposes, according to decedent's residence, is permissible. Enochs v. State, 133 Miss. 107, 97 So. 534 (1923).

3. Child custody.

Continuing and exclusive nature of chancery court jurisdiction over issues involving child custody precludes Youth Court from having exclusive original jurisdiction over proceedings involving abused child, where allegations of abuse are raised in context of custody proceeding over which chancery court already exercises jurisdiction. Rights of minor child suspected of having been sexually abused by parent, to access to court, were not impaired by chancery court's considering allegations of sexual abuse without referring matter to Youth Court. Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare, 780 F. Supp. 1104 (S.D. Miss. 1991), aff'd in part, rev'd on other grounds, 995 F.2d 595 (5th Cir. 1993), reh'g denied, 3 F.3d 441 (5th Cir. 1993), cert. denied, 510 U.S. 1214, 114 S. Ct. 1336, 127 L. Ed. 2d 684 (1994).

4. Long-arm statute.

The "doing business" provision of the Mississippi long-arm statute cannot be invoked by a nonresident plaintiff in a diversity action against a nonresident defendant and the statute, so construed, does not deny a nonresident plaintiff privileges and immunities secured under the federal constitution. Breeland v. Hide-A-Way Lake, Inc., 585 F. 2d 716 (C.A.5 (Miss.) 1978), on rehearing 593 F. 2d 22.

Nonresident engaging in business of termite eradication and control in this state under license from State Plant Board authorizing him to conduct such business is subject to action for damages in this state for breach of contract entered into and to be performed in this state and may be brought into court by service of process upon secretary of state in manner provided by Code 1942 § 1438. Condon v. Snipes, 205 Miss. 306, 38 So. 2d 752 (1949).

5. Extradition.

State statutes and decisions relating to habeas corpus and extradition are not applicable to interstate extradition except to extent that they may be in aid of, and not inconsistent with, the Constitution and laws of United States on the question.

Bishop v. Jones, 207 Miss. 423, 38 So. 2d 920 (1949), suggestion of error sustained, opinion withdrawn, 207 Miss. 438, 42 So. 2d 421 (1949).

Decision of governor of asylum state in extradition proceedings is subject to review by habeas corpus proceedings prior to granting relief to demanding state. Bishop v. Jones, 207 Miss. 423, 38 So. 2d 920 (1949), suggestion of error sustained, opinion withdrawn, 207 Miss. 438, 42 So. 2d 421 (1949).

Decree of court in habeas corpus proceedings adjudging extradition proceedings to be insufficient both in form and substance but providing for discharge of relator unless within a stated period of time the sheriff should be served with a proper, legal and sufficient extradition warrant based upon proper, legal and sufficient papers and proceedings, violated accused's constitutional right to have the trial judge as a judicial officer to not only pass upon the sufficiency of the extradition proceedings then before the court but also the sufficiency of any such papers that were to be thereafter supplied in their stead. Bishop v. Jones, 207 Miss. 423, 38 So. 2d 920 (1949), suggestion of error sustained, opinion withdrawn, 207 Miss. 438, 42 So. 2d 421 (1949).

The interstate extradition of criminals is governed by the laws of the United States, and the Federal Constitution and statutes must be looked to for authority in extradition matters. Ex parte Walters, 106 Miss. 439, 64 So. 2 (1914).

RESEARCH REFERENCES

ALR. Constitutionality, construction, and application of Federal Fugitive Felon Act. 154 ALR 1168.

Am Jur. 1 Am Jur 2d, Abortion and Birth Control § 14. 3B Am Jur 2d, Aliens and Citizens § 1850. 5 Am Jur 2d, Arrest § 39.

3B Am Jur 2d, Aliens and Citizens § 1850. 5 Am Jur 2d, Arrest § 39.

5 Am Jur 2d, Arrest § 39.

15 Am Jur 2d, Civil Rights § 3.

16A Am Jur 2d, Constitutional Law §§ 222, 398.

16B Am Jur 2d, Constitutional Law §§ 660, 790-822.

32A Am Jur 2d, Federal Courts § 923.

36 Am Jur 2d, Foreign Corporations § 183.

42 Am Jur 2d, Inheritance, Estate, and Gift Taxes § 19.

42 Am Jur 2d, Insolvency § 3.

82 Am Jur 2d, Workers' Compensation § 26.

Lawyers' Edition. Constitutionality of state laws which discriminate against nonresidents or aliens as to fishing or hunting rights. 52 L Ed 2d 824.

Supreme Court's construction and application of privileges and immunities clause of United States Constitution (Article IV, § 2, cl 1). 79 L Ed 2d 918.

Interstate extradition: Supreme Court's construction of Extradition Act (18 USCS § 3182, and similar predecessor provisions) and of extradition clause (Art. IV, § 2, cl. 2) of Federal Constitution. 96 L. Ed. 2d 750.

Federal constitutional right to interstate travel—Supreme Court cases. 143 L Ed 2d 1101.

§ 3. Admission of new states; Public lands

1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

RESEARCH REFERENCES

Am Jur. 27 Am Jur 2d, Energy and Power Sources § 137. 32A Am Jur 2d, Federal Courts § 583. 45 Am Jur 2d, Irrigation § 84. 77 Am Jur 2d, United States §§ 30, 32.

32A Am Jur 2d, Federal Courts § 583.

45 Am Jur 2d, Irrigation § 84.

77 Am Jur 2d, United States §§ 30, 32.

§ 4. Republican government

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature can not be convened) against domestic violence.

JUDICIAL DECISIONS

1. In general.

In light of the carefully-drafted language and legislative history of 47 USCS § 227(e)(1), and in spite of the presumption against preemption that attaches to the state's exercise of its police power, there is an inherent federal objective in the Truth in Caller ID Act of 2009 to protect nonharmful spoofing; Mississippi Caller ID Anti-Spoofing Act's proscription of nonharmful spoofing (spoofing done without intent to defraud, cause harm, or wrongfully obtain anything of value) frustrates this federal objective and is, therefore, conflict-preempted. Teltech Sys. v. Bryant, 702 F.3d 232 (5th Cir. 2012).

Because court held that Mississippi Caller ID Anti-Spoofing Act was conflict-preempted by Truth in Caller ID Act of 2009, court did not need to consider its validity under dormant Commerce Clause or First Amendment. Teltech Sys. v. Bryant, 702 F.3d 232 (5th Cir. 2012).

An indictment found by a grand jury from which negro citizens were intentionally excluded is at variance with the Constitutional guarantee of a republican form of government. Farrow v. State, 91 Miss. 509, 45 So. 619 (1908).

RESEARCH REFERENCES

Am Jur. 16 Am Jur 2d, Constitutional Law § 21.

16B Am Jur 2d, Constitutional Law §§ 681-688.

32A Am Jur 2d, Federal Courts § 598.

ARTICLE V.

AMENDMENTS

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress;

provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

JUDICIAL DECISIONS

1. In general.

Circuit court did not have subject matter jurisdiction over election contest, arising of primary election for state representative in which issue was which candidate received the most votes, inasmuch as question was one peculiarly within competence of legislature itself. Henry v. Henderson, 697 So. 2d 447 (Miss. 1997).

RESEARCH REFERENCES

Am Jur. 16 Am Jur 2d, Constitutional Law §§ 12, 15, 45.

CJS. C.J.S. Constitutional Law § 5.

Article VI.

Debts Validated; Supreme Law of Land; Oath of Office

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States.

JUDICIAL DECISIONS

1. Supremacy of law.
2. Oath or affirmation.

1. Supremacy of law.

In light of 47 USCS § 227(e)(1)'s carefully-drafted language and legislative history, and in spite of presumption against preemption that attaches to State's exercise of its police power, there is inherent federal objective in Truth in Caller ID Act of 2009 to protect non-harmful spoofing; Mississippi Caller ID Anti-Spoofing Act's proscription of non-harmful spoofing (spoofing done without intent to defraud, cause harm, or wrongfully obtain anything of value) frustrates this federal objective and is, therefore, conflict-preempted. Teltech Sys. v Bryant, 702 F3d 232 (5th Cir. 2012).

Because court held that Mississippi Caller ID Anti-Spoofing Act was conflict-preempted by Truth in Caller ID Act of

2009, court did not need to consider its validity under dormant Commerce Clause or First Amendment. Teltech Sys. v Bryant, 702 F3d 232 (5th Cir. 2012).

As defendant manufacturer's cigarette lighter complied with an established federal safety standard for child resistance, plaintiffs' state law products liability claim was preempted by federal law, and the manufacturer was properly granted summary judgment. Frith v. BIC Corp., 863 So. 2d 960 (Miss. 2004).

Chancellor properly considered a former spouse's veteran's disability benefits in an award of alimony; the former spouse's claim that it violated the Supremacy Clause to consider such benefits in calculating the spouse's ability to pay was rejected. Steiner v. Steiner, 788 So. 2d 771 (Miss. 2001).

Cornerstone of preemption is that state law which conflicts with federal law is invalid under Supremacy Clause. Cooper v. GMC, 702 So. 2d 428 (Miss. 1997).

State civil service statute and system of administrative appeal or judicial review is not unconstitutional or contrary to federal supremacy clause because, as matter of federal law, state agencies cannot be sued for damages in state court under 42 U.S.C.S. § 1983. Wright v. White, 693 So. 2d 898 (Miss. 1997).

Retroactive application of § 81-5-105, which limits the personal liability of a former officer of a failed federal savings and loan association to gross negligence, intentional tortious conduct, intentional breach of the duty of loyalty, and corporate waste, does not violate the Supremacy Clause; § 81-5-105 mirrors the policy embodied in 12 USCS § 1821(k) (Financial Institutions, Reform, Recovery, and Enforcement Act), showing that state law compliments federal policy. Resolution Trust Corp. v. Scott, 887 F. Supp. 937 (S.D. Miss. 1995).

Physician whose hospital staff privileges were suspended was not denied procedural due process where statutory scheme provided for appeal to the Chancery Court; 30-day period for appeal to Chancery Court in such matter did not violate Supremacy Clause of Article VI of the US Const. Caine v. Hardy, 943 F.2d 1406 (5th Cir. 1991), cert. denied, 503 U.S. 936, 112 S. Ct. 1474, 117 L. Ed. 2d 618 (1992).

By virtue of the supremacy clause, the Federal Uniformed Services Former Spouses' Protection Act overrides Mississippi's long-arm statutes to the extent that Mississippi law would exceed the limitations of the federal enactment. Thus, a former husband's absence from Mississippi for 15 continuous years precluded personal jurisdiction by reason of residence or domicile since the language of the federal Act makes it clear that only current domicile or residence may suffice to confer authority upon a court to adjudge rights in a former service person's military retirement pension. Petters v. Petters, 560 So. 2d 722 (Miss. 1990).

The fact that a trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Thus, notwithstanding § 99-19-81, which requires habitual offenders to be sentenced to a maximum term, the trial court had authority, as a function of the Supremacy Clause, to review a particular sentence in light of constitutional principles of proportionality. Clowers v. State, 522 So. 2d 762 (Miss. 1988).

Under Article VI, § 2, federal law has preemptive effect when the Congress, acting within its constitutional powers, expressly so provides. Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd. & Coastal Exploration of Miss., Inc., 457 So. 2d 1298 (Miss. 1984), probable jurisdiction noted, 470 U.S. 1083, 105 S. Ct. 1840, 85 L. Ed. 2d 140 (1985), rev'd on other grounds, 474 U.S. 409, 106 S. Ct. 709, 88 L. Ed. 2d 732 (1986), reh'g denied, 475 U.S. 1091, 106 S. Ct. 1485, 89 L. Ed. 2d 738 (1986).

Truth in Lending claims and defenses are well within the competence of state courts, since they are the subject of concurrent federal and state jurisdiction, and thus, under US Const Art 6 § 2, a state court was not free to refuse jurisdiction over a Truth in Lending claim, based as it is on rights created by the Constitution and laws of the United States. Brown v. Credit Ctr., Inc., 444 So. 2d 358 (Miss. 1983).

Every treaty made by the authority of the United States is superior to the constitution or laws of any individual state and the law of the state, if contrary to the treaty, is void. Guiseppe v. Cozzani, 238 Miss. 273, 118 So. 2d 189 (1960).

The imposition of a privilege tax on an amount received from a Federal agency for services rendered in compressing cotton was not violative of the Federal Constitution as being a tax on one of the Federal governmental agencies, since the tax was not imposed on a Federal governmental agency but on income derived from such an agency. Compress of Union v. Stone, 188 Miss. 49, 193 So. 329 (1940), cert. denied, 311 U.S. 668, 61 S. Ct. 27, 85 L. Ed. 429 (1940), overruled on other grounds, Hollingsworth v. Bovaird Supply Co., 465 So. 2d 311 (Miss. 1985).

2. Oath or affirmation.

The requirement of oath to support the Constitution of the United States, imposed upon members of state legislatures and all executive and judicial officers of the state, is not merely directory, but compliance therewith is essential. Taylor v. Thomas, 89 U.S. 479, 22 L. Ed. 789, 22 Wall. 479 (1874).

ATTORNEY GENERAL OPINIONS

The Department of Public Safety may implement the federal 'Driver's Protection Act of 1994' by enacting regulations, if necessary, under the Mississippi Administrative Procedures Act (Miss. Code Section 25-43-1 et seq.) to effectuate superseding federal exemptions to the Mississippi Public Records Act, and if it so desires, may adopt regulations pertaining to an 'opt-out' system. Ingram, Aug. 29, 1997, A.G.Op. #97-0515.

RESEARCH REFERENCES

ALR. Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 A.L.R.3d 504.

Application of state and local construction and building regulations to contractors engaged in construction projects for the federal government. 131 A.L.R. Fed. 583.

Am Jur. 16 Am Jur 2d, Constitutional Law §§ 50-55.

CJS. C.J.S. Banks and Banking §§ 485, 551 to 552.

C.J.S. Constitutional Law §§ 2 to 4, 528.

C.J.S. Employer-Employee Relationship § 68.

C.J.S. Insurance §§ 33 to 35.

C.J.S. Officers and Public Employees § 34.

C.J.S. States §§ 43-51.

Article VII.

Ratification of Original Articles

The ratification of the conventions of nine States, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

Done in convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the Independence of the United States of America the twelfth. *In Witness* whereof we have hereunto subscribed our names,

Go. WASHINGTON —
President and Deputy from Virginia.

New Hampshire.

John Langdon,
Nicholas Gilman.

Massachusetts.

Nathaniel Gorham,
Rufus King.

Connecticut.

Wm. Saml. Johnson,
Roger Sherman.

New York.

Alexander Hamilton.

New Jersey.

Wil. Livingston,
David Brearley,
Wm. Paterson,
Jona. Dayton.

Pennsylvania.

B. Franklin,
Robt. Morris,
Tho. Fitzsimmons,
James Wilson,
Thomas Mifflin,
Geo. Clymer,
Jared Ingersoll,
Gouv. Morris.

Delaware.

Geo. Read,
John Dickinson,
Jaco. Broom,
Gunning Bedford, Jun'r,
Richard Bassett.

Maryland.

James Mc'Henry,
Danl Carroll.
Dan. of St. Thos. Jenifer,

Virginia.

John Blair,
James Madison, Jr.

North Carolina.

Wm. Blount,
Rich'd Dobbs Spaight,

HU. WILLIAMSON.

South Carolina.

J. RUTLEDGE, CHARLES COTESWORTH PINCKNEY,
CHARLES PINCKNEY, PIERCE BUTLER.

Georgia.

WILLIAM FEW, ABR. BALDWIN.

Attest: WILLIAM JACKSON, *Secretary.*

Editor's Note — In May, 1785, a committee of Congress made a report recommending an alteration in the Articles of Confederation, but no action was taken on it, and it was left to the State Legislatures to proceed in the matter. In January, 1786, the Legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of them, should meet such commissioners as might be appointed in the other States of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when ratified by them, will enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz.: Delaware, New York, New Jersey, and Pennsylvania; the commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Under the circumstances of so partial a representation, the commissioners present agreed upon a report, (drawn by Mr. Hamilton, of New York,) expressing their unanimous conviction that it might essentially tend to advance the interests of the Union if the States by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other States, in the appointment of commissioners to meet at Philadelphia on the second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them, and afterwards confirmed by the Legislatures of every State, would effectually provide for the same.

Congress, on the 21st of February, 1787, adopted a resolution in favor of a convention, and the Legislatures of those States which had not already done so (with the exception of Rhode Island) promptly appointed delegates. On the 25th of May, seven States having convened, George Washington, of Virginia, was unanimously elected President, and the consideration of the proposed Constitution was commenced. On the 17th of September, 1787, the Constitution as engrossed and agreed upon was signed by all the members present, except Mr. Gerry, of Massachusetts, and Messrs. Mason and Randolph, of Virginia. The president of the convention transmitted it to Congress, with a resolution stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on the 28th of September, 1787, directed the Constitution so framed, with the resolutions and letter concerning the same, to "be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention."

On the 4th of March, 1789, the day which had been fixed for commencing the operations of Government under the new Constitution, it had been ratified by the conventions chosen in each State to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 25, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that North Carolina had ratified the Constitution November 21, 1789; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1790. Vermont, in convention, ratified the Constitution January 10, 1791, and was on March 4, 1791, by an act of Congress approved February 18, 1791, "received and admitted into this Union as a new and entire member of the United States."

AMENDMENTS

Amendment I.	Freedom of religion, speech and press; peaceful assemblage; petition of grievances
Amendment II.	Right to bear arms
Amendment III.	Soldiers denied quarter in homes
Amendment IV.	Search and seizure
Amendment V.	Grand jury indictment for capital crimes; double jeopardy; self-incrimination; due process of law; just compensation for property
Amendment VI.	Jury trial for crimes and procedural rights
Amendment VII.	Civil trials
Amendment VIII.	Excessive bail, fines, punishments
Amendment IX.	Construction of enumerated rights
Amendment X.	Reserved powers to states
Amendment XI.	Suits against states
Amendment XII.	Presidential electors
Amendment XIII.	Slavery abolished; enforcement
Amendment XIV.	Citizenship; privileges and immunities; due process; equal protection; apportionment of representation; disqualification of officers; public debt; enforcement
Amendment XV.	Universal male suffrage
Amendment XVI.	Income tax
Amendment XVII.	Popular election of Senators
Amendment XVIII.	Liquor prohibition [Repealed]
Amendment XIX.	Woman suffrage
Amendment XX.	Lame duck amendment
Amendment XXI.	Repeal of prohibition amendment
Amendment XXII.	Limitation on Presidential terms
Amendment XXIII.	Presidential electors for District of Columbia
Amendment XXIV.	Qualifications of electors; poll tax
Amendment XXV.	Succession to Presidency and Vice Presidency; disability of President
Amendment XXVI.	Right to vote; citizens eighteen years of age or older
Amendment XXVII.	Compensation of Senators and Representatives

AMENDMENT I

FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Proposal and Ratification of Amendments 1 to 10. The first ten amendments to the Constitution of the United States, which comprise the Bill of Rights, set out in 1 Stat. 97, were proposed to the Legislatures of the several States by the First Congress, on September 25, 1789. They were ratified by the following States, and the notifications of ratification by the Governors or Secretaries of State thereof were communicated successively by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791. The Legislatures of Connecticut, Georgia, and Massachusetts ratified them on April 19, 1939, March 18, 1939, and March 2, 1939, respectively.

Twelve articles were proposed on September 25, 1789. The first two, which failed of adoption, read as follows:

"Art. I. After the first enumeration required by the first article of the Constitution, there shall be one representation for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand persons.

"Art. II. No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened."

Cross References — Freedom of speech and press as protected by the Fourteenth Amendment against state action, see Fourteenth Amendment.

JUDICIAL DECISIONS

1. Statutes—In general.
2. — Freedom of association.
3. — Freedom of speech and press.
4. — Freedom of religion, statutes.
5. Freedom of speech violation not shown.
6. Flag display and salute.
7. Schools and school districts—In general.
8. — Prayer and religious observance, schools and school districts.
9. — Freedom of speech and press, schools and school districts.
10. Freedom of religion—In general.
11. — Establishment, freedom of religion.
12. Freedom of speech and press—In general.
13. — Criminal trials, freedom of speech and press.
14. — Correctional facilities, freedom of speech and press.
15. — Advertising, freedom of speech and press.
16. — Professional regulation, freedom of speech and press.
17. — Employment and job security, freedom of speech and press.
18. — Colleges and universities, freedom of speech and press.
19. — Parades and demonstrations, freedom of speech and press.
20. — Entertainment, freedom of speech and press.
21. — Defamation, freedom of speech and press.
22. — Obscenity, freedom of speech and press.
23. Freedom of association — Generally.
24. Elections and politics.
25. Constitutional vagueness.

1. Statutes—In general.

The mere fact that the discretion granted to the Secretary of State in the Public Trust Tidelands Act could be interpreted in different lights, does not automatically render it vague; the procedure established by the tidelands legislation has a reasonable relation to the governmental purpose of establishing the boundary of public trust lands and as such is not vague. Columbia Land Dev., LLC v. Sec'y of State, 868 So. 2d 1006 (Miss. 2004).

Where activity to be regulated is capable of reaching First Amendment rights, statute or ordinance should be subjected to heightened scrutiny when attacked as overbroad. Smith v. City of Picayune, 701 So. 2d 1101 (Miss. 1997).

Statutory language clearly prescribed for punishment only a class of true threats, and not social or political advocacy. Shackelford v. Shirley, 948 F.2d 935 (5th Cir. 1991).

Plaintiffs who showed that challenged statutes either impinged upon their protected rights to register to vote or burdened organizational efforts to assist prospective voters in registering had standing to sue to challenge Mississippi's dual registration requirement and prohibition on satellite registration as violative of their rights and all persons similarly situated. Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd sub nom. Mississippi State Chapter, Operation Push v. Mabus, 932 F.2d 400 (5th Cir. 1991).

The Mississippi Criminal Syndicalism Act (Code 1942 §§ 2066.5-01 to 2066.5-06) on its face unconstitutionally abridges the freedoms of speech, press and assembly. Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967).

2. — Freedom of association.

Statutes requiring that initiative petition circulators be qualified electors of State and prohibiting per-signature payment of circulators violated First Amendment; there was evidence that payment of primarily out-of-state circulators, who would only work on payment-per-signature basis, was most effective and economical avenue of political communication, and State failed to prove fraud or actual threat to citizens' confidence in government from per-signature payment, or to demonstrate any reasonable justification for permitting signature gathering only by voters registered in State. Term Limits Leadership Council, Inc. v. Clark, 984 F. Supp. 470 (S.D. Miss. 1997).

A state criminal statute prohibiting, among other things, picketing in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any courthouses or other public buildings is not so broad, vague, indefinite, and lacking in definitely ascertainable standards as to be unconstitutional on its face, is not void for overbreadth, but is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society. Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968), reh'g denied, 391 U.S. 971, 88 S. Ct. 2029, 20 L. Ed. 2d 887 (1968).

Sections of statutes which authorize certain state officials in their own judgment or discretion to suspend the terms of laws prohibiting certain activities on grounds occupied by capitol buildings, state office buildings, and the state executive mansion in favor of other activities of their choice are invalid and unconstitutional. Coppock v. Patterson, 272 F. Supp. 16 (S.D. Miss. 1967).

3. — Freedom of speech and press.

Defendant's free speech rights were not violated by his warrantless arrest where the confrontation occurred not out in public but at the sheriff's department, the officer neither initiated nor had an opportunity to walk away from defendant's words and combative conduct, defendant became agitated and began shouting profanities when the officer told him about the protocol he would have to follow to retrieve his vehicle from the impound lot, and defendant did not stop with simply expressing his displeasure. He was combative, and he created a stalemate that rose to the level of "fighting words" that were likely to inflict injury or incite an immediate breach of the peace. Odem v. State, 881 So. 2d 940 (Miss. Ct. App. 2004).

Statutes requiring that initiative petition circulators be qualified electors of State and prohibiting per-signature payment of circulators violated First Amendment; there was evidence that payment of primarily out-of-state circulators, who would only work on payment-per-signature basis, was most effective and economical avenue of political communication, and State failed to prove fraud or actual threat to citizens' confidence in government from per-signature payment, or to demonstrate any reasonable justification for permitting signature gathering only by voters registered in State. Term Limits Leadership Council, Inc. v. Clark, 984 F. Supp. 470 (S.D. Miss. 1997).

Conviction of defendant for violation of state telephone harassment statute was upheld, and did not violate First Amendment, where defendant placed telephone call to former supervisor stating that next time supervisor came by defendant's premises he would be 'toting an ass whippin.' Shackelford v. Shirley, 948 F.2d 935 (5th Cir. 1991).

Telephone harassment statute prohibiting making telephone call threatening to inflict injury or physical harm, with intent to terrify, intimidate, or harass, is not unconstitutionally overbroad on its face. Shackelford v. Shirley, 948 F.2d 935 (5th Cir. 1991).

Because trial judge's jury instructions tracked language of statute, jury's verdict represented finding that defendant, on trial for violating statute by placing telephone call to former supervisor stating that next time supervisor came by defendant's premises he would be "toting an ass whippin," engaged in unprotected, threatening speech. Shackelford v. Shirley, 948 F.2d 935 (5th Cir. 1991).

Permanent injunction has been issued to prevent enforcement of § 39-5-63 because this act and others relating to sealing of files of state sovereignty commission, which had a clandestine purpose of perpetuating racial inequality, unconstitutionally infringe on black citizens' rights to free speech and association, personal privacy, and lawful search and seizure. American Civil Liberties Union of Miss., Inc. v. Mabus, 719 F. Supp. 1345 (S.D. Miss. 1989), vacated, 911 F.2d 1066 (5th Cir. 1990), reh'g denied, 919 F.2d 735 (5th Cir. 1990), on remand, 969 F. Supp. 403 (S.D. Miss. 1994).

The breach of the peace statute, Section 97-35-13, is not unconstitutionally vague. Although the statute may have been constructed with broad language and could arguably be construed in a manner which would reach constitutionally protected speech or conduct, a statute may not be construed "so as to infringe upon the state or federally protected constitutional rights" of any individual. Jones v. City of Meridian, 552 So. 2d 820 (Miss. 1989).

Ideas and opinions, although incorrect or faulty in their premise, are protected by the United States Constitution and cannot support a defamation action. Meridian Star, Inc. v. Williams, 549 So. 2d 1332 (Miss. 1989).

Statute's definition of "obscene, indecent, or immoral" was overbroad and violated the First Amendment to the United States Constitution according to the requirement set by the United States Supreme Court, and it could not be made constitutional by construing it and applying it or by reading into it the specificity and limitations required by the Supreme Court. ABC Interstate Theatres, Inc. v. State, 325 So. 2d 123 (Miss. 1976).

A statute which prohibits signs, placards, advertisements, harangues, orations, loud language, parades, processions, assemblages, and partisan flags, banners, or devices on the grounds occupied by the state capitol buildings, office buildings, and executive mansion infringe no constitutional limitation. Coppock v. Patterson, 272 F. Supp. 16 (S.D. Miss. 1967).

The Mississippi Criminal Syndicalism Act (Code 1942 §§ 2066.5-01 to 2066.5-06) on its face unconstitutionally abridges the freedoms of speech, press and assembly. Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967).

4. — Freedom of religion, statutes.

The Child Residential Home Notification Act (§§ 43-16-1 et seq.) did not interfere with the constitutional religious freedom rights of a church congregation which operated a children's home. Fountain v. State ex rel. State Dep't of Health, 608 So. 2d 705 (Miss. 1992).

A state statute making it a misdemeanor to teach in state supported public schools the scientific theory or doctrine that man ascended or descended from a lower form of animal violates the First Amendment to the United States Constitution and is thus unconstitutional. Smith v. State, 242 So. 2d 692 (Miss. 1970).

5. Freedom of speech violation not shown.

Judge's statements were not protected by the First Amendment as the judge's comment concerning African-Americans in Hinds County was not a matter of legitimate public concern; the conference where the judge made her remarks was not a forum for expressing personal concerns about the alleged lack of educational background or demeanor of fellow judges or the alleged lack of intelligence of supervisors, nor was it the proper place for an alleged personal attack on a team participant, or an alleged attack on residents of Hinds County. Miss. Comm'n on Judicial Performance v. Boland, 975 So. 2d 882 (Miss. 2008).

Termination of the employee's employment was proper where his U.S. Const. amend. I rights were not violated because his speech was not a cause or even a contributing factor in the employer's decision to proceed with disciplinary action against him. Although his speech conduct (telephone calls, shouting, cursing, verbal threats) was clearly a large part of the reason for the disciplinary proceeding, that speech was in no way involved in or affected by the January 18, 2001 memo, which was what the circuit court found to be in violation of freedom of speech and freedom of association, evidencing conduct that the court could not condone. Miss. Transp. Comm'n v. Anson, 879 So. 2d 958 (Miss. 2004).

6. Flag display and salute.

Public reprimand against a judge was proper because he misused the powers of contempt and violated Miss. Code Jud. Conduct Canons 1, 3(B)(2), and 3(B)(8) when he held a defendant in criminal contempt for failing to recite the pledge of allegiance in open court. He violated Miss. Code Jud. Conduct Canons 2(A) and 3(B)(4) by incarcerating the defendant for expressing his rights under U.S. Const. amend. I. Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968 (Miss. 2011).

Mississippi statute (Laws, 1942, ch 178; Code 1942 § 2402) making it a criminal offense to indoctrinate any creed, theory or any set of principles which reasonably tend to create an attitude of stubborn refusal to salute, honor or respect the flag of the United States or of the state, denies the liberty guaranteed by the Fourteenth Amendment. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d 663 (1943).

7. Schools and school districts—In general.

Student could not complain of unconstitutional vagueness or overbreadth of school district alcohol policy as it applied to activities of third parties, but only as it applied to his own activities. Board of Trustees v. T.H. ex rel. T.H., 681 So. 2d 110 (Miss. 1996).

School district policy is not facially unconstitutionally overbroad if: there are substantial number of situations where policy may be validly applied; policy covers range of easily identifiable conduct which may be constitutionally proscribed; and policy is susceptible to narrowing interpretation. Board of Trustees v. T.H. ex rel. T.H., 681 So. 2d 110 (Miss. 1996).

School district's alcohol policy was not facially overbroad as applied to conduct of student who admitted consuming alcohol before entering school property to attend school athletic function; policy validly applied to student's conduct, district was constitutionally permitted to proscribe consumption of alcohol within limits, and policy was susceptible to narrowing interpretation. Board of Trustees v. T.H. ex rel. T.H., 681 So. 2d 110 (Miss. 1996).

Public schools have authority to promulgate and enforce a reasonable dress code for faculty, staff and students, provided only that it does not infringe rights otherwise protected, and even then the schools may enforce such a code when undergirded by some compelling governmental interest reasonably related to their educational mission, so long as the least restrictive means reasonably available are employed. Mississippi Emp. Sec. Comm'n v. McGlothin, 556 So. 2d 324 (Miss. 1990), cert. denied, 498 U.S. 879, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990).

8. — Prayer and religious observance, schools and school districts.

Miss Laws 1994, c. 609 § 1(2) (Section 37-13-4.1), permitting public school students to initiate nonsectarian nonproselytizing prayer at various compulsory and noncompulsory school events, was unconstitutional under test of Lemon v. Kurtzman, 403 US 602, where (1) its stated purpose "to accommodate the free exercise of religious rights of its student citizens in the public schools" was to advance prayer in public schools, (2) its effect was to advance religion over irreligion because it gave preferential exceptional benefit to religion that it did not extend to anything else, and (3) it excessively entangled government and religion in that government officials were allowed to lead students in prayer and punish students who left class or assemblies in order to avoid listening to prayer. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994), aff'd, 88 F.3d 274 (5th Cir. 1996), reh'g and reh'g en banc denied (5th Cir. 1996), cert. denied, 519 U.S. 965, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996).

Miss Laws 1994, c. 609 § 1(2) (Section 37-13-4.1), permitting public school students to initiate nonsectarian nonproselytizing prayer at various compulsory and noncompulsory school events, was unconstitutional under "coercion" tests where it would allow prayers to be given by any person, including teachers, school administrators, and clergy at school functions where attendance was compulsory, and students would be captive audience that could not leave without being punished by state or school board for truancy or excessive absences. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994), aff'd, 88 F.3d 274 (5th Cir. 1996), reh'g and reh'g en banc denied (5th Cir. 1996), cert. denied, 519 U.S. 965, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996).

Miss Laws 1994, c. 609 § 1(2) (Section 37-13-4.1), permitting public school students to initiate nonsectarian nonproselytizing prayer at various compulsory and noncompulsory school events, was unconstitutional endorsement of religion where it allowed school officials in their capacity as representatives of state to lead students in prayer, and it set aside special time for prayer that it did not set aside for anything else. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994), aff'd, 88 F.3d 274 (5th Cir. 1996), reh'g and reh'g en banc denied (5th Cir. 1996), cert. denied, 519 U.S. 965, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996).

A high school athletic association's anti-recruiting rule, which required that a participant in interscholastic activities attend a school in the school district of which his or her parents or guardian were bona fide residents, did not violate the constitutional right to free exercise of religion since the rule did not prevent a parent or child from actively practicing their chosen religion and did not regulate the conduct of student athletes to the point of interfering with any religious practice; any interference with religious practices was incidental to the stated purpose of the rule—to deter overzealous athletic recruiting practices—and the rule was reasonably related to that purpose. Mississippi High Sch. Activities Ass'n v. Coleman ex rel. Laymon, 631 So. 2d 768 (Miss. 1994).

A public school teacher's wearing of a head-wrap as an expression of her religious and cultural heritage as a member of the African Hebrew Israelites in violation of the school's dress code was constitutionally protected religious and cultural expression, such that the Mississippi Employment Security Commission had no authority to deny her claim for unemployment compensation benefits after she was discharged for insubordination when she refused to discontinue wearing the head-wrap, even though there is no specific tenant of the African Hebrew Israelites mandating that women wear headdress, the teacher was not a regular participant in the organized activities of a particular church, synagogue or other religious body, she might have been "selective in wearing the traditional head-wrap" in that at times she did not wear it, and even though her conduct may have been misconduct had it not been constitutionally protected expression. Mississippi Emp. Sec. Comm'n v. McGlothin, 556 So. 2d 324 (Miss. 1990), cert. denied, 498 U.S. 879, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990).

State statute authorizing moment of silence in public schools for "meditation or voluntary prayer", for the sole express purpose of returning voluntary prayer to schools, violates establishment clause of First Amendment. Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985).

9. — Freedom of speech and press, schools and school districts.

School administrator's testimony concerning operation of public schools constitutes matter of "public concern" and is protected by First Amendment, because testimony was generally factual, concerning reading program in school district; where this testimony truthfully related facts and impressions of administrator concerning decision-making process of government officials responsible for personnel decisions of local school system, District Court was correct in concluding that administrator had been discharged for exercising rights of free expression protected by First Amendment. Reeves v. Claiborne County Bd. of Educ., 828 F.2d 1096 (5th Cir. 1987).

A public school teacher's criticism of certain policies and practices of the school district in which she is employed, which criticism is communicated privately to a school principal, is subject to the protection of the First Amendment, since (1) such private expression of views is not beyond constitutional protection, and (2) the "captive audience" theory that there is no constitutional right to "press even 'good' ideas on an unwilling recipient" is inapplicable in view of the principal's having opened his office door to the teacher. Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619, 592 F.2d 280 (1979).

10. Freedom of religion—In general.

First Amendment forbids civil courts from resolving church property disputes by inquiring into and resolving disputed issues of religious doctrine and practice; however, subject matter jurisdiction existed over former parishioners' claim that the church breached a fiduciary duty by improperly diverting funds designated for reconstruction of a church after Hurricane Katrina. Schmidt v. Catholic Diocese, 18 So. 3d 814 (Miss. 2009).

First Amendment protections do not turn on whether the claimant's conduct or form of expression has been mandated by doctrine or teaching of a particular religious organization or denomination, nor is it necessarily of concern that members of the particular faith may disagree with the claimant's interpretation of church dogma. All that may be required is that the belief have a religious grounding and that the individual be expressing "sincerely held religious beliefs." Mississippi Emp. Sec. Comm'n v. McGlothin, 556 So. 2d 324 (Miss. 1990), cert. denied, 498 U.S. 879, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990).

If disbarred attorney's failure to participate in organized religion had been determinative of the denial of his petition for reinstatement, then his constitutional rights would have been violated. Williams v. Mississippi State Bar Ass'n, 492 So. 2d 578 (Miss. 1986).

Jehovah's Witness has right, based upon freedom of religion, to undergo surgery but refused to be given blood transfusion and such right outweighs interest of state in insuring that wounded Witness receive transfusion in order to insure that Witness is alive to testify in subsequent criminal trial. In re Brown, 478 So. 2d 1033 (Miss. 1985).

Municipality's inclusion of nativity scene in annual Christmas display is constitutional. Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984).

State legislature's practice of opening each legislative day with prayer by chaplain paid by state is not violative of establishment clause of First Amendment. Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983).

11. — Establishment, freedom of religion.

First Amendment did not shield a church administration from civil claims of sexual abuse by priests because there was nothing religious about such reprehensible conduct, and plaintiffs' claim of negligent hiring, retention and supervision of a priest was simply a negligence claim. Roman Catholic Diocese v. Morrison, 905 So. 2d 1213 (Miss. 2005).

The Mississippi Supreme Court does not recognize a privilege under the First Amendment to refuse to produce religiously oriented documents. Roman Catholic Diocese v. Morrison, 905 So. 2d 1213 (Miss. 2005).

A Texas school district's policy permitting student-led, student-initiated prayer at football games violated the establishment clause of the First Amendment; that the prayer was not "private speech" was established by factors beyond the policy's text, including the official setting in which the invocation was delivered, the policy's sham secular purposes, and its history, which indicated that the school district intended to preserve its long-sanctioned practice of prayer before football games. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000).

A court order in a divorce proceeding which required both parents to assume responsibility for attendance of their children in church each Sunday while in their respective custody did not violate the First Amendment establishment clause as the chancellor properly chose a reasonable and accessible support network to import stability into the lives of the children whose environment held the potential for producing a tumultuous existence; however, the order was modified to provide that, "both the mother and father should be vitally interested in seeing that their children get regular and systematic spiritual training. Whether it be by attending Sunday School each Sunday or Church or both is for the parents alone to decide." McLemore v. McLemore, 762 So. 2d 316 (Miss. 2000).

Ohio's denial of the Ku Klux Klan's application to display an unattended cross on the statehouse square was not justified on the ground that issuance of the permit would violate the First Amendment's establishment of religion clause since a statehouse square has the status of a public forum; under the circumstances, the state's right to limit expressive activity protected under the First Amendment is sharply circumscribed. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995).

A trial judge's remarks pertaining to religion were not sufficient to constitute a violation of the First Amendment's Establishment Clause where the judge told a venireperson during voir dire that the instructions on the law which would be given to the jury would not "conflict in any way with [H]is law at all," and he requested a moment of silence in honor of the troops serving in the Persian Gulf prior to the beginning of proceedings one morning. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A local law authorizing a city to issue revenue bonds for the purpose of acquiring hospital facilities to be leased to a Methodist hospital did not violate the First Amendment where there was nothing in the Act or the resolution of the city's governing body that could be construed as being in aid of, or directed toward, the establishment of religion; nor was there a violation of Mississippi Constitution, where the entire cost of the project was to be paid by the lessee and where the hospital facilities, which would be available to the public, did not involve a sectarian purpose or use. Kerley v. City of Hattiesburg, 361 So. 2d 44 (Miss. 1978).

12. Freedom of speech and press—In general.

Attorney was suspended, partially due to prior similar conduct, for violating Miss. R. Prof. Conduct 3.5, 8.4, 8.2 where the evidence showed that the attorney made disparaging remarks to a judge relating to "paying for justice" and later told a newspaper reporter that the judge was a barbarian; the statements were not protected by the First Amendment because a reasonable person would not have acted in the same manner. Miss. Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005), writ of certiorari denied by 546 U.S. 825, 126 S. Ct. 363, 163 L. Ed. 2d 70, 2005 U.S. LEXIS 6085, 74 U.S.L.W. 3202 (2005).

Where defendant was convicted of simple assault, trespassing, and disturbing the peace in connection with an altercation with the victim, conditions of probation that restricted defendant from communicating with or about the victim, witnesses, and their families permissibly restricted defendant's right of free speech. Griffith v. City of Bay St. Louis, 797 So. 2d 1037 (Miss. Ct. App. 2001).

Affidavit charging defendant with disturbing the peace sufficiently alleged criminal conduct, as the names defendant called the victim qualified as fighting words and were not protected speech. Griffith v. City of Bay St. Louis, 797 So. 2d 1037 (Miss. Ct. App. 2001).

A requirement that circulators of petitions for ballot initiatives must be residents imposed by way of an amendment to subsection (12) of this section is constitutional because it is narrowly tailored to the aim of preventing campaign fraud; however, a provision making such amendment retroactive to all initiative measures that had not been placed on the ballot at the time of the ratification of the proposed amendment was unconstitutional because it was aimed at one specific initiative and, therefore, amounted to content-based discrimination against a particular political viewpoint. Kean v. Clark, 56 F. Supp. 2d 719 (S.D. Miss. 1999).

Initiative petition circulation constitutes core political speech, for purposes of First Amendment analysis, as it necessarily involves both expression of desire for political change and discussion of merits of proposed change. Term Limits Leadership Council, Inc. v. Clark, 984 F. Supp. 470 (S.D. Miss. 1997).

Mississippi statute which, as construed by the state courts, makes it a criminal offense to communicate to others views and opinions respecting governmental policies, and prophesies concerning the state of this and other nations, irrespective of whether the communication was with an evil or sinister purpose or advocated or incited subversive action against the nation or state, or threatened any clear and present danger to American institutions or government, denies the liberty guaranteed by the Fourteenth Amendment. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d 663 (1943).

13. — Criminal trials, freedom of speech and press.

Even though First Amendment right to openness of courtroom and court files was qualified, public and press were entitled to prior notice of any attempt by court or party to close courtroom or seal court file in prosecution for conspiracy to commit murder. United States v. Nix, 976 F. Supp. 41 (1997).

Party seeking closure of courtroom or court file could overcome First Amendment presumption of openness to press and public of court file and defendants' motions to dismiss indictment and to sever in prosecution for conspiracy, but only if party seeking closure would show, first, that there was substantial probability that defendants' right to fair trial would be prejudiced by publicity that closure would prevent and, second, that reasonable alternatives to closure could not adequately protect defendants' fair trial rights. United States v. Nix, 976 F. Supp. 41 (1997).

First Amendment right of public and press to openness of courtroom and court files in criminal prosecution is qualified rather than absolute. United States v. Nix, 976 F. Supp. 41 (1997).

For purposes of determining whether to unseal defendants' previously-sealed motions to dismiss indictment and to sever and attached exhibits in prosecution for conspiracy to commit murder, in light of qualified First Amendment right of public and press to openness of courtroom and court files, defendants' rights to fair trial would be impaired if motions and exhibits were unsealed prior to trial; unsealing of motion to dismiss indictment and motion's exhibits, which contained names and addresses of potential prosecution witnesses, would compromise witnesses' safety and well-being, partial redaction would not prevent ascertainment of names and addresses, allegations in motion to sever could prejudice jury and might constitute inadmissible evidence, and voir dire to determine possible juror bias would not be workable solution. United States v. Nix, 976 F. Supp. 41 (1997).

After issuing initial orders sealing certain defendants' motions to dismiss indictment and to sever and their attached exhibits in prosecution for conspiracy to commit murder without giving prior notice to public and press, district court would not order any further closure of courtroom or sealing of court files unless supported by specific on-the-record findings after notice to press and public, in light of qualified First Amendment right of press and public to openness of courtroom and court files. United States v. Nix, 976 F. Supp. 41 (1997).

Four-step process applies in court's determination of whether to close criminal court proceeding or to seal court file despite qualified First Amendment right of public and press to openness of courtroom and court files: party seeking to close proceeding or seal file must advance overriding interest that is likely to be prejudiced; closure must be no broader than necessary to protect interest of accused's right to fair trial; court must consider reasonable alternatives to closing proceeding; and court must make findings adequate to support any closure or sealing. United States v. Nix, 976 F. Supp. 41 (1997).

District court would allow newspaper publisher access to transcript of any oral argument on murder conspiracy defendants' motions to dismiss indictment and to sever, which might take place prior to trial, at time motions were unsealed, in light of qualified First Amendment right of public and press to openness of courtroom and court files. United States v. Nix, 976 F. Supp. 41 (1997).

An accused's right to a fair trial and the press and public's right of access to criminal proceedings must be balanced when determining whether access to legal proceedings should be restricted. The press and public are entitled to notice and a hearing before a closure order is entered, and any submission in a trial court for closure, either by a party Or by the court's own motion, and be it a letter, written motion, or oral motion, either in chambers or open court, must be docketed, as notice to the press and public, in the court clerk's office for at least 24 hours before any hearing on such submission, with the usual notice to all parties. The requirement should not be taken to mean that a greater notice period may not be afforded where feasible. Preferably, the submission should be a written motion if time and circumstances allow. A hearing must be held in which the press is allowed to intervene on behalf of the public and present argument, if any, against closure. The movant must be required to advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceedings, and it must make findings adequate to support the closure. In considering the less restrictive alternatives to closure, the court must articulate the alternatives considered and why they were rejected. The court must then make written findings of fact and conclusions of law specific enough that a reviewing court can determine whether the closure order was properly entered. A transcript of the closure hearing should be made public and if a petition for extraordinary relief concerning a closure order is filed in the Supreme Court, it should be accompanied by the transcript, the court's findings of fact and conclusions of law, and the evidence adduced at the hearing upon which the judge based the findings and conclusions. These requirements cannot be avoided by an agreement between the defendant and the State that proceedings and files should be closed. Gannett River States Pub. Co. v. Hand, 571 So. 2d 941 (Miss. 1990).

Circuit Court's closure order in capital murder case was reasonable regulation of time, place, and manner of newspaper's enjoyment of its First Amendment right; desire of press to inform public about important criminal proceedings can result in publication of matter that can deprive defendant of his right to fair trial; access of press to trial and pretrial processes may be qualified, and record amply supported Circuit Court's finding that unrestricted access to trial process would result in substantial likelihood of defendant being denied fair trial; additionally, newspaper was not being denied access to pre-trial proceeding in perpetuity, because closure order expired once jury was sequestered and trial began; once that point was reached, newspaper would be granted access to complete transcript of all closed, pre-trial proceedings. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

Closure order in criminal trial did not violate newspapers' right of access to public records because that right is not of constitutional dimensions, instead being derived from common law and applicable statutes. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

By instructing the jury that if the defendant was arrested for public protest against racial segregation he could not be found guilty, the instruction constituted recognition that Code 1942 § 2089.5 could not be applied to restrict defendant's constitutional right so to protest, and that it could not be used to infringe upon the constitutional right of any person to speak freely within the framework of the law. McLaurin v. Greenville, 187 So. 2d 854 (Miss. 1966), cert. denied, 385 U.S. 1011, 17 L. Ed. 2d 548, 87 S. Ct. 704 (1967).

14. — Correctional facilities, freedom of speech and press.

No First Amendment claim arose where the inmate failed to assert facts supporting a showing of arbitrariness in classification; therefore, no issue of any merit could arise. Hurns v. Miss. Dep't of Corr., 878 So. 2d 223 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 918 (Miss. 2004).

The opening and inspection, without reading, of in-coming inmate mail of a non-privileged character, in the absence of the inmate, was not violative of first amendment rights, and was necessary to the state's substantial interests of security, discipline, and good order. Gates v. Collier, 390 F. Supp. 482 (N.D. Miss. 1975), aff'd, 525 F.2d 965 (5th Cir. 1976).

The district court's findings that the censorship of all incoming and outgoing mail at the Mississippi State Penitentiary was unconstitutional, and the relief therein granted, were affirmed. Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).

15. — Advertising, freedom of speech and press.

City sign regulations which barred the placement of an exterior sign on a "single office building" were content neutral and did not violate the First Amendment. American Federated Gen. Agency, Inc. v. City of Ridgeland, 72 F. Supp. 2d 695 (S.D. Miss. 1999).

The free speech guarantee of the First Amendment was not violated by rules of the Florida state bar association, which prohibited attorneys from targeting direct-mail solicitations of business to accident and disaster victims (or to relatives of such victims) during a 30-day period after the accident or disaster, where (1) Florida had a substantial interest in protecting the privacy and tranquility of potential clients from commercial intrusion on their personal grief in times of trauma, and in preventing outrage and irritation with the state-licensed legal profession, (2) the rules targeted concrete, nonspeculative harm, and (3) the restriction was reasonably well-tailored to its stated objective. Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995), on remand 66 F.3d 270.

Disciplining attorney for soliciting business through advertisements containing nondeceptive illustrations and legal advice violates attorney's First Amendment rights. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).

Commercial speech that lies within the First Amendment's scope may be subjected to greater governmental regulation than other forms of speech such as political expression. Accordingly, liquor advertising in Mississippi was commercial speech protected by the First Amendment, where there was no claim that the liquor advertisements would propose an unlawful sale or purchase of liquor, despite the assertion that liquor must be "entirely lawful" everywhere in Mississippi, a local option state, before First Amendment protection attaches to its advertising. Furthermore, any potential to mislead that liquor advertising may possess did not warrant wholesale exclusion of liquor advertising from First Amendment protection. Lamar Outdoor Adv., Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314 (5th Cir. 1983), on reh'g, 718 F.2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259, 104 S. Ct. 3553, 82 L. Ed. 2d 855 (1984), cert. denied, 467 U.S. 1259, 104 S. Ct. 3554, 82 L. Ed. 2d 855 (1984).

Mississippi's intrastate liquor advertising ban, Miss Code § 97-31-1 et seq., [repealed] violated Mississippi Media Businesses' First Amendment guaranty of freedom of speech, where the law did little to directly advance the government's interest of promoting health and safety for Mississippi residents, in light of uncontradicted evidence that Mississippi residents were literally inundated with liquor advertisements from sources originating outside the state. Lamar Outdoor Adv., Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314 (5th Cir. 1983), on reh'g, 718 F.2d

738 (5th Cir. 1983), cert. denied, 467 U.S. 1259, 104 S. Ct. 3553, 82 L. Ed. 2d 855 (1984), cert. denied, 467 U.S. 1259, 104 S. Ct. 3554, 82 L. Ed. 2d 855 (1984).

16. — Professional regulation, freedom of speech and press.

Judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) & (B), 3(B)(5), constituting willful misconduct in the judicial office which brought the judicial office into disrepute, thus causing the judge's conduct to be actionable pursuant to Miss. Const. Art. 6, § 177A; the judge's comments were disparaging results and not matters of legitimate public concern and went beyond the realm of protected campaign speech. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Code 1972 § 25-31-1, which requires district attorneys to be practicing lawyers admitted to practice in Mississippi for at least two years prior to taking office, does not violate the Voting Rights Act of 1965, does not deny the plaintiff equal protection of the law, and does not infringe upon his first amendment rights. Waide v. Waller, 402 F. Supp. 922 (N.D. Miss. 1975).

17. — Employment and job security, freedom of speech and press.

Balancing test to determine whether the government's interests as an employer outweighed an employee's right as a citizen to speak out favored a state employee who was terminated after he brought abusive practices at a state hospital to the attention of his manager's supervisor; no serious disruption resulted from the employee's failure to follow the chain of command. E. Miss. State Hosp. v. Callens, 892 So. 2d 800 (Miss. 2004).

City sanitation workers were not disciplined in violation of the First Amendment where (1) after a meeting at which drivers and crew members were rotated among different trucks and routes, the plaintiffs complained to their supervisor that they did not want to switch trucks, (2) the supervisor told the plaintiffs that they would be disciplined if they were not out of the facility to work on time, (3) the plaintiffs did not begin to work on time, and (4) the supervisor told them to clock out and return the next day, assigned other crews to their routes, and disciplined them; the plaintiffs were not disciplined for requesting an audience with higher ranking public officials as they were not denied access to their elected officials, but were simply told to go to work and to attend to their grievances after their job duties for the day were completed, and as their complaints did not touch on matters of public concern. Tolliver v. City of Starkville, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 10816 (N.D. Miss. July 25, 2000).

Evidence did not support the contention that a civil service employee was terminated in violation of her First Amendment right of freedom of speech and freedom to petition her government; although the employee noted that, in a television interview, she expressed her opposition as a private citizen and property owner to the proposed annexation of certain areas by a city, the record did not reflect that her termination was the result of the televised interview. Walters v. Department of Economic & Community Dev., 768 So. 2d 893 (Miss. 2000).

Police department employees' complaints in connection with their working conditions did not rise to level of public concern, thus were not protected by First Amendment such as to support their claim for wrongful discharge, by city, on basis of their speech; city's motion for summary judgment was granted. Evans v. Indianola, 778 F. Supp. 333 (N.D. Miss. 1991), aff'd 981 F.2d 1255.

Employee speech is entitled to judicial protection only if it pertains to matters of public concern, and this protection does not extend to comments of personal interest. Even employee speech on matters of public interest must be balanced against the government's interest in promoting efficiency, integrity and proper discipline in the discharge of public service. Thus, a police chief's request that an officer maintain a "low profile" did not wrongfully suppress the officer's constitutional right to free speech since the request was "well within the legitimate and necessary means inherent to the efficient operation of a police department which is deeply involved in combating narcotics activity in the community." Bulloch v. City of Pascagoula, 574 So. 2d 637 (Miss. 1990).

Equitable remedy of backpay is required in context of adverse personnel actions which occur as retaliation for exercise of First Amendment freedoms; such backpay award is not rendered inappropriate by administrator's voluntarily accepting lower salary by signing new contract, because administrator was under legal duty to minimize or mitigate damages. Reeves v. Claiborne County Bd. of Educ., 828 F.2d 1096 (5th Cir. 1987).

Reinstatement is integral part of remedy for constitutionally impermissible employment action and although not absolute and automatic, once plaintiff establishes discharge resulted from constitutionally impermissible motives, he is presumed to be entitled to reinstatement; neither hiring of successor during course of litigation nor finding that recommendation to transfer administrator was only partly motivated by constitutionally impermissible considerations is justification for denying reinstatement. Reeves v. Claiborne County Bd. of Educ., 828 F.2d 1096 (5th Cir. 1987).

Former university security coordinator was not terminated in violation of his First Amendment right to free speech when he publicly criticized administration's decision to rate campus security as security force rather than police force, or because of his living arrangement with female faculty member, because reason for termination was his repeated refusals to comply with orders and recommendations of immediate supervisor. Robinson v. Boyer, 825 F.2d 64 (5th Cir. Miss. 1987).

Where the decision not to reemploy an elementary school teacher was made, not because of her activities in speaking out against the school board and participating in teacher's organizations, but, rather, because of her disregard of school policy in taking leave without permission, such reasons supported the proposition that the protected activities under the First Amendment were not a "substantial factor" in the non-reemployment decision. Board of Trustees v. Gates, 461 So. 2d 730 (Miss. 1984), opinion clarified, 467 So. 2d 216 (Miss. 1985).

18. — Colleges and universities, freedom of speech and press.

A state university's prohibition on spectators bringing banners or flags larger than 12 by 14 inches into its football stadium was within the authority of the university and did not constitute deprivations of the plaintiff's First Amendment rights. Barrett v. Khayat, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 17899 (N.D. Miss. Nov. 12, 1999).

The University of Virginia's refusal to fund the printing of a newspaper published by a student organization because it had a Christian religious orientation violated the free speech guarantee of the First Amendment, and was not excused by the need to comply with the First Amendment's establishment of religion clause, where the organization was not a religious institution in the usual sense of that term or as defined in the university's own regulations, the organization sought funding as a student journal, no public funds would flow directly to the organization's coffers, any benefit to religion would be incidental to the payment of printing costs from the student activities fund on a religion-neutral basis, and denial of payment risked fostering a pervasive bias or hostility to religion. Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

A college newspaper run by students and operated with student funds could properly refuse to print an advertisement proffered by a primarily off campus and homosexual group, particularly in light of the statute [§ 97-29-59] proscribing unnatural intercourse, such statute not being unconstitutional, and in light of the fact that university officials had nothing to do with the rejection of the advertisement. Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), reh'g denied, 541 F.2d 281 (5th Cir. 1976), cert. denied, 430 U.S. 982, 97 S. Ct. 1678, 52 L. Ed. 2d 377 (1977).

19. — Parades and demonstrations, freedom of speech and press.

The section of an ordinance enacted by the City of Tupelo authorizing the Chief of

Police to deny a parade permit if he finds that "the conduct of the parade will probably cause injury to persons or property or provoke disorderly conduct or create a disturbance" is unconstitutional in that the term "disorderly conduct" is overbroad because it could be applied to deny permits to those seeking to engage in protected activity; the provision constitutes a prior restraint upon free speech because it is not narrowly drawn to relate to health, safety, and welfare interests, but instead sanctions the denial of a permit on the basis of the so-called "hecklers' veto;" the provision is unconstitutionally vague as well since it contains no instructions directing the Chief of Police in the formulation of his opinion. The phrase "will probably cause injury" is constitutionally invalid since the term "probably" is simply too vague and indefinite and does not control adequately the discretion of the Chief in his determination of when to grant or deny a permit; the phrase "create a disturbance" is unconstitutional because it vests in the licensing authority the unbridled discretion to determine when, in his opinion, it is likely that criminal conduct will occur in the future. Limiting parade activity to the hours before 6:00 pm is invalid where it remains light in Tupelo well past that hour most of the year and the protection of citizens at night is not thereby jeopardized by a later time limit. The requirements of the ordinance that all paraders be unarmed, line up no more than four abreast, in the right-hand lane of the street, in units of 100 or fewer, with 15-foot intervals between units is unconstitutional in that it violates the Equal Protection Clause since such requirements do not apply to students or governmental agencies. The requirement that marchers act in an "orderly manner" is unconstitutionally overbroad; and the restriction on the use of "profanity" is void since profanity is protected speech unless it falls into such unprotected categories as obscenity or fighting words. Exemption of governmental agencies and students participating in educational activities from the licensing and regulatory requirements constitutes a violation of the Equal Protection Clause since such discrimination is based upon the content of the speech involved. That section of the ordinance which requires that the applicant for a permit demonstrate the noise level of sound equipment to be used is not facially unconstitutional since all it requires is a demonstration of the noise level; however, in the course of applying this statute, if the Chief of Police denies permits because of the demonstrated noise level of the equipment, the applicant will be able to make the argument offered herein that the section fails to give narrow and objective standards to be used in the determination. The blanket prohibition against sound equipment in areas zoned for residential purposes is overbroad because the ordinance presumes incompatibility based on an area's merely being zoned residential and oftentimes areas zoned residential include structures other than homes, such as churches and schools, which are not incompatible with the use of sound equipment. The restriction of the operation of sound equipment at any location between the hours of 6:00 pm and 9:00 am is invalid where, although nighttime restrictions might be justifiable, the hour at which the restriction commences is not necessarily at night. Beckerman v. City of Tupelo, 664 F.2d 502 (5th Cir. 1981).

20. — Entertainment, freedom of speech and press.

The court would reject the contention that a city ordinance which banned public nudity was facially overbroad because it infringed upon protected First Amendment conduct since the hypothetical examples raised by the appellant were not substantial. J & B Entertainment, Inc. v. City of Jackson, 152 F.3d 362 (5th Cir. 1998).

The court would vacate the district court's grant of summary judgment in favor of the defendant city in an action challenging a city ordinance that banned public nudity since the record was too bare to support the conclusion that the city enacted the ordinance based on a desire to combat secondary effects linked to public nudity, as applied to nude dancing. J & B Entertainment, Inc. v. City of Jackson, 152 F.3d 362 (5th Cir. 1998).

City of Vicksburg Ordinance 93-37 § 1014(A)(1)(g), banning nude and seminude dancing in adult entertainment establishments, violated the First Amendment. Steverson v. City of Vicksburg, 900 F. Supp. 1 (S.D. Miss. 1994).

City of Vicksburg Ordinance 93-37, prohibiting adult entertainment establishments from locating within 1000 feet of churches and certain other facilities, provided reasonable alternative avenues of communication for the purposes of determining whether it violated the First Amendment, where the city planning commissioner submitted evidence of 93 potential sites for such establishments, including at least 69 with road access. Steverson v. City of Vicksburg, 900 F. Supp. 1 (S.D. Miss. 1994).

Pursuant to § 67-3-65, a city was authorized to enact ordinances regulating light wine and beer on adult entertainment premises without showing any secondary effects or showing that such establishments were conducive to criminal behavior; accordingly, any artistic or communicative value that might attach to topless dancing was overridden by the city's exercise of its broad powers arising under the Twenty-First Amendment, and the city's prohibition of light wine and beer in a lounge featuring topless dancing was constitutionally permissible. Steverson v. City of Vicksburg, 900 F. Supp. 1 (S.D. Miss. 1994).

City could not refuse to issue building permit for enlargement of premises which provided adult entertainment in form of topless dancing, despite fact that city claimed such entertainment would not be permitted in that area pursuant to zoning ordinance expected to be promulgated in future, where no such ordinance was currently in effect, and activities in question were protected by First Amendment. City of Jackson v. Lakeland Lounge, Inc., 800 F. Supp. 455 (S.D. Miss. 1992), rev'd, 973 F.2d 1255 (5th Cir. 1992), reh'g denied, 979 F.2d 211 (5th Cir. 1992), cert. denied, 507 U.S. 1030, 113 S. Ct. 1845, 123 L. Ed. 2d 469 (1993).

For purposes of showing irreparable harm in connection with request for injunction, violation of business' First Amendment right to free speech was irreparable harm, even if it occurred for minimal period of time. City of Jackson v. Lakeland Lounge, Inc., 800 F. Supp. 455 (S.D. Miss. 1992), rev'd, 973 F.2d 1255 (5th Cir. 1992), reh'g denied, 979 F.2d 211 (5th Cir. 1992), cert. denied, 507 U.S. 1030, 113 S. Ct. 1845, 123 L. Ed. 2d 469 (1993).

For purposes of awarding injunction to adult entertainment business requiring city to issue building permit, balance of harms favored grant of injunctive relief, as prevention of business from making improvements to its facility violated its protected First Amendment rights, whereas granting injunction would not harm city. City of Jackson v. Lakeland Lounge, Inc., 800 F. Supp. 455 (S.D. Miss. 1992), rev'd, 973 F.2d 1255 (5th Cir. 1992), reh'g denied, 979 F.2d 211 (5th Cir. 1992), cert. denied, 507 U.S. 1030, 113 S. Ct. 1845, 123 L. Ed. 2d 469 (1993).

Injunction was warranted to prevent city from filing criminal affidavits asserting violation of building code in connection with occupancy against operators of adult entertainment business offering topless dancing, in light of evidence that city's efforts in such regard were motivated in part by intent to deter exercise of First Amendment rights. City of Jackson v. Lakeland Lounge, Inc., 800 F. Supp. 455 (S.D. Miss. 1992), rev'd, 973 F.2d 1255 (5th Cir. 1992), reh'g denied, 979 F.2d 211 (5th Cir. 1992), cert. denied, 507 U.S. 1030, 113 S. Ct. 1845, 123 L. Ed. 2d 469 (1993).

Since a fair is a form of entertainment, a case involving a challenge to a zoning ordinance which severely limited the operation of fairs was one in which there was a protected interest under the First Amendment of the United States Constitution. Great South Fair v. City of Petal, 548 So. 2d 1289 (Miss. 1989).

21. — Defamation, freedom of speech and press.

First Amendment restrictions mandate that the plaintiff in a defamation action bear the burden of proving falsity. Burk v. Illinois Cent. G.R. Co., 529 So. 2d 515 (La. App. 1988), writ denied, 532 So. 2d 179 (La. 1988).

Plaintiffs did not transform themselves into public figures for defamation purposes by merely pleading guilty to a misdemeanor charge of transporting cattle from one state to another without having them tested for brucellosis. Whitten v. Commercial Dispatch Publishing Co., 487 So. 2d 843 (Miss. 1986).

In an editorial attacking three physicians operating an emergency room in a publicly funded hospital for demanding the ouster of the hospital administrator, the words "if I had such a good setup I wouldn't want someone to come along and tear up my little playhouse either" constituted an opinion that the writer of the editorial had a right to express, and were not libelous. Ferguson v. Watkins, 448 So. 2d 271 (Miss. 1984).

In an action against a newspaper for damages for malicious libel, plaintiffs failed to meet their burden of proving malice, reckless disregard for the truth, or knowledge of falsity of an article concerning a public official, where the evidence indicated that the reporter who wrote the article told his superior, immediately after informing plaintiffs that the article may have contained errors, that he thought he had "messed up," showing a state of mind contrary to any supposition that when he submitted the article for publication he either knew or seriously doubted that it was false, and where the newspaper and reporter took every reasonable step to correct any error in the article, insofar as any implication against the plaintiffs was concerned. Gulf Publishing Co. v. Lee, 434 So. 2d 687 (Miss. 1983).

In action against newspaper for invasion of privacy, failure to allege that publication was made with knowledge of its falsity, with reckless disregard for truth, or maliciously was not adequate to support demurrer since plaintiffs were not public figures and since jurisdiction recognized common law right to privacy, and the allegations, though possibly subject to technical criticism, sufficiently charged a tort to warrant a trial on the merits. Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471 (Miss. 1976).

Federal courts have pre-empted the field of libel and slander and have established that hatred, ill will, enmity, intent to harm or negligence are insufficient to establish malice toward those involved in discussions on public issues. Reaves v. Foster, 200 So. 2d 453 (Miss. 1967).

A public school principal, plaintiff in an action for damages for libel, cannot recover unless he shows malice by proving that the defendant when he published the words in question either knew that they were false, or published them in reckless disregard of whether true or not. Reaves v. Foster, 200 So. 2d 453 (Miss. 1967).

22. — Obscenity, freedom of speech and press.

Obscenity is not within the protection of the First Amendment to the United States Constitution under all of the authorities. McGrew v. City of Jackson, 307 F. Supp. 754 (S.D. Miss. 1969), vacated 91 S. Ct. 121, 401 U.S. 987, 28 L. Ed. 2d 525.

23. Freedom of association — Generally.

The banishment of the defendant from a 100-mile radius of the place that he committed a burglary was not justified where the trial court did not make an on-the-record finding of the benefits of banishment. Weaver v. State, 764 So. 2d 479 (Miss. Ct. App. 2000).

The plaintiff failed to state a cause of action for a violation of her right of association where she alleged that family members and friends were harassed by the defendants with the specific purpose of interfering with her right to associate with such people, but failed to allege a protected intimate association. Walker v. Henderson, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 19638 (N.D. Miss. Dec. 9, 1999), affirmed by 239 F.3d 366, 2000 U.S. App. LEXIS 30118 (5th Cir. Miss. 2000).

A term of probation requiring defendant to remain at least 125 miles away from a particular county did not violate his First, Fifth, or Fourteenth Amendment rights, where the record indicated that the trial judge carefully and meticulously explained to defendant his rights, the trial court found that defendant voluntarily and knowingly pled guilty, the Department of Corrections conducted an investigation of defendant prior to sentencing, and defendant accepted the terms of probation, which were neither unreasonable nor arbitrary. Cobb v. State, 437 So. 2d 1218 (Miss. 1983).

Right to peacefully picket grows out of right of freedom of speech and freedom of press. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

24. Elections and politics.

Order that the judge be suspended from office for a period of one year was appropriate because his commentary on Caucasian official and their African-American appointees in his jurisdiction was not worthy of being deemed a matter of legitimate political concern in his reelection campaign, but merely an expression of his personal animosity. The comments were not made within the content, form, or context of a matter of legitimate public concern. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

First Amendment protected advertisements profiling judicial candidates for state Supreme Court; communications created by producer independent of candidate, without explicit terms advocating specific electoral action, were not subject to mandatory disclosure requirements for campaign expenditures under Miss. Code Ann. §§ 23-15-809 and 801(j). Chamber of Commerce of the United States v. Moore, 288 F.3d 187 (5th Cir. 2002), writ of certiorari denied by 537 U.S. 1018, 123 S. Ct. 536, 154 L. Ed. 2d 425, 2002 U.S. LEXIS 8339, 71 U.S.L.W. 3337 (2002).

25. Constitutional vagueness.

Kidnapping statute, Miss. Code Ann. § 97-3-53, is not unconstitutionally vague because the use of other descriptive words in § 97-3-53, such as e.g. and inveigle, leave defendants well informed on the crimes of which they are accused. Perkins v. State, 863 So. 2d 47 (Miss. 2003).

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Supreme Court's views as to constitutionality of laws prohibiting, or of criminal convictions for, desecration, defiance, disrespect, or misuse of American flag. 105 L. Ed. 2d 809.

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When will private right of action for damages ('Bivens' action) be implied from provision of Federal Constitution—Supreme Court cases. 127 L. Ed. 2d 715.

Antiabortion activities—Supreme Court cases. 129 L. Ed. 2d 989.

Federal Constitution's First Amendment guarantee of freedom of speech and press as protecting private right to refuse to foster, repeat, advertise, or disseminate view, message, or statement divergent from one's own—Supreme Court cases. 132 L. Ed. 2d 961.

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Government regulation of cable television as violating Federal Constitution's First Amendment guarantees of freedom of speech and press—Supreme Court cases. 135 L. Ed. 2d 1187.

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Government regulation of or concerning advertising as violation of Federal Constitution's First Amendment rights of free speech and press—Supreme Court cases. 138 L. Ed. 2d 1085.

Racial discrimination, in students' admissions or education, with respect to college, university, or other higher eduaction—Supreme Court cases. 145 L. Ed. 2d 1149.

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Governmental restrictions on individual's publicly appearing live in nude or seminude condition as violating freedom of speech under Federal Constitution's First Amendment—Supreme Court cases. 146 L. Ed. 2d 1019.

Establishment and free exercise of religion clauses of Federal Constitution's First Amendment as applied to public schools—Supreme Court cases. 147 L. Ed. 2d 1117.

Civil rights laws prohibiting nongovernmental organization's membership restriction or its members' right of association under Federal Constitution's First Amendment—Supreme Court cases. 147 L. Ed. 2d 1157.

Licensing and regulation of attorneys, with respect to matters other than advertisements, as restricted by rights of free speech, expression, and association under Federal Constitution's First Amendment—Supreme Court cases. 149 L. Ed. 2d 1093.

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AMENDMENT II

RIGHT TO BEAR ARMS

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

RESEARCH REFERENCES

Am Jur. 16A Am Jur 2d, Constitutional Law §§ 415-418, 422.

79 Am Jur 2d, Weapons and Firearms § 4.

CJS. C.J.S. Weapons §§ 3-8.

AMENDMENT III

SOLDIERS DENIED QUARTER IN HOMES

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

RESEARCH REFERENCES

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 415-418, 422.

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AMENDMENT IV

SEARCH AND SEIZURE

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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51. Confrontation of witnesses — In general.
52. — Hearsay evidence, confrontation of witnesses.

1. In general.

Where defendant was charged with and found guilty of felony driving under the influence of alcohol, the trial court did not err in denying defense counsel's motion to suppress evidence of defendant's blood alcohol results; the warrant authorizing the blood alcohol test was valid and thus, defendant's constitutional rights were not violated. Inter alia, the officer observed defendant's slurred speech and staggered walk, and he noted that defendant's breath smelled of alcohol and defendant actually admitted to having drunk four beers that morning and was unable to recite the alphabet. Dove v. State, 912 So. 2d 1091 (Miss. Ct. App. 2005).

In a possession of marijuana case, defendant was not denied his due process rights in the revocation of his postrelease supervision as there was evidence that defendant had waived his rights to a hearing and that he had admitted to violating his probation. Hughes v. State, 901 So. 2d 1274 (Miss. Ct. App. 2004).

The rule that failure to object at trial waives objection on appeal applies to Fourth Amendment claims. Simply put, if a defendant fails to object to the admission of illegally obtained evidence, the objection is waived. Brown v. State, 875 So. 2d 214 (Miss. Ct. App. 2003), writ of certiorari denied by 876 So. 2d 376, 2004 Miss. LEXIS 697 (Miss. 2004).

Where a decedent had pointed a loaded gun at officers in violation of Miss. Code Ann. § 97-3-7, had refused to lower the gun, had backed into his house, and had initiated fire at the officers, an officer reasonably believed that his life and the lives of other officers at the scene were in imminent danger; hence, there was no violation of the decedent's Fourth Amendment rights when the officer followed the decedent into the latter's home, where the officer returned fire and mortally injured the decedent. Elkins v. McKenzie, 865 So. 2d 1065 (Miss. 2003).

The protections offered by the Fourth Amendment do not apply if the plaintiff challenges only continued incarceration following a seizure pursuant to a facially valid warrant. Jones v. City of Jackson, 203 F.3d 875 (5th Cir. 2000).

A mere police pursuit in attempting to seize a person does not amount to a seizure within the Fourth Amendment. Topps v. City of Hollandale, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 9925 (N.D. Miss. June 30, 2000).

The Fourth Amendment to the Federal Constitution and Article 3, § 23 of the Mississippi Constitution apply to volunteer firefighters who conduct a warrantless search of fire-damaged premises. Rose v. State, 586 So. 2d 746 (Miss. 1991).

There is no discovery violation as to an officer's notes, taken in the presence of witnesses and destroyed in good faith. Thus, the destruction of original handwritten notes of a defendant's statement, which were transcribed into a typed statement, and admission of the typed statement into evidence, did not deprive the defendant of his rights to a fair and impartial trial and adequate defense as provided by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Woodward v. State, 533 So. 2d 418 (Miss. 1988), cert. denied 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202, rehearing denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041, vacated in part, 635 So. 2d 805.

Search, of person who makes sudden reaching motion toward pocket upon being informed that officers have warrant for person's arrest, is reasonable. Dixon v. State, 465 So. 2d 1092 (Miss. 1985).

Earlier it had been said that this guaranty is directed at the exercise of Federal authority, and not at the states and their agencies. Tucker v. State, 128 Miss. 211, 90 So. 845, 24 A.L.R. 1377 (1922); Nash v. State, 171 Miss. 279, 157 So. 365.

2. Criminal proceedings.

On the inmate's claim that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he was mentally retarded, he was entitled to and did not receive an Atkins hearing because the inmate met the requirements of Chase and its progeny; the inmate's claim was not procedurally barred under Miss. Code Ann. § 99-39-21(1) because he could not have raised the claim before the trial court, as the Atkins decision was decided 12 days after the inmate was sentenced to death. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Denial of the inmate's motion for postconviction relief was proper where his Fourth Amendment argument was procedurally barred because a guilty plea waived the right to raise Fourth Amendment challenges on appeal. Jones v. State, 922 So. 2d 31 (Miss. Ct. App. 2006).

A defendant's constitutional rights were not violated when the public was excluded from a hearing on a petition to revoke his suspended sentence and probation; the hearing was not a part of a criminal prosecution and thus the full panoply of rights due a defendant in a criminal prosecution under the requirements of the United States and Mississippi Constitutions did not apply. Williams v. State, 409 So. 2d 1331 (Miss. 1982).

Defendant does not waive his objection to illegally obtained evidence by testifying in his own behalf, although he admits having the contraband in his possession. Keys v. State, 283 So. 2d 919 (Miss. 1973).

A defendant who was not present at the time and place where a search and seizure took place is without standing to attack its legality, and cannot object to the introduction in evidence of the fruits of the seizure. Robinson v. State, 219 So. 2d 916 (Miss. 1969).

3. Standing to challenge search.

Defendant failed to establish that he had a reasonable expectation of privacy in a motel room where money from a bank robbery was found as the room was registered in the name of a third party; as defendant did not produce evidence that he had a reasonable expectation of privacy in the motel room, he lacked standing to contest the search and the admission of the evidence obtained as a result of the search. Lyons v. State, 942 So. 2d 247 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 269 (Miss. 2007).

The defendant did not have standing to assert a constitutional violation based on the warrantless search of a motor vehicle, which was located on property being searched pursuant to a warrant, that was actually owned by his wife. Jenkins v. State, — So. 2d —, 1999 Miss. App. LEXIS 301 (Miss. Ct. App. May 18, 1999), affirmed by 759 So. 2d 1229, 2000 Miss. LEXIS 123 (Miss. 2000).

4. Expectation of privacy.

Defendant had no standing to challenge under U.S. Const. amend. IV, or Miss. Const. Art. III, § 23, evidence seized from the vehicle that he stole after killing a victim because defendant had no expectation of privacy in the stolen vehicle. Walker v. State, 913 So. 2d 198 (Miss. 2005), writ of certiorari denied by 546 U.S. 1038, 126 S. Ct. 743, 163 L. Ed. 2d 581, 2005 U.S. LEXIS 8688, 74 U.S.L.W. 3322 (2005), remanded by 2006 Miss. LEXIS 156 (Miss. Mar. 9, 2006).

Defendant did not have his Fourth Amendment rights infringed as he was a passenger, and did not have standing to challenge contraband found in car. McCollins v. State, 798 So. 2d 624 (Miss. Ct. App. 2001).

Defendant, as a mere passenger, could not challenge the search of the car or the seizure of the contents therein, even if the contents were found to be in defendant's personal property. Maldonado v. State, 796 So. 2d 247 (Miss. Ct. App. 2001).

A defendant charged with capital murder had no reasonable expectation of privacy during a conversation with his wife in which he told her that he had committed the alleged crime because she would not come back to him, and that if she and the children had been in the house at the time of the crime, they would be lying next to the victims, where the statements were made while the two were seated near the open door of a room in the sheriff's department, which led into an outer office occupied by five to seven people who were approximately two to three feet away, and continued while the two were entering into the outer office occupied by the third parties. Dycus v. State, 440 So. 2d 246 (Miss. 1983).

The relevant inquiry under the Fourth Amendment is whether the police have infringed upon some legitimate expectation of privacy which the defendant had. Accordingly, a defendant had no standing under the Fourth Amendment to complain about a warrantless entry by police officers in another's home nor the seizure of contraband therein. Moss v. State, 411 So. 2d 90 (Miss. 1982).

Where the record revealed that all persons who wanted to do business with the defendant were impliedly invited to approach the house in which he was staying along a circular driveway to a point where the defendant met law enforcement officers to ascertain what he could do for them, and where the officers purchased and received from the defendant a bottle of intoxicating liquor but made no search of the person or premises of the defendant, the testimony of the officers was not inadmissible on the ground that the purchase was an illegal search or that their testimony was in effect a method of requiring the defendant to testify against himself. Lyons v. State, 195 So. 2d 91 (Miss. 1967).

5. Use of force.

In a 42 U.S.C.S. § 1983 suit, an arrestee adequately pled claims for excessive use of force against a police officer because he had a clearly established Fourth Amendment right not to be bodily removed from his car after being stopped for careless driving and thrown to the ground; the officer's actions were not shielded by the doctrine of qualified immunity or governmental immunity arising under Miss. Code Ann. § 11-46-9(1). Stepney v. City of Columbia, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 16376 (S.D. Miss. Feb. 18, 2009).

The defendant police officer was not entitled to summary judgment in an action alleging that he used excessive force in arresting the plaintiff since the court could not say that a reasonable officer, facing the plaintiff, who was neither resisting arrest nor physically confrontational, and who was recovering from recent medical procedures, would have considered the defendant's actions an objectively reasonable response to the situation at hand. Dallas v. City of Okolona, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 19547 (N.D. Miss. Dec. 7, 1999).

Suit alleging that school official grabbed arm of student did not show type of action calculated to cause serious injury, nor did not such act evince malice or intention to cause injury, and even if serious injuries may have resulted, nature of contact suggested that any injuries were unintended rather than calculated and that if force used was in fact excessive, it came from carelessness or excess of zeal rather than malice. Whether physical harm by state officer rises to level of constitutional deprivation depends on extent of injury inflicted, degree of force used in proportion to amount necessary under circumstances, and motives of official; bottom-line inquiry is whether official's conduct amounted to abuse of official power that shocks conscience. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

6. Health inspections.

Guaranties against unreasonable searches and seizures do not apply to routine inspections by sanitary officers, nor does it apply to inspections made pursuant to advance information that the health laws have been, or are about to be, violated. Grillis v. State, 196 Miss. 576, 17 So. 2d 525 (1944).

When a person carries on a business for the dispensation and sale of food for human consumption and members of the public are invited to become patrons, the proprietor of the establishment thereby impliedly consents that the public, through its authorized departmental agents or officers, may from time to time make such reasonable inspections as will protect against unwholesomeness of the food and against any unwholesome conditions surrounding the preparation thereof, and against disease which might result therefrom, and so consenting the search and seizure provision of the state and Federal constitutions is not involved, so far as health officers are concerned. Grillis v. State, 196 Miss. 576, 17 So. 2d 525 (1944).

Search and seizure of diseased hog meat found in accused's restaurant by city health officers without a search warrant, upon advance information that the health laws had been, or were about to be, violated, did not constitute a violation of the constitutional prohibition against unreasonable searches and seizures. Grillis v. State, 196 Miss. 576, 17 So. 2d 525 (1944).

7. Private searches.

In a prosecution for burglary, the trial court properly entered into evidence a wristwatch which was recovered by the victim after he had received information that defendant had committed the burglary and was living in the same apartment complex, after which he went to the apartment and secured the tenant's permission to search defendant's belongings, found the stolen watch, and then called the police and conducted a second search in the presence of an officer; a search by a private individual for purely private reasons does not violate the Fourth Amendment. Lucas v. State, 381 So. 2d 140 (Miss. 1980).

Where defendant's neighbor, a private person, not connected with the police observed from his own premises marijuana growing on defendant's adjoining land, and after conversation with an officer, he went back alone and at his own election, and plucked several of the plants which he later took to the police, and there was no participation by the police in any of these actions and nothing at all was done by them until after a search warrant had been issued, trial court did not err in denying a motion to suppress the evidence and quash the indictment on grounds that the neighbor committed a trespass upon defendant's land in obtaining the marijuana plants. Wolf v. State, 281 So. 2d 445 (Miss. 1973).

8. Governmental records.

Permanent injunction has been issued to prevent enforcement of § 39-5-63 because this act and others relating to sealing of files of state sovereignty commission, which had a clandestine purpose of perpetuating racial inequality, unconstitutionally infringe on black citizens' rights to free speech and association, personal privacy, and lawful search and seizure. American Civil Liberties Union of Miss., Inc. v. Mabus, 719 F. Supp. 1345 (S.D. Miss. 1989), vacated, 911 F.2d 1066 (5th Cir. 1990), reh'g denied, 919 F.2d 735 (5th Cir. 1990), on remand, 969 F. Supp. 403 (S.D. Miss. 1994).

9. School facilities.

The search of a student's automobile by a school official while on school property did not violate the search and seizure clause of the Fourth Amendment where (1) the principal was informed by another student that the student in question had been drinking in the school parking lot and the story was corroborated by other students, and (2) the principal knew of no reason or motive that would cause the other students to lie about the actions of the student in question. Covington County v. G.W., 767 So. 2d 187 (Miss. 2000).

The warrantless search of a high school student's locker by school officials was reasonable under the circumstances and offended no federal constitutional standards where another student had told the assistant principal that the first student had offered to sell him 2 handguns and had told him that he had the guns at school. S.C. v. State, 583 So. 2d 188 (Miss. 1991).

10. Correctional facilities.

Prison inmate does not have reasonable expectation of privacy in his prison cell entitling him to protection of Fourth Amendment against unreasonable searches and seizures. Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), on remand 744 F.2d 22.

Appellant's Fourth Amendment rights were no greater as an escapee than they were while he was within the confines of penitentiary, and he had no standing to object to a warrantless search of his motel room and his effects by police officers. Swearingen v. Culpepper, 312 So. 2d 15 (Miss. 1975).

11. Game warden.

The stop and search of defendant's pick-up truck at a roadblock set up by game wardens to conduct routine game checks in a wildlife management area did not constitute a condemned intrusion on defendant's Fourth Amendment right against unreasonable search and seizure. Drane v. State, 493 So. 2d 294 (Miss. 1986), cert. denied, 482 U.S. 916, 107 S. Ct. 3189, 96 L. Ed. 2d 677 (1987).

Where a warrant for a search of an accused's land was based upon information acquired by a game warden who committed a trespass upon the land while "checking for violations", the search by a sheriff under the warrant was illegal, since a legal search must be based on preceding steps which are themselves lawful in their entirety. Davidson v. State, 240 So. 2d 463 (Miss. 1970).

12. Surveillance.

With regard to defendant's contention that the State conducted illegal surveillance of his telephone calls by placing a digital tape recorder on his telephone, the court found that defendant was not entitled to relief because he had waived the right to challenge the State's evidence by entering a valid guilty plea to the offense of conspiracy to manufacture methamphetamine. Sweat v. State, 910 So. 2d 12 (Miss. Ct. App. 2004), affirmed in part and reversed in part by 912 So. 2d 458, 2005 Miss. LEXIS 661 (Miss. 2005).

Testimony of police officers as to a conversation in defendant's home between the defendant and a confidential informer, who was invited into the home, which was electronically transmitted to the officers by a transmitter concealed on the informer, was admissible in defendant's trial for illegal sale and possession of a controlled substance, notwithstanding that no search warrant had been issued. Lee v. State, 489 So. 2d 1382 (Miss. 1986).

Installation of beeper in container of chemicals with consent of original owner does not constitute search or seizure within meaning of Fourth Amendment when container is delivered to buyer having no knowledge of presence of beeper; however, warrantless monitoring of beeper in private residence, a location not open to visual surveillance, violates Fourth Amendment rights of those having justifiable interest in privacy of residence. United States v. Karo, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984), rehearing denied, 105 S. Ct. 51, 468 U.S. 1250, 82 L. Ed. 2d 942.

Where, pursuant to an offer by the defendant to theft victim to obtain the return of his stolen property for a payment of $200, the defendant met the victim in a place where he was under the observation of a police detective, produced the stolen articles and received the $200 which the detective took from defendant's hand when he placed him under arrest for receiving stolen property, there was no violation of defendant's right of privacy or right of due process, and a search warrant was unnecessary for the stolen articles were seen in defendant's possession prior to his arrest. Bennett v. State, 211 So. 2d 520 (Miss. 1968), appeal dismissed, cert. denied, 393 U.S. 320, 89 S. Ct. 555, 21 L. Ed. 2d 515 (1969).

13. Roadblocks.

Checkpoint was set up in daylight, on a straight thoroughfare, and there was a definitive plan established by the officers for checking vehicles; appellant's stop was conducted in a safe and reasonable manner. Thus, any minor deviation from the departmental policy was reasonable under the circumstances and did not violate appellant's constitutional rights. Field v. State, 28 So. 3d 697 (Miss. Ct. App. 2010).

While the record did not indicate the adoption of written directives regarding roadblocks, it did indicate that all persons approaching the roadblock were to be stopped, without exception; the absence of specific written directives was not a fatal flaw, so long as the officers were neither arbitrary nor capricious in determining who would be stopped, and nothing in the record suggested that the roadblock was executed in an unreasonable or overly intrusive manner, or that its stated purpose was in any way misused. Graham v. State, 878 So. 2d 162 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 922 (Miss. 2004).

Checkpoint for the purpose of valid license checking was constitutional; where defendant was stopped, arrested for driving with a suspended license, and had his car searched, his constitutional rights were not violated as defendant was not singled out and the search was conducted incidentally to a lawful arrest as the deputy had probable cause to believe defendant was driving without a proper license. Johnston v. State, 853 So. 2d 144 (Miss. Ct. App. 2003).

Seizure of defendant for driving under the influence following a stop at a routine police roadblock being conducted to check vehicles for compliance with traffic laws relating to registration and licensing requirements did not violate defendant's rights under either Miss. Const. art 3, § 23 or the Fourth Amendment to the Constitution of the United States, and the trial court properly admitted a test result showing defendant's blood alcohol content as .152. Dixon v. State, 828 So. 2d 844 (Miss. Ct. App. 2002).

A roadblock set up to check licenses and outstanding warrants was constitutional as the degree of intrusion into the defendant's liberty caused by the roadblock was minimal where the defendant was treated the same way as any other driver who approached this roadblock and the roadblock did not involve drug dogs or mandatory searches of automobiles. Dale v. State, 785 So. 2d 1102 (Miss. Ct. App. 2001).

A roadblock intended principally to detect unlicensed drivers or improperly registered and uninspected vehicles is constitutionally permissible. Briggs v. State, 741 So. 2d 986 (Miss. Ct. App. 1999).

When a motorist appears to be attempting to evade a police roadblock, a police officer may stop that motorist to check for a valid license tag and inspection sticker. Boyd v. State, 751 So. 2d 1050 (Miss. Ct. App. 1998).

Police officers who set up a roadblock after receiving information that employees of two nearby factories were driving without licenses and who were checking all drivers did not violate defendant's constitutional rights in stopping his automobile and detaining its occupants and, upon smelling the odor of burning marijuana emanating from defendant's car, had probable cause to search it; the police officers were also authorized to seize the marijuana in defendant's car where one of the officers observed a purse or bag in the lap of defendant's wife with the corner of a plastic bag protruding therefrom in which he saw a green leafy substance that he suspected to be marijuana. Miller v. State, 373 So. 2d 1004 (Miss. 1979).

14. Possession of stolen property.

Possession of stolen property is illegal per se, and the seizure of such is not within the constitutional guaranty. Williams v. State, 216 Miss. 158, 61 So. 2d 793 (1953).

Where officers who were lawfully upon premises under a warrant based on probable cause to search for intoxicating liquors found and recognized some stolen property, this property was of contraband nature subject to seizure though it was not one of the designated objects of search, and the evidence of the stolen property obtained by such seizure was admissible in prosecution for theft of the property. Williams v. State, 216 Miss. 158, 61 So. 2d 793 (1953).

15. Physical evidence.

Seizure of partially burned clothing that had belonged to decedent was reasonable where the items were found on property not shown to belong to the defendant and were in open view to the public. Brown v. Findley Seed Co., 330 So. 2d 597 (Miss. 1976).

16. Fingerprints.

The taking of fingerprints is a search for purposes of the Fourth Amendment. Hooker v. State, 716 So. 2d 1104 (Miss. 1998).

17. Blood, bodily fluids, etc.

Defendant's conviction for DUI maiming was proper because he consented to a blood sample, he never objected to the introduction of the blood-analysis evidence during the course of the testimony by a witness with the Mississippi Crime Laboratory, defendant did not object to the admission of testimony by a doctor regarding the amount of other substances found in the blood sample and the impairing effects of the other substances, defendant's objection made at trial did not state with requisite specificity the basis for the objection to the admission of the testimony, and a deputy was permitted to testify as to what he personally observed concerning defendant's written consent to the blood test. Irby v. State, — So. 3d —, 2010 Miss. LEXIS 423 (Miss. Aug. 12, 2010), opinion withdrawn by 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), substituted opinion at 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

Although defendant claimed that taking his blood sample constituted an unlawful search and seizure in violation of his Fourth Amendment rights because the officer had no probable cause to take his blood, the court found that drawing blood evidence from a defendant at the hospital without a warrant following an accident was not a violation of the defendant's Fourth Amendment rights because the law enforcement officer had probable cause given that the facts surrounding the accident evinced reasonable suspicion that evidence material to the criminal investigation, an illegal blood alcohol level, would be found. Deeds v. State, 27 So. 3d 1135 (Miss. 2009), writ of certiorari denied by 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S. LEXIS 5807, 79 U.S.L.W. 3196 (U.S. 2010).

There was no constitutional violation where the state crime laboratory requested and obtained a second blood sample from the defendant in a murder prosecution after it found a discrepancy between the identification numbers of the vials of blood and the numbers listed on the submission form of the original sample. Morris v. State, 777 So. 2d 16 (Miss. 2000).

Section 63-11-8, which mandates that blood be taken from any driver involved in a fatal accident regardless of the existence of probable cause to believe that alcohol or drugs were involved, is unconstitutional because it requires search and seizure absent probable cause. McDuff v. State, 763 So. 2d 850 (Miss. 2000).

A capital murder defendant's objection to the admission of a blood sample obtained without a warrant was barred by the waiver of § 99-39-21(1) where the defendant did not raise the issue on direct appeal, since the basis of the Fourth Amendment objection to the admission of illegally obtained evidence is well known, and the defendant had practically no chance of escaping conviction even without the blood sample evidence. Woodward v. State, 635 So. 2d 805 (Miss. 1993).

An officer's failure to inform the defendant that he had a right to refuse the officer's request for a blood sample did not render the test results inadmissible in a manslaughter prosecution against the defendant where the officer had probable cause to obtain the blood sample in that the officer knew that the defendant was the driver of an automobile which had collided head on with another vehicle, the collision occurred on a straight and level highway when the road condition was dry, the officer knew that at least two people were dead in the vehicle which the defendant hit, the officer had observed a beer in the defendant's vehicle, and the defendant had slurred speech and dilated pupils. For a search which would otherwise be illegal, absent consent, knowledgeable waiver of one's constitutional right not to be searched is guaranteed by Article 3, § 23 of the Mississippi Constitution. However, blood searches which are based upon probable cause are not illegal, and, therefore, the question of the defendant's knowledgeable waiver was not relevant. Longstreet v. State, 592 So. 2d 16 (Miss. 1991).

There was no constitutional violation in obtaining hair and blood samples from a defendant where he was under lawful arrest, the blood was removed in a reasonable manner by a physician at a hospital, the hair samples were taken by a registered nurse, and the officers "had good reason to examine" the defendant's hair. Bevill v. State, 556 So. 2d 699 (Miss. 1990).

In prosecution for vehicular manslaughter, blood sample from allegedly intoxicated defendant absent his arrest or consent was admissible evidence, where probable cause to make search existed at time of sample's collection, given defendant's display of symptoms of intoxication, such as slurred speech, immediately following his automobile's striking rear of decedent's truck, parked wholly off interstate highway. Gibson v. State, 503 So. 2d 230 (Miss. 1987).

Admission into evidence of results of blood alcohol test at trial for manslaughter and aggravated assault arising out of a motor vehicle accident was reversible error, where deputy sheriff who investigated the accident had insufficient probable cause to request a blood alcohol test for defendant driver, in view of deputy's statement that he smelled no odor of alcohol on defendant either at the accident scene or at the hospital, he observed no whiskey bottles or beer cans in defendant's car, no aspect of defendant's speech, appearance or behavior indicated that he was under the influence of alcohol, and deputy admitted that the real reason for requesting the blood alcohol test was because it was sheriff department policy to do so when someone was killed in an automobile accident. Cole v. State, 493 So. 2d 1333 (Miss. 1986).

The Fourth Amendment prohibition against unreasonable search and seizure applies when an intrusion into the body—such as a blood test—is undertaken without a warrant, absent an emergency situation. Cole v. State, 493 So. 2d 1333 (Miss. 1986).

In a criminal prosecution, where a police officer was justified in requiring a blood test to determine the alcoholic content in defendant's blood, and such test had in fact been performed, although for diagnostic and not law enforcement purposes, the State was entitled to the benefit of the test results, and the result of the blood test administered at the direction of defendant's physician was admissible. Ashley v. State, 423 So. 2d 1311 (Miss. 1982).

The Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified or which are made in an improper manner. The drawing of blood from a rape suspect for a blood-semen test did not violate the suspect's Fourth Amendment right to be secure in his person, where the warrant for the blood test was issued upon sufficient evidence of probable cause. Birchfield v. State, 412 So. 2d 1181 (Miss. 1982).

18. Handwriting exemplars.

There is no Fourth Amendment privacy expectation in handwriting exemplars and, therefore, the use of trickery as a method for obtaining handwriting exemplars is at worst, bad practice. Burns v. State, 729 So. 2d 203 (Miss. 1998), cert. denied, 527 U.S. 1041, 119 S. Ct. 2406, 144 L. Ed. 2d 804 (1999).

19. Breathalyzer test.

Where defendant was in lawful custody, his right to be secure from an unreasonable search was not violated by police officers who administered a photoelectric intoximeter test, which tests the breath of a person without intrusion into the body. Jackson v. State, 310 So. 2d 898 (Miss. 1975).

20. Surgical procedure.

Search warrants are required, absent an emergency, where intrusions into the human body are concerned and testing procedures plainly constitute searches of persons and depend antecedently upon seizures of persons within the meaning of the Fourth Amendment. Daniel v. State, 536 So. 2d 1319 (Miss. 1988).

Compelled surgical procedure to remove bullet from suspect's chest constituted unreasonable search under Fourth Amendment. Winston v. Lee, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985).

21. Medical treatment.

A defendant's constitutional right to privacy was not violated by the State's taking the defendant to the health department for treatment of gonorrhea where the defendant was charged with capital rape of a child who was found to have gonorrhea, since the State's interest in operating a prison and providing for the health of inmates outweighed the privacy interests of the defendant. Ormond v. State, 599 So. 2d 951 (Miss. 1992).

22. Search warrant — In general.

The court rejected the contention that a judge was not an impartial magistrate because he personally completed the affidavit for search warrant and the actual search warrant where the judge testified at the suppression hearing that the information contained in the affidavit was received from a police officer and the officer testified that he signed both forms indicating his assent to the accuracy of the information. Bryant v. State, 746 So. 2d 853 (Miss. Ct. App. 1998).

The delay from the time of a defendant's arrest until he was taken before a judicial officer did not violate Rule 1.04, Miss. Unif. Crim. R. Cir. Ct. Prac. and the 4th Amendment to the United States Constitution where his initial hearing was held within 48 hours of the time he was taken into custody for questioning, and there was no indication that the officers were purposely holding him in custody to gather sufficient evidence to justify his arrest; thus, his confession was not a product of any delay in taking him before a magistrate and was therefore admissible. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A search warrant was not defective because it erroneously named the defendant as the owner of the property to be searched. The Fourth Amendment does not require that either the affidavit or the warrant give the name of the owner of the property to be searched; identifying the owner of the premises is relevant only to assist and aid in particularizing the place to be searched. Williams v. State, 583 So. 2d 620 (Miss. 1991).

A narcotics agent's failure to hand the defendant a copy of the search warrant for her residence did not require reversal even though the defendant should have received a copy of the warrant pursuant to § 41-29-157; failure to follow this ministerial provision does not void an otherwise valid search. Williams v. State, 583 So. 2d 620 (Miss. 1991).

There was no merit to a defendant's claim that the judge who issued 2 search warrants was not neutral and detached on the basis that the judge who went to the scene of the crime and saw the body also issued the search warrants, where there was no showing as to how this, in and of itself, created any prejudice or bias towards the defendant. Bevill v. State, 556 So. 2d 699 (Miss. 1990).

A judge who issues a search warrant is not required to confer on the searching officer the full range of authority allowed by law. The judge is within his prerogatives to limit the officer's authority, either by use of a pre-printed form or by interlined language. Strange v. State, 530 So. 2d 1336 (Miss. 1988).

The Fourth Amendment was designed to protect against "general warrants" and other exploratory searches. The fact that contraband is believed to be on the premises cannot in and of itself justify a warrantless search. The discovery of evidence does not "create" an exigent circumstance such that a valid warrant is not required. Carney v. State, 525 So. 2d 776 (Miss. 1988).

Justice Court Judge who issued search warrant was neutral and detached magistrate where nothing in record indicated that judge acted in biased manner when he issued search warrant; central requirement for valid search warrant is that it must be issued by neutral and detached magistrate, and substantial involvement in search is forbidden; however, magistrate who goes to scene, issues warrant, and remains there for some time does not abdicate his proper position. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Fact that magistrate primarily relies on fact that sworn police officers are asking for search warrant rather than on anything in particular in affidavit of underlying facts and circumstances does not mean that magistrate is not acting in neutral and detached manner in issuing warrant where judge issues warrant only if judge feels that it is warranted. McCommon v. State, 467 So. 2d 940 (Miss. 1985), cert. denied, 474 U.S. 984, 106 S. Ct. 393, 88 L. Ed. 2d 345 (1985).

In a prosecution for the unlawful possession of intoxicating liquor, State's evidence obtained in a search of the defendant's premises pursuant to search warrant was inadmissible where the affidavit and search warrant were not produced on the trial, and the proof was insufficient to show their loss. Harvey v. State, 232 Miss. 294, 98 So. 2d 764 (1957).

Search warrants are in the nature of criminal process and may be invoked only in furtherance of public prosecutions, and statutes providing for their issuance and execution are sustained, under constitutional provisions forbidding unreasonable search and seizure, only as a necessary means in suppression of crime and detection and punishment of criminals. Brooks v. Wynn, 209 Miss. 156, 46 So. 2d 97 (1950).

Evidence obtained by coroner under illegal warrant for search and seizure of intoxicating liquor was inadmissible in prosecution for permitting games of chance to be played for money on defendant's premises. Millwood v. State, 198 Miss. 485, 23 So. 2d 496 (1945).

Warrant directing search for and seizure of intoxicating liquor, issued merely to any lawful officer of the county, constitutes a legal search warrant, but the coroner, unless the sheriff is disqualified under § 3906, cannot lawfully serve it. Millwood v. State, 198 Miss. 485, 23 So. 2d 496 (1945).

Warrant issued by justice of the peace addressed and delivered to the coroner as such directing him to search for and seize intoxicating liquor although the sheriff suffered no disqualification within the purview of Code 1942 § 3906, and which was served as directed by the coroner while acting as such officer, was illegal and evidence obtained under authority of such search warrant was inadmissible, notwithstanding that the warrant was also addressed to any lawful officer of the county. Millwood v. State, 198 Miss. 485, 23 So. 2d 496 (1945).

23. —Affidavit, search warrant.

Where defendant was taken to a hospital after a two-car collision, the search warrant for a blood draw was invalid because: (1) the officer who requested the search warrant falsely stated in his affidavit that defendant had (a) refused to submit to an "analysis of his breath" after having been offered an opportunity to submit, and (b) been placed under arrest for driving while under the influence, although at that time he had not yet been arrested; and (2) there were no exigent circumstances present at the hospital that would have justified a blood test since defendant was not fleeing, and the officer obviously had time to secure a warrant, albeit an invalid one. As to the admissibility of defendant's statements about having consumed several beers, made to police at the scene of the accident, defendant did not claim that he was in custody at the time, and his statements clearly had probative value, thus the trial court did not abuse its discretion in allowing the statements to be admitted into evidence despite the defendant's argument that he was disoriented, confused, and suffering from shock and retrograde amnesia when he made the statements and they were therefore not reliable. Shaw v. State, 938 So. 2d 853 (Miss. Ct. App. 2005), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 602 (Miss. 2006).

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit court had not erred in not granting his pretrial motion to suppress evidence obtained by a search warrant based on the statements of the child victim because she specifically stated that defendant had showed her pictures of nude people on his computer screen doing things she described as "gross." She used language to describe acts performed on her and by her in relation to defendant in such sexually explicit terms that veracity could easily be inferred. Foley v. State, 914 So. 2d 677 (Miss. 2005).

An affidavit offered by a police officer for the purpose of getting a warrant can be based on hearsay. Donerson v. State, 812 So. 2d 1081 (Miss. Ct. App. 2001).

When defendant asserts that information contained in affidavit supporting application for search warrant constitutes false swearing, then reviewing court must determine, with false material set aside, whether affidavit's remaining content, together with sworn oral testimony presented to issuing magistrate, is sufficient to establish probable cause. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Even though underlying facts stated in affidavit for search warrant, considered alone, may not be sufficient to confer probable cause for issuance of warrant, oral testimony adduced before issuing magistrate, when taken together with affidavit, may sufficiently establish probable cause for issuance of search warrant under totality of circumstances test. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Affidavit supporting application for warrant to search defendant's motel room, when excised of false information, was not by itself sufficient to establish probable cause for issuance of warrant, where affidavit provided merely that officer who was executing other warrant found defendant in possession of large quantity of currency and motel room key, and motel manager verified that motel room was registered to defendant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

An affidavit for a search warrant was not fatally defective merely because the attached page containing a description of the residence to be searched was not signed by the affiants, where other pages of the affidavit were signed, and the narcotics agent who was the author of the warrant and application swore that the description was not substituted. Williams v. State, 583 So. 2d 620 (Miss. 1991).

Detailed underlying facts supporting the affidavits for 2 search warrants furnished the judge with probable cause for issuing the search warrants, even though the criminal investigator who executed the affidavits erred in some of the statements set forth in the underlying facts, where the investigator was cross-examined at the suppression hearing at great length by the defendant's attorney, there was no showing that the investigator intentionally misrepresented those facts or made them in reckless disregard for the truth, and the remaining underlying facts clearly constituted probable cause for the issuance of the search warrants. Bevill v. State, 556 So. 2d 699 (Miss. 1990).

In a prosecution for possession of intoxicating liquor, the trial court erred in overruling defendant's motion to suppress evidence seized during a search of his home, based on his contention that the warrant was defective, where the underlying facts and circumstances portion of the affidavit, stating that a deputy had called the affiant and said that after several observations of defendant over a period of time "he was apparently selling whiskey," was insufficient as a matter of law. Washington v. State, 382 So. 2d 1086 (Miss. 1980).

For an affidavit to be sufficient to meet Fourth Amendment standards, the informant or the affiant must have reasonable information or cause to believe that the items sought pursuant to the search warrant are located in the premises to be searched, and, if the information which the affiant uses as the basis of his probable cause for a search warrant was obtained from an informant, there must be underlying facts and circumstances alleged which would show the independent magistrate that the informant was reliable and that his information was reasonably trustworthy. Ratliff v. State, 310 So. 2d 905 (Miss. 1975).

In order to justify the issuance of a valid search warrant the basic affidavit must include a statement by the affiant of the underlying facts and circumstances upon which he relies as constituting probable cause so that the magistrate may judge for himself the persuasiveness of the facts to show probable cause. Burnett v. State, 227 So. 2d 479 (Miss. 1969).

The affidavit of a sheriff, the basis for the issuance of a warrant to search the premises of the defendant for unlawfully possessed intoxicating liquor, which stated that the affiant's belief that defendant unlawfully possessed intoxicating liquor in her home was based on "information given me by a person who on other occasions has given me information found to be true and correct" was insufficient to support the issuance of the warrant. Burnett v. State, 227 So. 2d 479 (Miss. 1969).

Where the affidavit for a search warrant fails to allege facts or circumstances from which the justice of the peace could judicially ascertain or determine probable cause, but sets forth nothing more than a mere conclusion, it does not meet the requirements of this amendment, and a search warrant issued upon such an affidavit is void. Walker v. State, 192 So. 2d 270 (Miss. 1966).

A search warrant, issued in case involving possession of intoxicating liquors upon the statutory affidavit that the affiant "has reason to believe and does believe," was not invalid as a violation of the Fourth Amendment to the Federal Constitution, since such amendment applies only to the exercise of Federal authority and has no application to state action. Armstrong v. State, 195 Miss. 300, 15 So. 2d 438 (1943).

24. — Probable cause, search warrant.

Substantial basis existed for a finding of probable cause to issue search warrants for defendant's person and vehicle because the oral testimony of the officer who requested the search warrants raised a fair probability that evidence of the crime would be found on defendant's person and in defendant's vehicle. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

After an appellate court reversed defendant's drug possession conviction by finding that the trial court should have granted defendant's suppression motion because the magistrate who issued the search warrant lacked a substantial basis for concluding that probable cause existed and because the probable cause determination was based upon false and/or omitted information, the state supreme court held that there there was no showing that the investigator intentionally misrepresented facts or made them in reckless disregard for the truth; the investigator described the confidential informant (CI) who provided information about defendant's activities as reliable in the past because he knew him to be a reliable CI used by the police department on occasion, and he was able to independently corroborate the CI's reliability when a controlled buy resulted in defendant selling cocaine to the CI. The investigator's omission of the fact that there was a controlled buy the day before did not constitute a reckless disregard for the truth, and the omission was adequately explained by the investigator, who testified that he was protecting the identity of the CI; as such, the warrant was supported by adequate probable cause. Roach v. State, 7 So. 3d 911 (Miss. 2009), writ of certiorari denied by 558 U.S. 949, 130 S. Ct. 399, 175 L. Ed. 2d 274, 2009 U.S. LEXIS 7474, 78 U.S.L.W. 3206 (2009).

Search warrant was supported by probable cause because an officer personally observed a drug transaction and subsequently took a statement that the buyer regularly purchased cocaine from the pool hall; that information supported the prior anonymous statements that defendant kept and sold cocaine at the pool hall. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

Although defendant's motion to suppress items found in his house should have been granted because the issuing justice had not been presented with a basis of reliability for the informer's statement on which the officers relied, the Miss. Code Ann. § 41-29-313(1)(a)(i) conviction was not reversed because the evidence that ended in defendant's conviction did not come from defendant's house but from the search of other property on which a clandestine methamphetamine lab was found and the search of that property was not dependent on the search warrant issued for defendant's house. Roebuck v. State, — So. 2d —, 2005 Miss. App. LEXIS 167 (Miss. Ct. App. Mar. 8, 2005), substituted opinion at, opinion withdrawn by 915 So. 2d 1132, 2005 Miss. App. LEXIS 1006 (Miss. Ct. App. 2005).

Search warrant affidavit was detailed, the confidential informant was an eyewitness to illegal acts and had a reliable track record, and the magistrate proceeded on more than mere suspicion in issuing the warrant; there was no merit to defendant's argument that under the given facts the warrant was fatally defective because of inadequate probable cause, and the trial court did not err in admitting the evidence obtained from the search of defendant's residence. Flake v. State, 948 So. 2d 493 (Miss. Ct. App. 2007).

Where an appellate court held that a motion to suppress should have been granted, it did not find fault due to the lack of the word "reliable" in the affidavit or underlying facts and circumstances but because nothing in the record suggested that the officers presented the justice with any basis for relying on the informer's statement. Roebuck v. State, — So. 2d —, 2005 Miss. App. LEXIS 167 (Miss. Ct. App. Mar. 8, 2005), substituted opinion at, opinion withdrawn by 915 So. 2d 1132, 2005 Miss. App. LEXIS 1006 (Miss. Ct. App. 2005).

In a drug case, there was sufficient probable cause for the issuance of a search warrant under the "totality of the circumstances" test where the evidence showed that police had received tips about a methamphetamine laboratory hidden behind a tarp underneath a trailer; the informant was well-known to police, and the information presented to the magistrate contained specific details. Kerns v. State, 923 So. 2d 210 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 923 So. 2d 196, 2005 Miss. LEXIS 799 (Miss. 2005).

Through Miss. Unif. Cir. & County Ct. Prac. R. 6.03, Mississippi has provided a procedure for a fair and reliable determination of probable cause by a judicial officer promptly after arrest. If the procedure of Rule 6.03 is followed, the U.S. Const. amend IV and Miss. Const. art. 3, § 23, rights of the accused are protected; however, the converse does not necessarily follow: failure to follow the exact procedure of Rule 6.03 does not necessarily result in a Fourth Amendment or Article 3 violation. Lawrence v. State, 869 So. 2d 353 (Miss. 2003), writ of certiorari denied by 540 U.S. 1164, 124 S. Ct. 1178, 157 L. Ed. 2d 1211, 2004 U.S. LEXIS 892, 72 U.S.L.W. 3487 (2004).

Probable cause for the issuance of a warrant to search the defendant's residence was established where (1) the magistrate was informed by the police that an undercover drug operation had occurred that day and that the defendant had been arrested for the sale of $220 worth of cocaine, (2) an informant had set up the buy by calling the defendant at his residence, and the police suspected the origin of the cocaine was indeed his residence, and (3) the residence had been under surveillance as a drug distribution center due to complaints of anonymous neighbors. Donerson v. State, 812 So. 2d 1081 (Miss. Ct. App. 2001).

Probable cause existed for the issuance of a search warrant where information from a reliable source that had proven to be reliable in the past stated that within the "last forty-eight hours numerous drug transactions are occurring" at the defendant's address. Buggs v. State, 738 So. 2d 1253 (Miss. Ct. App. 1999).

Probable cause existed for a warrant to issue for a search of the defendant's residence for illicit drugs since the officer who obtained the warrant did not rely solely on unsubstantiated hearsay relayed to him by another officer but, instead, questioned the other officer's informant, and then undertook to independently verify the accuracy of the informant's representations by having him make what appeared to be an actual purchase of drugs at the defendant's residence. Jones v. State, 724 So. 2d 1066 (Ct. App. 1998).

Probable cause supported the issuance of a search warrant for the defendant's home where (1) in the course of the investigation of the arson of a vacant home, officers discovered a trail leading through the woods from the burned home to the defendant's home and also discovered marijuana plants growing along the path, and (2) although the marijuana was on the property on which the burned home was located, that property was owned by an elderly woman, the burned home had been abandoned, and there was no evidence that the elderly woman frequented the trail. Jones v. State, 724 So. 2d 427 (Ct. App. 1998).

Probable cause did not exist for issuance of warrant to search defendant's motel room based on information that defendant was present, with others, when drugs were purchased by confidential source, that defendant was present when police officers executed other warrant which yielded 4 grams of cocaine, and that officers found on defendant's person large amount of money and motel room key. Petti v. State, 666 So. 2d 754 (Miss. 1995).

A warrant to search a murder suspect's trailer was supported by sufficient probable cause, in spite of his argument that no facts were provided to the judge to support an inference that evidence of the crime would be in the trailer, where the crime involved the theft of cash, clothing, guns and other items likely to be kept at a suspect's residence. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

Probable cause existed for the issuance of a search warrant for a defendant's residence, in spite of the defendants' argument that an informant's personal observation of marijuana at the residence 2 weeks earlier was stale and too remote, where 2 narcotics agents saw a sale of marijuana, which came from one of the defendants and from the house in question on the day of the search. Williams v. State, 583 So. 2d 620 (Miss. 1991).

In determining whether probable cause existed for a particular search or search warrant, judges must scrupulously examine the facts in each case, make a careful evaluation, and make a determination in their own best judgment. Probable cause is not what some officer thought, and not some conduct that was simply unusual or that simply roused the suspicion that illegal activity could be afoot, when there was at the same time just as likely a possibility that nothing at all illegal was transpiring. Rather, it must be information reasonably leading an officer to believe that, then and there, contraband or evidence material to a criminal investigation would be found. Rooks v. State, 529 So. 2d 546 (Miss. 1988).

Where available information shows only that a crime has been committed and that a particular person has committed it, there is probable cause only for the issuance of an arrest warrant. The mere fact that a person committed a crime does not necessarily mean that there is probable cause to search that person's dwelling for evidence of that crime. Carney v. State, 525 So. 2d 776 (Miss. 1988).

Affidavit and facts established substantial basis for judge's determination that probable cause to issue warrant existed where judge testified that after swearing in officers, he based his probable cause determination on written affidavit and officers and investigator testified that they were sworn in by judge and provided him with oral statements in addition to written affidavit. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Probable cause did exist to obtain search warrant for defendant's residence where officer who served as affiant for warrants testified that state had composite drawing of man who used victim's credit cards, number of truck license tag registered to defendant was listed on credit card purchase receipt, authorities had observed truck in defendant's yard whose tag number was used in purchase, and officer who identified defendant from composite prepared photographic lineup from which merchant identified defendant as man using victim's credit card to make purchases day following victim's murder. Lutes v. State, 517 So. 2d 541 (Miss. 1987).

Defendant was not entitled to have evidence suppressed where the affidavit for the warrant under which the search was conducted supplied the issuing magistrate with a substantial basis to conclude that there was a fair probability that contraband could be found in the vehicle to be searched. Harper v. State, 485 So. 2d 1064 (Miss. 1986).

Under the Fourth Amendment, a police dispatcher, working as a desk sergeant, was not sufficiently severed from the activities of law enforcement nor independent of the police and prosecution so as to be considered a neutral and detached magistrate; however, where the defendant was already the subject of a valid arrest warrant by Florida authorities on a completely separate charge, the invalidity of the arrest warrant was irrelevant. Lockett v. State, 459 So. 2d 246 (Miss. 1984).

Although officers who executed the affidavit for a search warrant had not been previously acquainted, either personally or officially, with defendant's neighbor who supplied the information as to marijuana plants growing on defendant's property, and had no previous experience as to his reliability based on former tips, or otherwise, inasmuch as the informant was an eyewitness to the growing of the marijuana, which he had observed simply by looking across the imaginary line separating his property from defendant's property, and inasmuch as his statements with respect to it were supported and borne out when he took several other plants to the police where it was identified by them as being marijuana, the information in the hands of the officers was ample, and was sufficiently set out in detail in the affidavit, to justify a finding of probable cause and the issuance of a warrant. Wolf v. State, 281 So. 2d 445 (Miss. 1973).

In determining whether probable cause existed for the issuance of a search warrant the standards imposed by the US Supreme Court must be applied by state courts. O'Bean v. State, 184 So. 2d 635 (Miss. 1966).

Under this amendment the officer who issues the search warrant must have before him the facts which justify a finding of probable cause, so that a search warrant issued upon reason to believe and belief would not be sufficient. Armstrong v. State, 195 Miss. 300, 15 So. 2d 438 (1943).

25. — Guilty plea in absence of search warrant.

Where the inmate claimed in a postconviction appeal that the inmate's arrest was illegal under U.S. Const. Amend. IV and Miss. Const. Art. III, § 23 for lack of a warrant or probable cause, the inmate waived the argument by entering a guilty plea. Battaya v. State, 861 So. 2d 364 (Miss. Ct. App. 2003).

26. —Totality of circumstances, search warrant.

Court rejected defendant's claim that he was subjected to an illegal search and seizure, and that the confidential informant was not sufficiently reliable to establish probable cause for a search warrant as required under the Fourth Amendment, because the test for probable cause in Mississippi is the totality of the circumstances and defendant admitted to the undercover officer that he had drug paraphernalia in his home, which was sufficient to give the officer probable cause to believe that defendant had and was committing a crime and to place him under arrest. Also, the informant's reliability was confirmed by a recording of the informant's telephone conversations with defendant. Passman v. State, 937 So. 2d 17

(Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 482 (Miss. 2006), writ of certiorari denied by 549 U.S. 1324, 127 S. Ct. 1914, 167 L. Ed. 2d 570, 2007 U.S. LEXIS 3842, 75 U.S.L.W. 3530 (2007).

Although defendant was not given an initial appearance until six days after his arrest, which violated Miss. Unif. Cir. & County Ct. Prac. R. 6.03, because defendant was not taken for his initial appearance within 48 hours of arrest, the failure to comply with Rule 6.03 did not violate defendant's U.S. Const. amend IV or Miss. Const. Art. 3, § 23, rights because a probable cause determination was made well within the required 48-hour period, when defendant was served with an arrest warrant on the day after his arrest. Lawrence v. State, 869 So. 2d 353 (Miss. 2003), writ of certiorari denied by 540 U.S. 1164, 124 S. Ct. 1178, 157 L. Ed. 2d 1211, 2004 U.S. LEXIS 892, 72 U.S.L.W. 3487 (2004).

Under totality of circumstances test, written affidavit supplemented by oral testimony of police officers can, as combined, establish substantial basis for magistrate's determination that probable cause existed for issuance of search warrant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

In making its review of whether search warrant was issued upon probable cause, reviewing court looks both to facts and circumstances set forth in affidavit for search warrant and as well, sworn oral testimony presented to issuing magistrate. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Totality of circumstances was sufficient to establish probable cause to issue search warrant for automobile and home, although underlying facts stated in affidavit for search warrant considered alone may not have been sufficient, where oral testimony was adduced before magistrate which, taken together with affidavit, sufficiently established that probable cause existed. Hickson v. State, 512 So. 2d 1 (Miss. 1987).

Under totality of circumstances test, affidavit in which affiant relates substance of interview with eyewitness who observed suspect shooting into occupied building, gave description which fit that of suspect and identified automobile in presence of affiant is sufficient to enable magistrate requested to issue warrant for search of suspect's home to make practical decision that there is fair probability that evidence of crime will be found at suspect's residence. Walker v. State, 473 So. 2d 435 (Miss. 1985).

Under totality of circumstances analysis, affiant may establish probable cause for issuance of search warrant on basis of information obtained by affiant from confidential informant where affidavit establishes that confidential informant has demonstrated both personal knowledge of location of evidence and declaration against informant's interest and where affiant swears that informant has given reliable information on activity being investigated in past. Breckenridge v. State, 472 So. 2d 373 (Miss. 1985).

Under totality of circumstances test, there is probable cause for arrest of burglary suspect where arresting officer knows that burglary has been committed about one hour earlier, it is late at night and suspect is approximately 100 to 250 yards from burglary scene, suspect is wet and covered with seed particles, and explanation of drunkenness offered by suspect is inconsistent with that of person who has been recently drinking heavily. Riddles v. State, 471 So. 2d 1234 (Miss. 1985).

27. — Curtilage, search warrant.

The wooded area behind a trailer was not part of the curtilage of the trailer and, therefore, the defendant had no standing to contest the search of the area where (1) in order to reach the area, it was necessary to walk down a sloping path, travel through a drainage ditch, and then enter the woods, (2) there was no evidence that the wooded area was within an enclosure, (3) the area behind the trailer resembled a garbage dump, and (4) there was no testimony at the suppression hearing concerning any steps made to protect the woods behind the trailer. Jordan v. State, 728 So. 2d 1088 (Miss. 1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

A storm shed was within the "curtilage" of a residence and, therefore, within the scope of a search warrant which permitted a search of the residence where the shed was approximately 150 to 175 feet from the house, the shed was the type of building used in connection with a residence, there were only a few trees separating the house and shed, and, most importantly, the house and shed were on the same side of the fence and not separated by it. Arnett v. State, 532 So. 2d 1003 (Miss. 1988).

28. — Sufficiency of search warrant.

Defendant's convictions for capital murder during the commission of a robbery were proper because the search warrant for the farm was based on probable cause, was sufficiently particular regarding the place to be searched, and was properly executed. At trial, through use of testimony and exhibits, the farm was described as a cluster of buildings, situated fairly close together, consisting of a metal shed, a wooden shed, an abandoned farmhouse, and an outhouse (or old chicken house); a search of any or all of these buildings was within the scope of the warrant, which authorized search of "a farm house" and "any out buildings normally associated with this residence." Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011), remanded by 2014 Miss. LEXIS 287 (Miss. June 12, 2014).

Though the search warrant was not accompanied by the "underlying facts and circumstances" sheet, which was to contain facts supporting issuance of same, that fact alone did not render the search warrant fatally flawed where the officer's sworn testimony was that the eyewitness (an arrested person), had given detailed information regarding the location of the residence where the drugs were being manufactured and had also stated that he had bought and supplied defendants with precursor elements; said information was furnished by an eyewitness as opposed to an informant, a credibility determination was not required, and there was probable cause to support issuance of the search warrant. Pittman v. State, 904 So. 2d 1185 (Miss. Ct. App. 2004).

Where the defendant was suspected of operating a "chop shop" where stolen vehicles were brought in and either disassembled to be sold for their constituent parts or disguised so that they would not be readily identifiable, a search warrant was not overboard where it permitted the search and seizure of documents relating to the defendant's vehicle repair and rebuilding activities conducted on his premises. Logan v. State, 773 So. 2d 338 (Miss. 2000).

In a prosecution for defrauding the Mississippi Department of Public Safety and the Mississippi Tax Commission and uttering forgery arising from the defendant's operation of a business rebuilding salvaged trucks, the Court rejected the defendant's argument that the scope of a warrant to search his shop was too broad to meet constitutional strictures where the warrant permitted the search and seizure of documents relating to the vehicle repair and rebuilding activities conducted on the defendant's premises; it was not necessary for the officers to know, in advance, what records, invoices, or other documents the defendant would actually have on the premises in order to obtain a warrant to search for such evidence so long as they had a reasonable basis to conclude that some such documentary evidence might be discovered on the premises, and the officers' inability to describe with more certainty the documents that would be sought was not fatal to the warrant. Logan v. State, 2000 Miss. LEXIS 128 (Miss. May 25, 2000), opinion withdrawn by, substituted opinion at 773 So. 2d 338, 2000 Miss. LEXIS 267 (Miss. 2000).

The terms "controlled substances," "paraphernalia," and "guns" were sufficiently definitive to indicate which items should have been included in a search. Bryant v. State, 746 So. 2d 853 (Miss. Ct. App. 1998).

The search of a one-story building, pursuant to an affidavit and search warrant for a two-story dwelling, did not violate the defendant's constitutional rights where the officer who made the affidavit for the search warrant had driven by the defendant's property in a rural area and thought that there was only one building—the two-story building—on the property, the defendant owned all the property but resided in the one-story building, the officers went to the unoccupied two-story building when they arrived on the property but received no answer, the defendant came to the front door of the one-story building and the officers went there and served him with the warrant, and the officers searched the one-story building and found marijuana in that building. The affidavit and search warrant sufficiently directed the officers to the defendant's premises where they found him in his residence, executed the warrant and discovered marijuana, and therefore the trial court was not in error when it denied the defendant's motion to suppress the evidence found in the search. Hamilton v. State, 556 So. 2d 685 (Miss. 1990), cert. denied, 497 U.S. 1024, 110 S. Ct. 3271, 111 L. Ed. 2d 781 (1990).

29. Execution of warrant.

A gun retrieved from the defendant's vehicle was not subject to suppression although obtained in a search that exceeded the bounds of a search warrant where (1) as officers neared the premises to be searched, they spotted the defendant driving away in his own vehicle, (2) these officers informed the defendant that a search of his residence was imminent, and, (3) to facilitate his return to his residence, one officer accompanied the defendant in his vehicle, and (4) prior to the officer entering the defendant's vehicle, the officers inquired whether there was anything in the vehicle they needed to know about and the defendant informed them that there was a firearm in the glove box; the weapon in the vehicle was discovered as a result of constitutionally permissible efforts by the investigating officers to protect their physical safety while temporarily detaining the defendant in the course of carrying out a search of his residence. Dees v. State, 758 So. 2d 492 (Miss. Ct. App. 2000).

A "no-knock" warrant was both justified and reasonable where (1) the defendant was living in a virtual fortress, (2) any announcement made by the officers would only have given him more time to destroy evidence, and (3) the defendant was a convicted felon and a previous search of the residence had produced firearms. White v. State, 746 So. 2d 953 (Miss. Ct. App. 1999).

30. —Return, search warrant.

In a drug case, a trial court did not err in admitting items into evidence that were not on an original search warrant inventory, but were included on the return, because any error resulting from the ministerial act of the return did not invalidate the properly issued search warrant. Kerns v. State, 923 So. 2d 210 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 923 So. 2d 196, 2005 Miss. LEXIS 799 (Miss. 2005).

Return on gun warrant clearly indicating warrant was served coupled with officers' testimony refuted testimony that marijuana warrant instead of gun warrant was served prior to its execution. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

31. Scope of search with warrant.

A police officer can, via a search warrant, compel a person to submit to a gunpowder residue test and, because the chemicals sought to be found on a person's hand can easily and quickly be destroyed, an officer is within his rights to swab a person's hand even over his objections. Hubbert v. State, 759 So. 2d 504 (Miss. Ct. App. 2000).

A search conducted at 11:30 p.m. exceeded the officer's authority under the search warrant where the warrant authorized searches only "in the daytime"; thus, the fruits of the search were inadmissible at trial. Strange v. State, 530 So. 2d 1336 (Miss. 1988).

Search warrant providing that searching officers were to search for guns used in murder authorized officers to take reasonable actions such as looking behind wall plaque and credit cards found there were therefore lawfully seized. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

In his trial for murder of a police officer, defendant's contention that the homicide was justifiable because he was resisting an unlawful arrest and reasonably believed himself to be in imminent danger of great bodily harm was not supported by the evidence, where the law officers had sufficient grounds to believe that fugitives for whom they had arrest warrants were located in the house in which defendant was staying and fired gas into the house only after a reasonable time had elapsed following the announcements requesting the occupants to vacate the house; failure of the occupants to exit as requested demonstrated their refusal to cooperate with the arresting officers who had identified themselves and stated their purpose, and the officers were warranted in using reasonable force and means to execute the arrest warrants. Norman v. State, 302 So. 2d 254 (Miss. 1974), cert. denied, 421 U.S. 966, 95 S. Ct. 1956, 44 L. Ed. 2d 453 (1975).

Where police officer who obtained a search warrant allowing a search of defendant's apartment, saw defendant and 2 other people driving away in defendant's car from the house, and police officer stopped the defendant to serve the warrant and ordered the occupants out of the car, and during a "patdown" of defendant, the police officer found 3 boxes containing marijuana and upon later search of automobile found 3 additional boxes of marijuana, the search of defendant was an illegal search and the contraband obtained as a result of the illegal search was inadmissible in evidence. Keys v. State, 283 So. 2d 919 (Miss. 1973).

Search of defendant's parked automobile and seizure of quantity of whisky found therein were unlawful where such search and seizure took place after officers, armed with warrant to search defendant's premises for stolen money and other chattels, failed to find anything, there being no evidence or information that the automobile was used for the transportation of liquor; and order of sale of such automobile pursuant to Code 1942 § 2618 constituted reversible error. Brooks v. Wynn, 209 Miss. 156, 46 So. 2d 97 (1950).

32. Search without warrant — In general.

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove, when an informant told officers the subject of outstanding arrest warrants would be driving a similar vehicle, because the good-faith exception to the exclusionary rule did not apply as (1) an officer said the officer did not know the identity of the subject of the arrest warrants, so the officer could not reasonably execute the warrants without verifying the suspect's identity, and (2) the officer's misinterpretation of constitutional mandates, contradictions between the officer's arrest report and testimony, and the officer's failure to resolve the suspect's identity made the exception inapplicable. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

Investigatory stop of defendant was not violative of defendant's constitutional rights under the Fourth Amendment where a telephone call to the police officer gave the State a reasonable suspicion that justified the police in driving to defendant's location; furthermore, the plea agreement was an independent justification for the State to detain and/or search defendant. Sweet v. State, 910 So. 2d 735 (Miss. Ct. App. 2005).

Court properly denied a motion to suppress where an officer testified that the bulge in defendant's shorts was unusually large and given his erratic behavior, defensive posturing, and possession of a pocket knife, the officer believed that the bulge could be a weapon; therefore, at the time the officer proceeded to pat the bulge, the officer had not extended the search of defendant beyond what was necessary to determine whether he was armed and dangerous. In addition, the officer stated that when he touched the bulge, he could feel stems and seeds through the fabric of defendant's shorts that he thought was marijuana, and it was immediately apparent to the officer that the bulge was marijuana. Tate v. State, 946 So. 2d 376 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 66 (Miss. 2007).

In a case of possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance, after a drug store clerk informed the police that two suspects had purchased large amounts of ephedrine/pseudoephedrine contained in over-the-counter cold medications and described their car, a be-on-the-lookout announcement was made and the officer's investigatory stop of the driver's car, in which defendant was a passenger, was entirely proper and the driver's consent to search of the car relieved the officer of any need for a search warrant; thus, the admission of the evidence of the pills found was proper and did not violate defendant's federal or state constitutional rights under U.S. Const. Amend. IV and Miss. Const. Art. 3, § 23. Burchfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 660 (Miss. Ct. App. July 22, 2003), opinion withdrawn by, substituted opinion at 892 So. 2d 248, 2004 Miss. App. LEXIS 538 (Miss. Ct. App. 2004).

Where defendant was arrested for speeding and reckless driving, defendant was subject to a pat-down search at the time of the arrest, and also to a warrantless search at the place of detention, where cocaine was discovered in defendant's shoe, as exceptions to the warrant requirement. Jackson v. State, 856 So. 2d 412 (Miss. Ct. App. 2003).

Mississippi Supreme Court adopts the U.S. Supreme Court's Leon good faith exception to warrantless searches. White v. State, 842 So. 2d 565 (Miss. 2003).

Though a "telephonic search warrant" was not recognized in Mississippi, under the Leon good faith exception to warrantless searches, police officers' good faith belief that a telephonic warrant was valid justified admission of drugs found in a search of a defendant's apartment. White v. State, 842 So. 2d 565 (Miss. 2003).

Officers had probable cause to believe that defendant was dealing marijuana, they were attempting to prevent the destruction of evidence instead of effectuating arrest and seizure, and they reasonably believed in good faith they had a valid telephonic search warrant and were acting reasonably in the midst of exigent circumstances; thus, the trial court, even in the absence of a state statute allowing telephonic search warrants, properly upheld the search as a reasonable warrantless search. White v. State, — So. 2d —, 2002 Miss. LEXIS 311 (Miss. Oct. 24, 2002), opinion withdrawn by, substituted opinion at 2003 Miss. LEXIS 208 (Miss. Apr. 10, 2003).

The warrantless search of a student's pickup truck by school officials was not improper since there was reasonable suspicion to believe that the student had been in the parking lot drinking before class where a student reported the incident, several other students confirmed the report, and empty beer cans were found in the back of the student's truck. Covington County v. G.W., 767 So. 2d 187 (Miss. 2000).

The inventory search of the defendant's car after his arrest for violation of a city's open container law was proper where (1) the defendant was found urinating next to a car with its headlights on outside an abandoned building, (2) the officers determined that the defendant was intoxicated and saw two containers of beer in the car, one of which was open, and (3) such a search was standard policy for the police department in order to decrease liability for items that could be stolen from an unattended automobile. Bolden v. State, 767 So. 2d 315 (Miss. Ct. App. 2000).

The testimony of the sheriff indicated that there was no valid consent on the part of the defendants since he did not advise them of their right to refuse consent, he never advised them of their Miranda rights, and he did not obtain a signed, written consent to search until the day after the search. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), reversed by 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

A search pursuant to the defendant's consent was proper, notwithstanding the defendant's assertion that his arrest was without probable cause, where, prior to his arrest, the defendant stated that he did not care if a search was conducted; the subsequent arrest of the defendant, even if invalid, did not end the effectiveness of the consent. Carroll v. State, 755 So. 2d 483 (Miss. Ct. App. 1999).

The search of the defendant's room in a shared mobile home could not be justified on the basis of any of the exceptions to the warrant requirement where the officers who conducted the search attempted to justify the search by the existence of a search warrant issued for the express purpose of searching for contraband possessed by the defendant's roommate in his residence. Graves v. State, 708 So. 2d 858 (Miss. 1997).

Warrantless arrest of persons in motel room registered to person who matches description of person involved in theft of stolen vehicle parked outside room is reasonable, as is seizure of evidence found in plain view within room. Hanner v. State, 465 So. 2d 306 (Miss. 1985).

Where marijuana plants that were seized were not actually situated upon defendant's property, but instead were removed from neighboring land, the defendant was not in a position to complain of any irregularity or defect, if any, in the search warrant since the fruit of the search came from a search of property other than his own. Freeland v. State, 285 So. 2d 895 (Miss. 1973).

Law enforcement officers have no authority to search the person of an individual because they may suspect that he is violating the law, or because they are desirous of physically searching the person of an individual to see if he has in his possession contraband so that he may be arrested and prosecuted. Keys v. State, 283 So. 2d 919 (Miss. 1973).

Where the defendant, a guest at a dance at which police officers were chaperones, requested the officers to help him find his coat and authorized them to examine any coat they might find to determine whether or not it belonged to the defendant, marijuana found in the defendant's coat when the officers searched the pockets for identifying marks or items, was not wrongfully admitted into evidence, since the officers had not been conducting a search for the purpose of discovering evidence to be used in a prosecution, but had been merely trying to help the defendant. Amos v. State, 234 So. 2d 630 (Miss. 1970), cert. denied, 401 U.S. 942, 91 S. Ct. 945, 28 L. Ed. 2d 222 (1971).

Sheriff had no right to search trunk on premises, while investigating murder without a search warrant. Page v. State, 208 Miss. 347, 44 So. 2d 459 (1950).

33. — Consent, search without warrant.

Trial court did not commit reversible error in admitting beer cans found in defendant's car into evidence because even though the beer cans were found in the course of a warrantless search of the car, there was no Fourth Amendment violation, as the car was parked on defendant's brother's premises and defendant's brother, as the renter of the premises, had sufficient authority to consent to a search of the premises; because defendant's brother did consent to a search of his premises, the evidence collected pursuant to that consent was constitutionally acquired. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Trial court did not err in denying defendant's motion to exclude evidence taken from a car that he was driving; because defendant's wife was the titled owner of the automobile, the police were reasonable in their belief that she possessed common authority, joint control, and mutual use over the car so as to give her the authority to consent to a search. Peters v. State, 920 So. 2d 1050 (Miss. Ct. App. 2006).

Defendant's convictions for manufacture of a controlled substance and possession of a controlled substance were both proper where he validly consented to a search of his residence and premises; there was ample testimony from law enforcement officers to show that defendant had consented to the search and there was no evidence of threats or coercion by the officers in obtaining defendant's consent to search. Clair v. State, 845 So. 2d 733 (Miss. Ct. App. 2003).

The fact that the defendant's wife was not affirmatively informed by police officers of her right to decline to consent to the inspection of the defendant's premises did not render her consent involuntary where, after she was requested to consent to an inspection of the premise, she declined to do so unless the officers agreed to remove a substantial number of the police cars parked at her residence, since the very act of attaching conditions to the consent to search and demanding compliance with the conditions before the search began was a strong indicator that she understood that she was not obligated to permit the officers to inspect the premises. Logan v. State, 2000 Miss. LEXIS 128 (Miss. May 25, 2000), opinion withdrawn by, substituted opinion at 773 So. 2d 338, 2000 Miss. LEXIS 267 (Miss. 2000).

The search and seizure of the defendant's mobile home and the neighboring vacant house containing marijuana were valid since the defendant signed a consent to search form that contained a clause informing her of the right to refuse, and the defendant's knowledge of the location of the marijuana and acceptance of responsibility for it demonstrated the voluntariness of the consent. Gilbreath v. State, 783 So. 2d 720 (Miss. Ct. App. 2000).

Consent is unnecessary when seizure follows search based on probable cause. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

A defendant did not have standing to object to a search of his sister's residence and subsequent seizure of cocaine where the defendant resided elsewhere, did not possess a key to the house, did not have permission to "have the run of the place," and, aside from the familial relationship, was "little more than a babysitter." Hopson v. State, 625 So. 2d 395 (Miss. 1993).

A trial court did not err in overruling a capital murder defendant's motion to exclude certain physical evidence seized from his automobile, even though the search was conducted pursuant to consent given by the defendant's wife who may not have had mutual use of the car, since the police were reasonable in their belief that the wife had common authority, mutual use, and joint control over the car where the wife held title to the car, she told the police she owned the car and provided them with keys, and she never indicated that the car had been in the defendant's sole possession. Mettetal v. State, 615 So. 2d 600 (Miss. 1993).

A defendant did not have standing to object to the search of his friend's apartment, in which he was an occasional overnight guest, where he had no key to the apartment, exercised no control over it, and was there on occasion only by the friend's permission. Thus, stolen items which were found during a search of the apartment were admissible in the defendant's burglary trial. White v. State, 571 So. 2d 956 (Miss. 1990).

A search pursuant to a defendant's consent was constitutionally valid, even though the defendant, who was deaf, was not afforded an interpreter in accordance with § 13-1-303(3), where the testimony of the law enforcement officers clearly indicated that the defendant understood what he was doing when he agreed to the search, the defendant was asked questions to which he gave appropriate responses, he was specifically told that he did not have to consent to the search, both the request for and the granting of the consent were done in writing, and the defendant used communicative and cognitive faculties other than hearing when he consented to the search. Shook v. State, 552 So. 2d 841 (Miss. 1989).

A defendant's mother had the right to consent to a search of her son's bedroom where the mother paid the rent on the home and had access to the defendant's room. Stokes v. State, 548 So. 2d 118 (Miss. 1989), cert. denied, 493 U.S. 1029, 110 S. Ct. 742, 107 L. Ed. 2d 759 (1990), dismissal of habeas corpus aff'd, 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

A trial court did not err in admitting into evidence a powdery substance, which was later identified as a by-product resulting from the manufacture of methamphetamine, found on the property near a trailer, where the owner of the trailer gave a valid consent to search the trailer, the police were validly on the property on which the trailer was located, and the powdery substance was visible from the trailer itself, thus falling under the plain view doctrine. Waldrop v. State, 544 So. 2d 834 (Miss. 1989).

Even if the defendant was the owner of land on which a trailer was located, police officers did not illegally trespass on his land in order to search the trailer, where the owner of the trailer consented to the search since police officers are allowed the right of ingress and egress onto private property. Waldrop v. State, 544 So. 2d 834 (Miss. 1989).

A defendant did not have standing to object to the search of a trailer where the true owner of the trailer consented to the search and, when the defendant was arrested, he denied ownership of the trailer. Waldrop v. State, 544 So. 2d 834 (Miss. 1989).

A second search of a defendant's truck for blue fountain pens, after the investigator had previously conducted a valid consent search, had seen the pens in the truck, and had subsequently learned that there was a similar pen at the crime scene, was reasonable even though, after the first consent search, the defendant had been allowed to take the truck and continue his daily work activities. Woodward v. State, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

Warrantless search of robbery suspect's apartment is reasonable where consent to search is given by suspect's girlfriend who has dominion and control over apartment, and who rents apartment in her name and pays all bills, particularly where at time consent is obtained, investigating officers are unaware that suspect is person living in apartment. Hudson v. State, 475 So. 2d 156 (Miss. 1985).

The warrantless seizure of jewelry from a son's room by police pursuant to his father's consent to enter did not violate the son's Fourth Amendment rights since the son did not have exclusive dominion and control over his room and since the father was authorized to enter it and to permit anyone else to so enter. Wilcher v. State, 455 So. 2d 727 (Miss. 1984), cert. denied, 470 U.S. 1034, 105 S. Ct. 1411, 84 L. Ed. 2d 794 (1985), denial of habeas corpus aff'd in part, rev'd in part, 978 F.2d 872 (5th Cir. 1992), reh'g denied, 981 F.2d 1254 (5th Cir. 1992), cert. denied, 510 U.S. 829, 114 S. Ct. 96, 126 L. Ed. 2d 63 (1993), vacated in part, 635 So. 2d 789 (Miss. 1993).

Warrantless search of the backyard of the house occupied by the defendant, his brother, his parents, and other family members was not unreasonable where consent to search was given by the defendant's brother in the presence of their mother, who was, with their father, joint owner of the property. Loper v. State, 330 So. 2d 265 (Miss. 1976).

One cannot object to the introduction into evidence against him of articles seized by a search made without a warrant, to which he consented. Pinnix v. Jones, 127 Miss. 764, 90 So. 481 (1922).

34. — Emergency situations, search without warrant.

The initial entry into the house by police officers was justified under the emergency circumstances exception to the warrant requirement where the officers had been informed that the victim was burned and lying on the bathroom floor of the house. Taylor v. State, 733 So. 2d 251 (Miss. 1999).

An emergency situation is a valid exception to the warrant requirement; the elements for the application of this exception are: (1) reasonable grounds to believe there is an emergency situation and there is an immediate need for their assistance in order to protect life and property; (2) the primary motivation for the search must not be an intent to arrest and seize the evidence; and (3) some reasonable basis, approximating probable cause, must associate the emergency with the area or place searched. Taylor v. State, 733 So. 2d 251 (Miss. 1999).

A second and third walk-through of a house were continuations of the original entry, which was justified based on information that the victim was burned and lying on the bathroom floor of the house, and, therefore, the seizure of evidence during those walk-throughs was proper where all of the evidence seized was in plain view during the first walk-through and would have seized then had not the officers been focused on their goal of locating the victim and attempting to assist her. Taylor v. State, 733 So. 2d 251 (Miss. 1999).

35. — Plain view, search without warrant.

Search was lawful under the plain view exception to the warrant requirement because the officer had the legal authority to stop defendant for running a stop sign and to approach the vehicle. In addition, the incriminating character of the black duffel bag and other items was readily apparent, as the officer was aware that those types of items were used in the recent restaurant armed robbery, and they were in plain view. Johnson v. State, 999 So. 2d 360 (Miss. 2008).

There was sufficient probable cause to search defendant's vehicle after an accident and to seize beer in the vehicle because the smell of beer on defendant's breath, coupled with his impaired coordination and his statement that he had consumed a good bit of alcohol earlier in the day, constituted probable cause to seize beer in plain view. Comby v. State, 901 So. 2d 1282 (Miss. Ct. App. 2004), writ of certiorari denied by 901 So. 2d 1273, 2005 Miss. LEXIS 313 (Miss. 2005).

Though crack cocaine was often carried in plastic bags, and defendant's having a plastic bag inside his pants was unusual, neither consideration creates probable cause to believe that there was cocaine in defendant's pants. It took a look after pulling open defendant's pants before probable cause existed. Thus, the bag and its contents were not in plain view and the searching of defendant's pants was not justified. Anderson v. State, 864 So. 2d 948 (Miss. Ct. App. 2003).

Photographing a defendant's injured hand, which was within the plain view of police officers and was incident to a lawful arrest, was not an improper search, as defendant had no more of a reasonable expectation of privacy with respect to his hand than he would have had with his handwriting. Jones v. State, 841 So. 2d 115 (Miss. 2003).

Where an officer enters a residence under an emergency situation he may seize any evidence in plain view during the course of emergency activities. Taylor v. State, 733 So. 2d 251 (Miss. 1999).

The plain view doctrine does not parley a limited search warrant into a general search warrant. Godbold v. State, 731 So. 2d 1184 (Miss. 1999).

Both the automobile and plain view exceptions permitted agents to search the defendant's vehicle without first obtaining a warrant where they had probable cause to stop and search the vehicle on the basis of information received from a confidential informant and where an agent looked through a window and saw a bag in the rear of the vehicle which appeared to contain several large bricks of marijuana. Harper v. State, 722 So. 2d 1267 (Ct. App. 1998).

In a prosecution for possession of crack cocaine, the search of an automobile was not valid under the plain view exception to the search warrant requirement where the police officer entered the car to retrieve the keys, he saw an ordinary matchbox on the passenger seat and opened it to find only matches, and he then noticed another matchbox between the 2 front seats and opened it to find that it contained 9 rocks of crack cocaine; no incriminating evidence was visible at the time the officer entered the car, since the mere presence of a matchbox on the front seat of a car ordinarily cannot be termed an incriminating object in plain view. Ferrell v. State, 649 So. 2d 831 (Miss. 1995).

No constitutional rights were implicated in an officer's seizure of illegal drugs where the drugs were found on the front porch ledge of an abandoned apartment in which the defendant had no propriety or possessory interest. The officer had probable cause to arrest and search the defendant where the officer had observed suspicious behavior by the defendant and had seized drugs which he had seen the defendant handling. Young v. State, 562 So. 2d 90 (Miss. 1990).

Where entry upon premises is lawful, contraband open to observation thereon may be seized. Williams v. State, 216 Miss. 158, 61 So. 2d 793 (1953).

36. —Informant, search without warrant.

A confidential informant's tip to a sheriff's deputy provided probable cause to justify a stop, and therefore a subsequent search and seizure of the suspect's property did not violate his constitutional rights, where the officer knew the informant, information supplied by the informant had been successfully used by the officer in the past, and the informant accurately told the officer that the suspect would be traveling in a certain direction on a certain road which demonstrated a special familiarity with the suspect's affairs. Neely v. State ex rel. Tate County, 628 So. 2d 1376 (Miss. 1993).

37. —Open fields doctrine, search without warrant.

Open fields doctrine permits police officer to enter and search marijuana fields without warrant, even where fields are secluded and contain no-trespassing signs. Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), on remand, 485 A.2d 952.

38. —Fruit of poisonous tree, search without warrant.

Court erred in denying defendant's motion to suppress evidence of steroids found in a search of his vehicle during a traffic stop because driving in the left-hand lane of a four-lane highway did not violate state law. Because the stop was not proper, the court erred in not suppressing all contraband that stemmed from the stop. Couldery v. State, 890 So. 2d 959 (Miss. Ct. App. 2004).

Marijuana seized from a bundle of clothes which the defendant was carrying from her motel room constituted "fruit of the poisonous tree" and was therefore inadmissible, where an unlawful warrantless search of the motel room lead officers to set up a surveillance, during which the defendant exited the motel room with bundles of clothing from which the marijuana was seized. Marshall v. State, 584 So. 2d 437 (Miss. 1991).

In a prosecution for murder arising out of the deaths of two people during a fire in a house owned by the defendant's brother-in-law, the conviction would be reversed and the case remanded for a new trial where the trial court erred in admitting into evidence a written inculpatory statement made by the defendant after he had been arrested by the police where there was no evidence to establish probable cause for the arrest and where no event or combination of events transpired to sever the connection or stream of closely related events between his illegal detention and the written statement which was given two hours after an oral statement which had been ruled inadmissible by the trial court. Dycus v. State, 396 So. 2d 23 (Miss. 1981).

39. — Inevitable discovery, search without warrant.

The discovery of a pill bottle containing crack cocaine did not fall within the inevitable discovery doctrine where (1) an officer stopped to investigate two males in the vicinity of a pick-up truck improperly stopped in a lane of traffic in a public road, (2) the officer arrested the driver of the truck for a violation of the open container law and then discovered a handgun, the handle of which was in plain view, during a search of the truck, (3) the defendant passenger was then placed in handcuffs, and (4) the pill bottle was discovered during a second search of the truck; the inevitable discovery doctrine had no application as there was no valid underlying reason for the officer to return to the truck after the driver and passenger had been secured. White v. State, 735 So. 2d 221 (Miss. 1999).

40. —Motor vehicles, search without warrant.

Defendant's vehicle was stopped lawfully and an officer had probable cause to conduct a walk-around inspection of the vehicle because police were "looking for a vehicle as a murder weapon," witnesses identified the victim as being with defendant, police arrested defendant on an outstanding warrant, and an officer noticed something hanging from the vehicle that was later determined to be the victim's skin. Galloway v. State, 122 So. 3d 614 (Miss. 2013), writ of certiorari denied by

189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685, 82 U.S.L.W. 3685 (U.S. 2014).

Traffic stop was reasonable where an officer determined via his radar that defendant's speed was 69 miles per hour in a 55 mile per hour zone, and testified that he estimated the speed by following defendant; even if the officer was operating his radar incorrectly, his testimony established a reasonable belief that speeding, a traffic violation, had occurred. Freeman v. State, 121 So. 3d 888 (Miss. 2013).

Defendant's convictions for possession of cocaine with the intent to distribute and possession of cocaine were appropriate because, notwithstanding that defendant consented to the search of his vehicle, the use of narcotics-detection dogs during a stop based on probable cause was not in violation of the Fourth Amendment. Jaramillo v. State, 950 So. 2d 1104 (Miss. Ct. App. 2007).

Search of a vehicle was a valid inventory search where defendant was legally arrested, there was no one available to remove defendant's vehicle from the roadside, and under such circumstances, the standard procedure was to call a wrecker to impound the vehicle and conduct an inventory search. Garrison v. State, 918 So. 2d 846 (Miss. Ct. App. 2005).

During a traffic stop, defendant was arrested for driving without a license, no taillights, and possession of beer by a minor; his car was searched by police. The circuit court correctly admitted evidence of marijuana found in the vehicle, because the search fit squarely into the automobile exception. Jim v. State, 911 So. 2d 658 (Miss. Ct. App. 2005).

Search of defendant's vehicle fell squarely within the Fourth Amendment's automobile exception. The facts, including finding defendant in the same type of vehicle as had just been observed in conjunction with a burglary, justified issuance of a warrant to search the vehicle, the car was readily mobile, and probable cause existed to believe it contained contraband. Roche v. State, 913 So. 2d 306 (Miss. 2005).

Officer made a valid traffic stop, smelled alcohol on defendant's breath, and saw an open container of alcohol in his truck in plain view; he properly seized this evidence without a warrant, and as he had probable cause to search the truck for alcohol, the cocaine he found in the process of conducting that legitimate search was properly seized. McKee v. State, 878 So. 2d 232 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 961 (Miss. 2004).

Roadblock set up by city police department was not conducted in violation of defendant's rights arising under Miss. Const. Art. 3, § 23; in view of the striking similarities between the Fourth Amendment and Miss. Const. Art. 3, § 23, and the lack of a history of differentiation between the two by the Mississippi Supreme Court, there was no tenable basis to accept defendant's contention that the roadblock was unconstitutional. Sasser v. City of Richland, 850 So. 2d 206 (Miss. Ct. App. 2003).

In a case of possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance, after a drug store clerk informed the police that two suspects had purchased large amounts of ephedrine/pseudoephedrine contained in over-the-counter cold medications and described their car, a be-on-the-lookout announcement was made and the officer's investigatory stop of the driver's car, in which defendant was a passenger, was entirely proper and the driver's consent to search of the car relieved the officer of any need for a search warrant; thus, the admission of the evidence of the pills found was proper and did not violate defendant's federal or state constitutional rights under U.S. Const. Amend. IV and Miss. Const. Art. 3, § 23. Burchfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 660 (Miss. Ct. App. July 22, 2003), opinion withdrawn by, substituted opinion at 892 So. 2d 248, 2004 Miss. App. LEXIS 538 (Miss. Ct. App. 2004).

The random selection of certain trucks for a walk-around inspection once they have already been stopped for weighing is constitutional. Edwards v. State, 795 So. 2d 554 (Miss. Ct. App. 2001).

A police officer's practice of conducting a search whenever a driver leaves his or her vehicle during a routine traffic stop was in direct conflict with the constitutional requirement that automobile searches be conducted only when there are particular objective factors warranting the intrusion. United States v. Hunt, 253 F.3d 227 (5th Cir. 2001).

Neither the initial stop of the defendant's vehicle nor the scope of the search of the vehicle was improper where (1) two separate officers testified that the defendant was driving in excess of the posted speed limit and that they had observed him swerve off the side of the road, and (2) the officers conducted an inventory search of the vehicle after arresting the defendant on an outstanding warrant and impounding the vehicle because there was no one readily available to remove the vehicle from the roadside. Ray v. State, 798 So. 2d 579 (Miss. Ct. App. 2001).

The Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. Atwater v. City of Lago Vista, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001).

The prohibition of random stops of motorists does not apply to roadside truck weigh-stations and inspection checkpoints and, therefore, it was not improper for police officers to pull the defendant's truck over at a weigh-station and ask him to come into the scale-operating office. Edwards v. State, — So. 2d —, 2001 Miss. App. LEXIS 72 (Miss. Ct. App. Feb. 20, 2001), substituted opinion at 795 So. 2d 554, 2001 Miss. App. LEXIS 241 (Miss. Ct. App. 2001).

The trial court did not err in not suppressing evidence seized from the defendant's car without a warrant pursuant to the automobile exception where (1) the defendant arrived at a hospital emergency room with a coperpetrator, who had been shot, removed the coperpetrator from his car and attempted to leave, (2) the defendant's car, however, stalled and an officer detained the defendant and transported him to the emergency room, (3) the officer returned to the defendant's vehicle where he noticed that the trunk was partially open and in which he saw bloody money, (4) the officer then looked into the passenger compartment and observed the handle of a firearm protruding from under the driver's seat, and (5) the officer then, without first obtaining a warrant, removed the gun from the car. Moore v. State, — So. 2d —, 2000 Miss. LEXIS 264 (Miss. Dec. 21, 2000), opinion withdrawn by, substituted opinion at 787 So. 2d 1282, 2001 Miss. LEXIS 164 (Miss. 2001).

After a traffic stop, a search of the trunk of the automobile driven by the defendant was proper, notwithstanding that the defendant refused to consent to such a search, where a police dog alerted to the trunk. Millsap v. State, 767 So. 2d 286 (Miss. Ct. App. 2000), cert. denied, 888 So. 2d 1177 (Miss. 2004).

A warrantless search of a vehicle driven by the defendant was reasonable where (1) the defendant was stopped for following a vehicle too closely and changing lanes without signaling, (2) the rental agreement for the vehicle showed that the defendant was not an authorized driver and that the vehicle was overdue for return, and (3) there was a strong, overpowering odor of unburned marijuana. Blissett v. State, 754 So. 2d 1242 (Miss. 2000).

Police officer who stopped the defendant lacked probable cause or even reasonable suspicion to do so; therefore, the trial court erred in denying the defendant's motion to suppress all evidence found inside his vehicle where the officer testified that he knew that the defendant's driver's license had been suspended, but it was not clear how fresh such information was. Boyd v. State, 758 So. 2d 1032 (Miss. Ct. App. 2000).

Search of passenger compartment of defendant's car and of bag found therein was valid as justified by search incident to arrest and probable cause; officer had pulled defendant over for running traffic light, defendant was placed under lawful arrest for three failures to appear for traffic violations and was seated in patrol car, defendant's request for his money bag sent officer back to vehicle, officer then smelled marijuana, giving him probable cause to search further for source of smell, and search for money bag in passenger compartment, in which defendant had been only passenger, followed immediately after arrest. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

Both probable cause and exigency prong of automobile exception to warrant requirement were satisfied, despite defendant's claim that narcotics agents should have gotten search warrant in the several hours that passed between informant's giving defendant informant's car and defendant's arrest; in recorded conversations, defendant had agreed to go out-of-state and get cocaine for informant, who had allegedly made similar transactions with defendant in past, and at time vehicle was stopped, nearness of state line and ease with which defendant could have fled agents' jurisdiction made getting search warrant impracticable. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

For purposes of exigency prong of automobile exception to warrant requirement, exceptional circumstances excusing issuance of warrant are: when vehicle searched is in motion; when officers have probable cause to believe vehicle contains contraband subject to search; and when it is impracticable to secure warrant because vehicle can and may be removed from jurisdiction. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

Pursuant to automobile exception to warrant requirement, evidence seized without warrant from automobile is admissible if there is probable cause and exigency. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

A warrantless search of an automobile was proper, even though the vehicle had been immobilized, since the "automobile exception" to the warrant requirement "does not vanish once the car has been immobilized." Additionally, the search was valid because the contraband had been observed in plain view inside the vehicle. The search was also lawful because it was made in connection with the inventory of an impounded vehicle, where the vehicle was in the lawful custody of the police, a police officer had information that the vehicle had been used in a shoplifting, and a search of the driver bore no fruit. Franklin v. State, 587 So. 2d 905 (Miss. 1991).

At trial of a defendant charged with possession, with intent to distribute, of more than one kilogram of marijuana, evidence obtained by a warrantless search of the trunk of an automobile which had been stopped for speeding did not require suppression where state troopers, upon approaching stopped automobile, had observed marijuana seeds and parts and had detected odor of marijuana emanating from, passenger compartment. Fleming v. State, 502 So. 2d 327 (Miss. 1987).

Owner of automobile in which marijuana is found during warrantless search cannot argue that driver has no authority to consent to search where driver has lawful possession of car, having been given keys by owner, who requested that driver drive car and who has not asked that keys be returned. Shaw v. State, 476 So. 2d 22 (Miss. 1985).

A passenger in an automobile had no standing to challenge the constitutionality of a search of the vehicle which uncovered a revolver found in a box in the rear compartment. Ware v. State, 410 So. 2d 1330 (Miss. 1982).

In a prosecution for possession of marijuana with intent to deliver, the trial court erred in admitting, over defendant's objection, evidence of the contents of a vacuum cleaner bag containing .2 of a gram of marijuana gleaned from a warrantless search of defendant's automobile where the search was conducted while defendant was in jail and after the automobile had been seized by the officers and lodged in a public garage; since there was ample time to obtain a warrant and no probability that the automobile would be removed beyond the reach of police the rule permitting warrantless searches of vehicles was inapplicable. Fields v. State, 382 So. 2d 1098 (Miss. 1980).

Where an automobile was itself an integral part of the evidence of a robbery committed and was seized in order to preserve it as evidence, search of the automobile without a warrant at Highway Patrol headquarters was reasonable, although not made at the scene of the arrest. Gordon v. State, 222 So. 2d 141 (Miss. 1969).

41. —Luggage, search without warrant.

Defendant's rights were not violated by search of luggage at airport, where he had made a trip to a marijuana "source city," had purchased a one-way ticket, had made a long distance trip with short turnaround, had checked a suitcase that was not full, had been accompanied by persons who issued fictitious names, and had claimed luggage which a drug detecting dog had indicated contained narcotics. McCray v. State, 486 So. 2d 1247 (Miss. 1986).

The search of defendant and his possessions at an airport violated both the Fourth Amendment to the US Constitution and Miss Const § 23, where there was no reasonable ground on which to arrest defendant, he was not under arrest at the time of the search, the federal agent conducting the search was not confronted with exigent circumstances, the defendant was not informed he had a right to refuse the search, and the search was the result of a detention and custodial interrogation of defendant in a police office during which he was not informed of his rights, and this violation tainted the search. Penick v. State, 440 So. 2d 547 (Miss. 1983).

42. —Drugs, search without warrant.

The use of an undercover narcotics agent to enter the premises and purchase cocaine without a search warrant did not violate the defendant's Fourth Amendment rights. Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

43. —Observation by police officer, search without warrant.

Court correctly concluded that defendant's detention was legal and did not exceed what was necessary where an officer testified that although he initially stopped defendant for speeding, his observance of defendant led him to suspect that defendant had been driving under the influence of a drug. Prior to the pat down search, the officer had not completed his activities incident to the traffic stop nor allayed his reasonable suspicion that defendant had been driving under the influence of a drug. Tate v. State, 946 So. 2d 376 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 66 (Miss. 2007).

A defendant's arrest for driving while intoxicated was legal, and therefore the subsequent intoxilyzer test was not tainted, even though the arresting officer did not observe the defendant driving, where the defendant admitted to the arresting officer that he had been driving an automobile which was involved in an accident, and the defendant was publicly intoxicated in the presence of the officer and others in violation of § 97-29-47. Goforth v. City of Ridgeland, 603 So. 2d 323 (Miss. 1992).

A police officer who observed a crime in progress had probable cause to arrest the defendant, and was therefore justified in searching the defendant incident to a lawful arrest, even though the defendant was not actually arrested until after the search was completed. Ellis v. State, 573 So. 2d 724 (Miss. 1990).

A police officer made a permissible Terry stop and pat-down search of a defendant where the defendant was seen by the officer running across a road at 1:30 a.m. in a commercial area which had been the scene of previous burglaries. Nathan v. State, 552 So. 2d 99 (Miss. 1989).

The trial court erred in refusing to suppress marijuana plants seized under a void search warrant, notwithstanding the fact that the arresting officers had previously observed what appeared to be growing marijuana plants from a tract of land adjacent to defendant's land and could then have arrested defendants for committing a felony in their presence, where no such arrest occurred prior to execution of the void warrant; contraband in "plain view" may be seized without a warrant (1) incident to a lawful arrest, or (2) incident to "hot pursuit" of a fleeing suspect, or (3) incident to a search of a stopped vehicle on probable cause or because of the mobility of the vehicle, or (4) where officers have a valid search warrant to search a given area for specific objects and in the course of the search come across contraband; the "plain view" doctrine does not eliminate the requirement that seizure of contraband discovered while in "plain view" must comply with constitutional requirements and in the absence of "exigent circumstances" must be based on a valid warrant. Isaacks v. State, 350 So. 2d 1340 (Miss. 1977).

Where officers had sufficient facts to justify their action in stopping an automobile for investigative purposes, the arrest of the driver after the officers observed a gun in the automobile was lawful, and the evidence discovered in the subsequent search of the automobile was admissible. Singletary v. State, 318 So. 2d 873 (Miss. 1975).

It was neither a trespass nor an unlawful search, nor was it illegal for a deputy sheriff to look into a station wagon recently occupied by three persons subsequently charged with burglary, and through the windows of the vehicle to observe and consider marks and other indicia that tended to establish that the vehicle had been used for the transportation of property allegedly stolen. Wilson v. State, 186 So. 2d 208 (Miss. 1966).

44. — "Reasonable suspicion" under "Terry" rule.

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove because it was clear error to find that officers who stopped the vehicle were allowed to rely on arrest warrants for another person who, an informant told officers, would be driving a similar vehicle, as the officers' observations and the informant's information gave the officers no reasonable suspicion since the officers acted, without independent investigation, on the caller's vague description of the car. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove because it was clear error to find that officers who stopped the vehicle were allowed to rely on arrest warrants for another person who, an informant told officers, would be driving a similar vehicle, as (1) the subject of the warrants was not present, and (2) nothing showed the officers knew the description of the arrest warrants' subject's car, so, absent further independent investigation, the officers could only stop defendant to clarify defendant's identity, but the stop exceeded this permissible scope. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

Motion to suppress evidence was properly denied in a drug case because a Terry stop did not violate U.S. Const. Amend. IV or Miss. Const. Art. III, § 23, where an officer had a reasonable suspicion that a vehicle had no tag in violation of Miss. Code Ann. § 27-19-323 and Miss. Code Ann. § 27-19-40, since the officer could not see a "special in-transit tag" on a tinted window. Gonzales v. State, 963 So. 2d 1138 (Miss. 2007).

Officers had reasonable suspicion to stop defendant's vehicle because they received information from an informant that she had been purchasing marijuana from an individual she knew as "Trouble," further investigation revealed that "Trouble" was defendant, the officers asked the informant to arrange to buy marijuana from defendant, and as defendant's vehicle, which matched exactly the description of "Trouble's" car given by the informant, approached the abandoned bridge, it was stopped by an officer who recognized defendant and knew that he was on probation for a prior conviction. Carlisle v. State, 936 So. 2d 415 (Miss. Ct. App. 2006).

Officer stopped defendant for failure to have a tag light, smelled alcohol, and then asked defendant to get in his squad car where he gave her a breath test, which she passed. Nevertheless, he kept her in his patrol car for 20 minutes until she consented to a search of her car, and the officer then conducted a pat-down search, sticking his hands in her pockets; the officer testified that defendant was nervous, that he was fearful, and that he had no cage for defendant in his patrol car, and the Mississippi Court of Appeals held the trial court erred in concluding the officer did not have a reasonable suspicion of criminal activity, or a reasonable fear for his safety, to have allowed for the pat-down search which revealed cocaine. State v. White, 918 So. 2d 763 (Miss. Ct. App. 2005).

Where city officer investigated defendant's parked vehicle outside the city limits, no crime was committed in the officer's presence or jurisdiction, and even if the officer had been authorized to do a pat-down search for weapons under Terry v. Ohio, the officer's identification of a small "knot like nudge" was unreasonable. The continued exploration of defendant's pockets after determining that no weapon was present amounted to the sort of evidentiary search that Terry expressly refused to authorize, and therefore, the trial court erred in failing to suppress the methamphetamine found as a result of the officer's unlawful search. McFarlin v. State, 883 So. 2d 594 (Miss. Ct. App. 2004).

45. — Probable cause, search without warrant.

Search of defendant's automobile was not illegal as the car was lawfully stopped for speeding and once he smelled marijuana, the trooper had probable cause to search the vehicle; the trooper's legal search of the vehicle yielded the money and the Carpet Fresh spray can. Cowan v. Miss. Bureau of Narcotics, 2 So. 3d 759 (Miss. Ct. App. 2009).

Officer had probable cause to initiate a traffic stop of defendant's vehicle because defendant was stopped after law enforcement officials received credible information that he had purchased some precursor chemicals to manufacture a controlled substance, methamphetamine, at two different stores within a short span of time. Watts v. State, 936 So. 2d 377 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 452 (Miss. 2006).

Denial of defendant's motion to suppress 864 unit dosages of ephedrine was affirmed; police had reasonable suspicion for stopping the car in which defendant was riding as the car matched the description given by store employees after two men bought large quantities of cold medicine containing ephedrine, and the driver of the car consented to a search of the car. Burchfield v. State, 892 So. 2d 248 (Miss. Ct. App. 2004), affirmed by 892 So. 2d 191, 2004 Miss. LEXIS 1346 (Miss. 2004).

Officer's decision to investigate defendant's reason for being parked alongside a highway was reasonable because of numerous complaints that defendant sold drugs from a parked car; moreover, drugs found inside the car were admissible because they were located when the officer was looking for a weapon. Hill v. State, 865 So. 2d 371 (Miss. Ct. App. 2003).

Given the fact that the defendant had committed several traffic violations, including possibly driving under the influence of alcohol and without a driver's license, a police officer had probable cause to arrest, therefore making the "Terry search" of the defendant not only reasonable, but common procedure. Ficklin v. State, 767 So. 2d 1035 (Miss. Ct. App. 2000).

A police officer lawfully stopped the defendant's motor vehicle on the basis of a tip that it was being operated in a reckless manner, notwithstanding that reckless driving is a misdemeanor and that the officer did not personally observe the vehicle being driven in a reckless manner. Floyd v. City of Crystal Springs, 749 So. 2d 110 (Miss. 1999).

Probable cause existed for the search of the defendant and the seizure of a pistol from him where (1) the city parks and recreation director observed the defendant giving chase to his girlfriend and heard someone exclaim that the defendant had a gun, (2) the city parks and recreation director then relayed this information to an officer, who proceeded to investigate, and (3) the officer viewed the defendant standing over his girlfriend in an offensive, threatening position and making a stuffing motion into the front of his pants. Bradford v. State, 743 So. 2d 421 (Miss. Ct. App. 1999).

Probable cause existed to search the defendant and to seize cocaine found on his person where (1) an officer stopped to ask occupants of a van if they needed assistance and, as he approached the defendant/driver, he smelled a strong odor of alcohol, (2) the officer asked the defendant to step out of the vehicle, a patdown was conducted and no weapons were found, (3) the officer then walked up to the passenger side of the van and engaged the passenger in conversation, (4) while talking to the passenger, the officer noticed a syringe lying on the floor of the van directly in front of the passenger, (5) the officer questioned the passenger about the syringe, and the passenger denied any knowledge about the syringe, and (6) the officer then asked the defendant to empty his pockets, and cocaine was found; the defendant was effectively or constructively arrested at that point he was told to empty his pockets and, therefore, the cocaine was obtained from a lawful arrest based on probable cause. Chaney v. State, 749 So. 2d 1078 (Miss. Ct. App. 1999).

There was probable cause for the search of the defendant where the reason a deputy stopped the defendant's car was the fact that the defendant and his car matched the description given over the radio of a man who had just stolen a purse in a store parking lot. Pickens v. State, — So. 2d —, 1998 Miss. App. LEXIS 919 (Miss. Ct. App. Oct. 27, 1998).

Police officers had sufficient probable cause to conduct a warrantless search of an abandoned red and white automobile where (1) the officers had just received information that such a car was believed to have been involved in a robbery and murder, and one officer had also received information that two black males in a red and white car "had picked up a young lady and was trying to mess with her," (2) that officer, who had earlier stopped the defendant brothers, stated that they were acting suspiciously, (3) when one officer drove past the defendant, as they were walking away from the red and white car, they ran away, and (4) when that officer shined his flashlight in the car, he saw the sawed-off shotgun in plain view on the back floorboard. Smith v. State, 729 So. 2d 1191 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (1999).

Police radio broadcast describing rape suspect, which led officer to look for defendant, established probable cause for arrest and reasonable suspicion justifying stop of defendant's vehicle, and validating defendant's subsequent consent to search of vehicle, rendering rifle and flashlight recovered during vehicle search admissible. Ellis v. State, 667 So. 2d 599 (Miss. 1995).

Task of court reviewing whether search warrant was issued upon probable cause is to insure that issuing magistrate had substantial basis for concluding that probable cause existed for issuance of search warrant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Information necessary to establish probable cause must be information reasonably leading officer to believe that, then and there, contraband or evidence material to criminal investigation would be found. Petti v. State, 666 So. 2d 754 (Miss. 1995).

In determining question of probable cause for issuance of warrant, oral testimony is admissible before officer who is required to issue search warrant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Substantial evidence existed to support a finding that probable cause existed for a warrantless search of a defendant's automobile where there was probable cause to obtain a warrant to search the defendant's home, and evidence found in the home provided probable cause to believe that a murder may have been committed in the home and that the victim's body may have been placed in the automobile for transportation. Spivey v. Mowdy, 617 So. 2d 999 (Miss. 1992).

Fourth Amendment rights of students who were arrested in nearby store were violated where firemen who detained them, after having been requested to do so by police who were responding to report of fight on or near school grounds, where firemen had not seen students leave scene and did not indicate who advised them that students had been seen at the fight; facts did not establish probable cause to pick up students. C-1 ex rel. P-1 v. City of Horn Lake, 775 F. Supp. 940 (N.D. Miss. 1990).

Arrest without probable cause violates rights clearly established under Fourth Amendment and officer who makes such arrest is not entitled, solely as matter of law, to qualified immunity in suit brought under 42 USCS § 1983. White v. Taylor, 677 F. Supp. 882 (S.D. Miss. 1988), affirmed 877 F.2d 971.

Probable cause existed for law enforcement officers to stop and search an automobile for contraband where 2 strange individuals drove to one particular area of a small town airport to which vehicles did not usually travel, an occupant got out of the automobile, walked directly to a place in the grass, picked up 2 garbage bags and put them into the trunk, the auto immediately sped off, and the individuals were observed by a reliable person with some experience in law enforcement who reported the entire activity to the sheriff. Rooks v. State, 529 So. 2d 546 (Miss. 1988).

Arrest of defendant at his home without arrest warrant was proper because it was supported by probable cause, where defendant was arrested for house burglary upon seizure from his room of 2 guns, serial numbers of which matched 2 weapons reported stolen from nearby homes, and officers had gone into his home pursuant to valid search warrant. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Showing that suspect departed bar with murder victim shortly prior to time of victim's death and returned to bar shortly thereafter in disheveled condition and in hurry to get friends to leave is sufficient to establish probable cause for search of suspect's home. Hester v. State, 463 So. 2d 1087 (Miss. 1985).

Where police officers knew that two banks had been robbed by a group of three men and two women, that such a group was staying at a local motel, that two of the men at the motel fit the description of the bank robbers, and that the group at the motel was reported to be counting money, the officers were entitled to stop the automobile in which two members of the group at the motel were riding for investigative purposes, even though they did not have the level of information necessary for probable cause to arrest. Singletary v. State, 318 So. 2d 873 (Miss. 1975).

Where defendant's actions and demeanor in the presence of the arresting officer were indicative of drunkenness in a public place, a misdemeanor, probable cause existed for his arrest, and there was no constitutional impediment to the introduction of testimony relative to the arrest and subsequent events even though the officer's ticket indicated the arrest was for driving under the influence. Ewing v. State, 300 So. 2d 916, 95 A.L.R.3d 701 (Miss. 1974).

46. —Abandonment of property, search without warrant.

Because defendant voluntarily surrendered the cocaine, the circuit court did not err in ruling that it was admissible; when a suspect voluntarily discards contraband prior to arrest, the State may collect the contraband as evidence without offending the search and seizure protections of the Fourth Amendment. Sweet v. State, 910 So. 2d 735 (Miss. Ct. App. 2005).

Package of cocaine that a defendant threw away as he fled from a police officer who was conducting a pat-down search of defendant after stopping defendant for speeding was admissible at trial since the officer was entitled to conduct the pat-down search for his safety because of defendant's behavior and defendant had abandoned the property. Bessent v. State, 808 So. 2d 979 (Miss. Ct. App. 2001), writ of certiorari denied by 537 U.S. 872, 123 S. Ct. 281, 154 L. Ed. 2d 121, 2002 U.S. LEXIS 5938, 71 U.S.L.W. 3239 (2002).

In a prosecution for possession of a controlled substance, cocaine which had been discarded by the defendant was not the fruit of an illegal search and seizure, and was therefore properly admitted into evidence, since the defendant was not "seized or arrested" when he discarded the drugs where the defendant did not stop when police officers ordered him to do so for the purpose of checking his identification, and he threw down the cocaine while he was walking away from the officers; the defendant was not restrained or stopped at the time he discarded the cocaine, and therefore the cocaine was abandoned and not the fruit of an unlawful seizure or arrest. Harper v. State, 635 So. 2d 864 (Miss. 1994).

In a burglary prosecution, where a police officer testified that he observed the defendant throw or drop three bottles at his feet, even if the officer lacked probable cause at the time to arrest the defendant or to search him, once the bottles were abandoned by the defendant, their possession by the officers did not stem from a search, and the defendant was in no position to protest the possession on the basis of constitutional provisions as to searches. Branning v. State, 222 So. 2d 667 (Miss. 1969).

47. — Admissibility of evidence, search without warrant.

In a case in which defendant appealed his conviction and sentence for felony driving under the influence (DUI) as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, he argued unsuccessfully that the trial court erred in failing to grant his pretrial motion to suppress evidence because: (1) the police chief had no authority to stop or arrest him, (2) he never committed any offense in the chief's jurisdiction, (3) his arrest occurred when the pursuit to make the arrest began, and (4) he had not committed any felony at that time. When the police chief began his pursuit, it was not a pursuit for the purpose of making an arrest, rather, it was a pursuit to give a courtesy warning; at the time defendant was arrested at his home, he had committed the crime of felony DUI, as well as the crime of driving with a suspended license. Delker v. State, 50 So. 3d 309 (Miss. Ct. App. 2009), affirmed by 50 So. 3d 300, 2010 Miss. LEXIS 529 (Miss. 2010).

Police officer lawfully and properly stopped a vehicle with an expired tag; when defendant, the driver, consented to a search of his vehicle and where the police officer and defendant talked while waiting for another officer to appear so that the search could be conducted by two officers as required by state law, where defendant indicated that he had recently "lost" his girlfriend and his demeanor changed significantly, where the officer contacted dispatch to inquire whether the girlfriend had been injured and if authorities in southern Mississippi were searching for defendant, and where the officer learned that defendant was a person of interest in the girlfriend's murder and placed defendant under arrest, the trial court did not err in denying defendant's motion to suppress evidence obtained as a result of the stop because the stop was proper, the length of the detention was reasonable, and the consent to search was valid. Goff v. State, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 559 U.S. 944, 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (2010).

Though a "telephonic search warrant" was not recognized in Mississippi, under the Leon good faith exception to warrantless searches, police officers' good faith belief that a telephonic warrant was valid justified admission of drugs found in a search of a defendant's apartment. White v. State, 842 So. 2d 565 (Miss. 2003).

When police are properly authorized to enter a dwelling under the exigent circumstances doctrine, they are also authorized to return and take physical evidence that was in plain view during the initial search, which they could have seized at the time but for the emergency situation that allowed them to enter the dwelling in the first place.á Baker v. State, 802 So. 2d 77 (Miss. 2001).

Both out-of-court and in-court identification of defendant were properly admitted into evidence, despite defendant's claim that but for his illegal arrest, neither identification would have occurred, where, after his illegal arrest on date of lineup, defendant had been served with, and arrested on, outstanding aggravated assault warrant, dated 2 months earlier. White v. State, 507 So. 2d 98 (Miss. 1987).

Where hearsay evidence, received from a computer, that an automobile was stolen, was admitted without objection, the testimony was sufficient to prove that the car was stolen, rendering its search legal, and thus, defendant's Fourth Amendment rights were not violated in a prosecution for possession of marijuana found in the stolen automobile. Burns v. State, 438 So. 2d 1347 (Miss. 1983).

Although the stopping of a car, to "check out" the occupants and check the driver's license, constitutes an illegal arrest in violation of the US Constitution Fourth Amendment, nevertheless the exclusionary rule does not bar evidence of a violent assault by a passenger in the car upon a police officer summoned to the aid of the arresting officer. Watkins v. State, 350 So. 2d 1384 (Miss. 1977).

An arrest by sheriff without a warrant of a person who has committed no crime in his presence is illegal, and a search of the person is likewise illegal and the evidence obtained thereby is inadmissible. Lynch v. Lynch, 198 Miss. 479, 23 So. 2d 401 (1945).

Arrest of defendant and the search of her person by a sheriff without a warrant was illegal, and consequently evidence that he found on her person a key which fitted the lock of the door to a room in which whisky was found was inadmissible in prosecution for unlawful possession of whisky, notwithstanding that the room was in a house owned by the defendant and for which the sheriff had a proper search warrant, where the defendant lived elsewhere. Lynch v. Lynch, 198 Miss. 479, 23 So. 2d 401 (1945).

48. Search incident to arrest.

Defendant's convictions for capital murder during the commission of a robbery were proper because the denial of his motion to suppress his warrantless arrest and the seizures incident thereto was not clearly erroneous nor contrary to the substantial evidence before it. The trial judge was not required to make on-the-record findings of historical fact before ruling on a motion to suppress evidence; the Federal Rules of Criminal Procedure were not applicable in the case; and Kan. Stat. Ann. § 22-2401 specifically allowed for arrests based on probable cause. Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011), remanded by 2014 Miss. LEXIS 287 (Miss. June 12, 2014).

Search incident to arrest exception to the warrant requirement applied because the officers testified to seeing the black duffel bag and money from a robbery at the traffic stop in plain view in the vehicle. The officers recovered money and receipts from defendant, and when the officer arrived, he saw that defendant was wearing a tan shirt and white tennis shoes; the store's employees had described the armed robber as wearing a tan shirt and white shoes. Johnson v. State, 999 So. 2d 360 (Miss. 2008).

Search and seizure of defendant's truck and the cocaine contained therein were proper as incident to a lawful custodial arrest because defendant was lawfully arrested based on probable cause and the cocaine found inside his vehicle was clearly within the permissible scope of the search, i.e. a container located in the passenger compartment of the vehicle. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

The seizure of blood-stained jeans worn by the defendant did not require a search warrant and was permissible as an inventory search following the arrest of the defendant. Mitchell v. State, 792 So. 2d 192 (Miss. 2001), writ of certiorari denied by 535 U.S. 933, 122 S. Ct. 1308, 152 L. Ed. 2d 218, 2002 U.S. LEXIS 1623, 70 U.S.L.W. 3577 (2002).

There was no improper search where (1) an officer conducted a pat-down search of the defendant after a traffic stop, felt something in the defendant's pocket that did not appear to be a weapon, and asked the defendant what the object was, (2) the defendant voluntarily told the officer that it was a marijuana cigarette, and (3) the officer then conducted a full search of the defendant and discovered crack cocaine; the discovery of the crack cocaine was not improper as the officer had probable cause to arrest the defendant after he volunteered that he possessed marijuana. Williams v. State, 763 So. 2d 202 (Miss. Ct. App. 2000).

When officer is making valid stop, and has not exceeded its parameters in dealing with defendant, any search pursuant to probable cause is valid; in determining whether probable cause existed for search, it must be information reasonably leading officer to believe that then and there contraband or evidence material to criminal investigation would be found. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

Search may be made when circumstances surrounding search incident to arrest indicate probable cause, and items may be seized as a result of cursory viewing (or smelling) of area. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

In a prosecution for possession of crack cocaine, the search of an automobile was not valid as a search incident to an arrest for driving with a suspended license where the police officer searched the car after the defendant had been frisked, handcuffed and placed in the back seat of the officer's patrol car, and therefore the officer could have had no reasonable fear that the defendant might have had a weapon or could have been in a position to destroy incriminating evidence from the crime which led to his arrest. Ferrell v. State, 649 So. 2d 831 (Miss. 1995).

There are "degrees" of detainments which fall short of an arrest which requires probable cause; detainments which would become an arrest depending on the outcome of a pending investigation are permissible, though police officers do not have unlimited authority, and may not be clothed with the authority to detain where they are not diligently investigating in such a way which will resolve the matter. Haddox v. State, 636 So. 2d 1229 (Miss. 1994), modified on denial of rehearing, 1994 Miss. LEXIS 323 (Miss. June 16, 1994).

It was permissible for a police officer to stop an automobile and detain the occupants until a warrant to search the car was obtained where the officer had "staked out" the highway based on phone calls from a confidential informant who had given him reliable information in the past, the officer was familiar with the occupants of the car and the informant had given him their names, and the car make, license plate, and ownership of the car were confirmed by the officer before he pulled the car over. Haddox v. State, 636 So. 2d 1229 (Miss. 1994), modified on denial of rehearing, 1994 Miss. LEXIS 323 (Miss. June 16, 1994).

The search of a defendant's person incident to his arrest for carrying a concealed weapon was reasonable within the confines of the Fourth Amendment, even though the search took place after the defendant was taken to the county jail rather than at the time and place of the arrest; thus, the defendant's attorney was not deficient in failing to move to suppress the evidence obtained as a result of this search on the ground that the search was illegal. Rankin v. State, 636 So. 2d 652 (Miss. 1994).

The search of a defendant's jacket incident to his arrest for carrying a concealed weapon was reasonable within the meaning of the Fourth Amendment where the arresting officers saw the defendant take the jacket off and place it on a guard rail beside him, since the jacket was in the area within the defendant's immediate control at the time of his arrest; thus, the defendant's attorney was not deficient in failing to move to suppress the evidence obtained as a result of this search on the ground that the search was illegal. Rankin v. State, 636 So. 2d 652 (Miss. 1994).

In a prosecution for the sale of cocaine to an undercover police officer, the trial court did not err in admitting into evidence currency seized from the defendant when he was stopped at a traffic light since the officers had probable cause to arrest the defendant without a warrant where one of the officers had videotaped the defendant earlier the same day in a drug sale transaction with other undercover officers, and the stop of the defendant for running a red light was lawful and a subsequent consensual search produced evidence justifying an arrest. Curry v. State, 631 So. 2d 806 (Miss. 1994).

The warrantless seizure of a defendant's tennis shoes did not violate his constitutional rights where the shoes were removed at the sheriff department's request pursuant to a valid arrest which was based on probable cause, since law enforcement officials may seize personal effects and clothing from one who has been arrested. Shell v. State, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

In prosecution for possession with intent to distribute marijuana, marijuana introduced in evidence was admissible as seized incident to lawful arrest of defendant, even though arrest was made without warrant, where information from confidential informant and from previous anonymous telephone callers, as well as observation of defendant, gave officer probable cause to make arrest. Alexander v. State, 503 So. 2d 235 (Miss. 1987).

In a prosecution for burglary items from a recent burglary which were seized from defendant's trunk were properly admitted, where such evidence was obtained pursuant to an inventory search of defendant's borrowed automobile shortly after his arrest for public drunkenness, where the search of the vehicle took place while the vehicle was still located at the scene of the accident, and where such search was conducted pursuant to routine police procedure. Robinson v. State, 418 So. 2d 749 (Miss. 1982).

In a prosecution for possession of marijuana and phencyclidine, the trial court properly admitted into evidence the drugs found by a police officer in the console located between the driver and the passenger seats in the defendant's car where the defendant and his passenger had been lawfully arrested for illegal possession of beer and drug paraphernalia when the police officer had removed them from the vehicle and conducted a search of the passenger compartment without a warrant. Horton v. State, 408 So. 2d 1197 (Miss. 1982).

The temporary detention of a defendant for fingerprinting in the course of an investigation without his being booked, charged, or incarcerated did not constitute an arrest, and evidence derived therefrom was not inadmissible at the defendant's trial on charges of burglary and assault and battery with intent to kill. Reeves v. Reeves, 210 So. 2d 780 (Miss. 1968).

49. Review.

A search and seizure question was preserved for review by the Supreme Court, even though the defendant did not use the term "Fourth Amendment" or "Section 23" at the initial suppression hearing, where there was no doubt that the defendant was seeking protection of his right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article 3, § 23 of the Mississippi Constitution. Longstreet v. State, 592 So. 2d 16 (Miss. 1991).

50. Surveillance or use of informant's tip.

Where defendant was charged with possession of "precursors" used in the illegal manufacture of controlled substances, having purchased or having attempted to purchase quantities of the subject common cold medication, the anonymous tip information given to the officer who conducted the investigatory stop included the color of the van, the number and race of occupants, the license plate number and the direction of travel, including the name of the street. All of those details were verified by officer prior to the investigatory questioning, and under the totality of the evidence standard, the investigatory stop based on the anonymous tip was lawful. Williamson v. State, 876 So. 2d 353 (Miss. 2004).

51. Confrontation of witnesses — In general.

52. — Hearsay evidence, confrontation of witnesses.

Under Miss. R. Evid. 803(d)(2)(E), any statements made between coconspirators in the furtherance of a conspiracy had the necessary guarantee of trustworthiness the court required to address the right to confrontation. Bush v. State, 895 So. 2d 836 (Miss. 2005).

Cited in: Busick v. State, 906 So. 2d 846 (Miss. Ct. App. 2005), writ of certiorari denied by 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

ATTORNEY GENERAL OPINIONS

The mere fact that an individual is openly carrying a weapon, absent anything more, does not give a law enforcement officer grounds to detain that individual or to require him to submit to questioning. Lance, June 13, 2013, 2013 Miss. AG LEXIS 111.

RESEARCH REFERENCES

ALR. Search and seizure: "furtive" movement or gesture as justifying police search. 45 A.L.R.3d 581.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child — state cases. 99 A.L.R.3d 598.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant. 99 A.L.R.3d 1232.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident cases) — state cases. 1 A.L.R.4th 673; 65 A.L.R.5th 407.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property — state cases. 2 A.L.R.4th 1173; 61 A.L.R.5th 1.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse — state cases. 4 A.L.R.4th 196; 55 A.L.R.5th 125.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant — state cases. 4 A.L.R.4th 1050.

Odor of narcotics as providing probable cause for warrantless search. 5 A.L.R.4th 681.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure. 10 A.L.R.4th 376.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues. 12 A.L.R.4th 318.

Employment of photographic equipment to record presence and nature of items as constituting unreasonable search. 27 A.L.R.4th 532.

Searches and seizures: reasonable expectation of privacy in contents of garbage or trash receptacle. 28 A.L.R.4th 1219; 62 A.L.R.5th 1.

Searches and seizures: validity of searches conducted as condition of entering public premises — state cases. 28 A.L.R.4th 1250.

Propriety in state prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant. 32 A.L.R.4th 378.

Search and seizure: what constitutes abandonment of personal property within rule that search and seizure of abandoned property is not unreasonable — modern cases. 40 A.L.R.4th 381.

Admissibility, in criminal case, of physical evidence obtained without consent by surgical removal from person's body. 41 A.L.R.4th 60.

Officer's ruse to gain entry as affecting admissibility of plain-view evidence — modern cases. 47 A.L.R.4th 425.

Search and seizure: necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person. 47 A.L.R.4th 501.

Eavesdropping on extension telephone as invasion of privacy. 49 A.L.R.4th 430.

Propriety of state or local government health officer's warrantless search — post-Camara cases. 53 A.L.R.4th 1168.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights. 76 A.L.R.4th 536.

Observation through binoculars as constituting unreasonable search. 59 A.L.R.5th 615.

Search and seizure: reasonable expectation of privacy in driveways. 60 A.L.R.5th 1.

Belief that burglary is in progress or has recently been committed as exigent circumstances justifying warrantless search of premises. 64 A.L.R.5th 637.

Validity of anticipatory search warrants. 67 A.L.R.5th 361.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant — state cases. 68 A.L.R.5th 343.

Civilian participation in execution of search warrant as affecting legality of search. 68 A.L.R.5th 549.

Effect of retroactive consent on legality of otherwise unlawful search and seizure. 76 A.L.R.5th 563.

Permissibility and sufficiency of warrantless use of thermal imager or Forward Looking Infra-Red Radar (F.L.I.R.). 78 A.L.R.5th 309.

Validity of police roadblocks or checkpoints for purpose of discovery of illegal narcotics violations. 82 A.L.R.5th 103.

Validity of Search or Seizure of Computer, Computer Disk, or Computer Peripheral Equipment. 84 A.L.R.5th 1.

What Constitutes Compliance With Knock-and-Announce Rule in Search of Private Premises — State Cases. 85 A.L.R.5th 1.

Federal and State Constitutions as Protecting Prison Visitor Against Unreasonable Searches and Seizures. 85 A.L.R.5th 261.

Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving - cases focusing on presence of inculpatory evidence other than statements by accused and cases focusing on absence of particular inculpatory evidence. 90 A.L.R.5th 225.

Constitutionality of secret video surveillance. 91 A.L.R.5th 585.

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Destruction of property as violation of Fourth Amendment. 98 A.L.R.5th 305.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches. 99 A.L.R.5th 557.

Error, in either search warrant or application for warrant, as to address of place to be searched as rendering warrant invalid. 103 A.L.R.5th 463.

Admissibility, in civil proceeding, of evidence obtained through unlawful search and seizure. 105 A.L.R.5th 1.

Odor detectable by unaided person as furnishing probable cause for search warrant. 106 A.L.R.5th 397.

When are facts offered in support of search warrant for evidence of sale or possession of cocaine so untimely as to be stale — State cases. 109 A.L.R.5th 99.

When are facts offered in support of search warrant for evidence of sexual offense so untimely as to be stale — State cases. 111 A.L.R.5th 239.

When are facts relating to marijuana, provided by one other than police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of a controlled substance — State cases. 112 A.L.R.5th 429.

When are facts relating to drug other than cocaine or marijuana so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of controlled substance — State cases. 113 A.L.R.5th 517.

Validity of warrantless search of motor vehicle based on odor of marijuana — State cases. 114 A.L.R.5th 173.

When are facts relating to marijuana, provided by police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of controlled substance — State cases. 114 A.L.R.5th 235.

Validity of warrantless search based in whole or in part on odor of narcotics other than marijuana, or chemical related to manufacture of such narcotics. 115 A.L.R.5th 477.

Validity of routine roadblocks by state or local police for purpose of discovery of driver's license, registration, and safety violations. 116 A.L.R.5th 479.

Use of trained dog to detect narcotics or drugs as unreasonable search in violation of state constitutions. 117 A.L.R.5th 407.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Motions and objections during trial and matters other than pretrial motions. 117 A.L.R.5th 513.

Validity of warrantless search of other than motor vehicle or occupant of vehicle based on odor of marijuana-State cases. 122 A.L.R.5th 439.

Validity of warrantless search of motor vehicle driver based on odor of marijuana-State cases. 123 A.L.R.5th 179.

Validity of search conducted pursuant to parole warrant. 123 A.L.R.5th 221.

Application in state narcotics cases of collective knowledge doctrine or fellow officers' rule under Fourth Amendment — Drugs other than marijuana and cocaine and unidentified drugs. 12 A.L.R.6th 553.

Construction and application of rule permitting knock and talk visits under Fourth Amendment and state constitutions. 15 A.L.R.6th 515.

When Does Use of Taser Constitute Violation of Constitutional Rights. 45 A.L.R.6th 1.

Federal court determination of probable cause for search warrant: consideration of oral testimony which was, in addition to affidavit, before officer who issued warrant. 24 A.L.R. Fed. 107.

Use of trained dog to detect narcotics or drugs as unreasonable search in violation of Fourth Amendment. 31 A.L.R. Fed. 931; 150 A.L.R. Fed. 399.

Construction and application of "national security" exception to Fourth Amendment search warrant requirement. 39 A.L.R. Fed. 646.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's relative. 48 A.L.R. Fed. 131.

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Sufficiency of description of business records under Fourth Amendment requirement of particularity in federal warrant authorizing search and seizure. 53 A.L.R. Fed. 679.

Validity, under Federal Constitution, of search conducted as condition of entering public building. 53 A.L.R. Fed. 888.

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Attachment or use of transponder (beeper) to monitor location of airplane or automobile as constituting "search" within Fourth Amendment. 57 A.L.R. Fed. 646.

Validity, under Fourth Amendment, of "mail cover". 57 A.L.R. Fed. 742.

Propriety in federal prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant. 69 A.L.R. Fed. 522.

What constitutes "an opportunity for full and fair litigation" in state court precluding habeas corpus review under 28 USCS § 2254 in federal court of state prisoner's Fourth Amendment claims. 75 A.L.R. Fed. 9.

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Supreme Court's views on mandatory testing for drugs or alcohol. 145 A.L.R. Fed. 335.

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Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse. 154 A.L.R. Fed. 579.

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29 Am. Jur. 2d, Evidence § 764.

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INS factory surveys held not to violate the Fourth Amendment. 80 L. Ed. 2d 247.

Warrantless automobile search held constitutional even though vehicle had been impounded and secured. 80 L. Ed. 2d 381.

Warrantless search of packages 3 days after their seizure from vehicle held permissible under Fourth Amendment. 80 L. Ed. 2d 890.

Installation of beeper in container of chemicals held not to constitute search or seizure but monitoring of beeper in private residence held to violate Fourth Amendment. 82 L. Ed. 2d 530.

Evidence obtained in reasonable reliance on defective search warrant held admissible. 82 L. Ed. 2d 677.

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Compelled surgical procedure to remove bullet from suspect's chest held to constitute unreasonable search under Fourth Amendment. 84 L. Ed. 2d 662.

Transporting suspect to police station for fingerprinting without probable cause, warrant, or consent held violative of Fourth Amendment. 84 L. Ed. 2d 705.

Detention and "seizure" of defendant at airport held justified by articulable suspicion. 93 L. Ed. 2d 165.

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Supreme Court's views as to constitutionality of inventory searches. 109 L Ed 2d 776.

When is evidence which is obtained after unconstitutional search or seizure sufficiently remote from such search or seizure so as not to be tainted by, and not to be inadmissible as fruit of, such search or seizure—Supreme Court cases. 109 L Ed 2d 787.

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Interest in property as basis for accused's standing to raise question of constitutionality of search or seizure—Supreme Court cases. 123 L Ed 2d 733.

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AMENDMENT V

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Cross References — Constitutional right to be informed of nature and cause of accusation, generally, see Amendment VI.

Deprivation of due process by state, see Amendment XIV, § 1.

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1. Construction and application.

Defendant's conviction for burglary of a dwelling house was improper where defendant exercised his right to remain silent up until the time of the trial and the trial court committed reversible error by allowing the prosecutor to imply to the jury that defendant's post-arrest silence was an indication that he was untruthful and, by implication, and indication that he committed the crime. Emery v. State, 869 So. 2d 405 (Miss. 2004).

In a divorce action, a former husband's constitutional rights were not violated by a complaint alleging cruel and inhumane punishment because he was not charged with an infamous crime. Richardson v. Richardson, 856 So. 2d 426 (Miss. Ct. App. 2003), writ of certiorari denied by 2003 Miss. LEXIS 638 (Miss. Nov. 6, 2003).

The Fifth Amendment does not apply to a cause of action against a state or local official where the plaintiff does not allege that the official was acting under authority of the federal government. Jones v. City of Jackson, 203 F.3d 875 (5th Cir. 2000).

Defendant may generally waive his Sixth Amendment right to counsel when he waives his Fifth Amendment rights. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Section 47-5-112 [repealed] did not violate any "right" enjoyed by a county under the Fifth Amendment to the United States Constitution or § 17 of the Mississippi Constitution, since political subdivisions of a state have no Fifth or Fourteenth Amendment protections against the state, and § 17 of the Mississippi Constitution applies only to "private" property. State v. Hinds County Bd. of Supvrs., 635 So. 2d 839 (Miss. 1994).

2. Court rules.

Rule providing that case could not be heard or re-heard en banc unless majority of all judges in regular active service, including any who may be recused in particular case, vote that case be heard or re-heard en banc does not deny equal protection and due process. United States v. Nixon, 827 F.2d 1019 (5th Cir. 1987), cert. denied, 484 U.S. 1026, 108 S. Ct. 749, 98 L. Ed. 2d 762 (1988).

3. Indictment—In general.

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because an indictment was sufficient without listing aggravating circumstances; any time an individual was charged with murder, he was put on notice that the death penalty might result. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

Indictment charging a person with money laundering under Miss. Code Ann. § 97-23-101(1)(b)(ii)(1) was required to specify the "unlawful activity" from which the illegal proceeds were alleged to have derived, and violation of this requirement may be cured only where the prosecution demonstrated that it otherwise provided timely notice to defendant of the alleged illegal activity, and that the notice clearly and sufficiently provided defendant a fair opportunity to prepare a defense to the charges; the omission of the "specified unlawful activity" in defendant's indictment was harmless error which did not render the trial fundamentally unfair. Tran v. State, 962 So. 2d 1237 (Miss. 2007), writ of certiorari denied by 553 U.S. 1054, 128 S. Ct. 2472, 171 L. Ed. 2d 769, 2008 U.S. LEXIS 4212, 76 U.S.L.W. 3619 (2008).

Denial of an inmate's motion for leave to proceed with a petition for postconviction relief in the trial court was proper, where his indictment was not unconstitutional for the failure to include and specify the aggravating factors used to sentence him to death, since the United States Supreme Court has not ruled that State capital defendants have a constitutional right to have all aggravating circumstances listed in their indictments. Simmons v. State, 869 So. 2d 995 (Miss. 2004), writ of certiorari denied by 543 U.S. 960, 125 S. Ct. 436, 160 L. Ed. 2d 325, 2004 U.S. LEXIS 7185, 73 U.S.L.W. 3272 (2004).

Defendant was properly apprised by an indictment of the nature and cause of a homicide despite the fact that the manner and method of the crime were not disclosed; the jury instructions sufficiently informed the jury that the act committed by defendant involved asphyxiation. Starns v. State, 867 So. 2d 227 (Miss. 2003).

Absent waiver, only grand jury can charge person with felony such as burglary. State v. Berryhill, 703 So. 2d 250 (Miss. 1997).

An indictment charging the defendant with rape under § 97-3-65 was proper, even though the indictment used the language "a female person under the age of 14," while the statute states, in pertinent part, "a child under the age of 14." The indictment's language was wholly included within the statutory language, since a female person under the age of 14 is a child under the age of 14; the indictment need not use the precise words of the statute. Furthermore, the defendant was not prejudiced in the preparation of his defense or exposed to double jeopardy by the indictment's language. Allman v. State, 571 So. 2d 244 (Miss. 1990).

The constitutional prohibition against double jeopardy was violated where the defendant was prosecuted for 2 counts of aggravated assault arising from an automobile accident, after the defendant had been charged with and pled guilty to the misdemeanor offense of driving an automobile on the wrong side of the highway, since the defendant's conduct in driving on the wrong side of the highway was the same conduct which the state relied upon in the felony prosecution for the assault charges. Harrelson v. State, 569 So. 2d 295 (Miss. 1990).

4. —Waiver, indictment.

Defendant's guilty plea to armed robbery as charged in a criminal information rather than an indictment was proper under U.S. Const. Amend. V and Miss. Const. Art. 3, § 27, because defendant waived the indictment requirement. The trial court was not required under Miss. Unif. Cir. & Cty. R. 8.04 to discuss with defendant whether he was entitled to early release. Berry v. State, 19 So. 3d 137 (Miss. Ct. App. 2009).

A trial court's failure to inform a defendant, who pled guilty to possession of cocaine with intent to distribute, that a $1,000.00 fine was the minimum penalty for the crime was harmless error where the record contained the defendant's written waiver of indictment, his petition to enter a plea of guilty, and a 12-page transcript of the circuit judge's interrogation of the defendant before accepting the plea. Eley v. State, 631 So. 2d 787 (Miss. 1994).

5. Double jeopardy — In general.

Petitioner's argument that he was sentenced twice for the same offense and was subjected to double jeopardy lacked merit because the petitioner was not given a second sentence, but instead, after learning that federal authorities would not allow him to serve his state and federal sentences concurrently, the circuit court simply corrected its sentencing order, which it had authority to do because the sentencing order was amended before the end of the circuit court term. Toney v. State, 906 So. 2d 28 (Miss. Ct. App. 2004).

Where defendant robbed the victim, a store clerk, at gunpoint, and pistol whipped the victim numerous times, the offenses of robbery with the use of a deadly weapon, and aggravated assault, clearly required different elements of proof, and double jeopardy did not apply. Houston v. State, 887 So. 2d 808 (Miss. Ct. App. 2004), writ of certiorari denied by 888 So. 2d 1177, 2004 Miss. LEXIS 1448 (Miss. 2004).

Because the offenses of possession under Miss. Code Ann. § 41-29-313, and conspiracy, were considered separate criminal violations separately punishable, no double jeopardy principle was violated. Hunt v. State, 863 So. 2d 990 (Miss. Ct. App. 2004).

While it may be true that the language of Miss. Code Ann. § 41-29-313(1)(a)(i) regarding "any amount" of the prohibited substances was primarily intended to cover situations where lesser quantities of the suspect materials were discovered and, therefore, the showing of multiple items was required to strengthen the inference of wrongful intent, it is nevertheless true that "any amount" plainly means just that — any amount; therefore, the possession of 250 — or 250,000, for that matter — dosage units of pseudoephedrine simultaneously with the possession of any one of the other prohibited substances listed in the statute constitutes a consummated violation of § 41-29-313(1)(a)(i), and, if a defendant is charged, convicted, and sentenced for that violation, it would plainly constitute a double jeopardy violation to attempt to punish defendant a second time for the possession of the exact same supply of pills, simply on the basis that the quantity happened to exceed the permissible level under a separate criminal statute. Hunt v. State, 863 So. 2d 990 (Miss. Ct. App. 2004).

Quantity of pseudoephedrine described in count one, a violation of Miss. Code Ann. § 41-29-313(1)(a)(ii), was the same quantity of the drug that was identified in count two, a violation of § 41-29-313(3); this exposed defendant to multiple punishments for the same conduct, and under double jeopardy considerations, the court reversed defendant's conviction under count two. Hunt v. State, 863 So. 2d 990 (Miss. Ct. App. 2004).

Because the first indictment was nolle prosequi before defendant pled guilty, defendant was not subject to double jeopardy as there was no prejudice. McKenzie v. State, 856 So. 2d 344 (Miss. Ct. App. 2003), writ of certiorari denied by 864 So. 2d 282, 2004 Miss. LEXIS 7 (Miss. 2004), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 57 (Miss. 2007).

There was no double jeopardy violation in a case where DUI defendant's two prior DUI convictions were considered for the sole purpose of enhancing punishment. Horn v. State, 825 So. 2d 725 (Miss. Ct. App. 2002).

The defendant in a murder prosecution was not subjected to double jeopardy when his bond on an unrelated pending charge was revoked based on the fact that there was probable cause to believe that he committed the murder at issue. Johnson v. State, 768 So. 2d 934 (Miss. Ct. App. 2000), writ of certiorari denied by 532 U.S. 930, 121 S. Ct. 1378, 149 L. Ed. 2d 304, 2001 U.S. LEXIS 2341, 69 U.S.L.W. 3618 (2001), remanded by 152 Fed. Appx. 403, 2005 U.S. App. LEXIS 23834 (5th Cir. Miss. 2005).

In the retrial of the defendant for murder, the introduction of evidence connecting the defendant to items taken from the crime scene did not twice put him in jeopardy for capital murder or robbery;

although he was previously acquitted of murder during the commission of a robbery, a capital offense, and thus could not be retried for capital murder, the jury's acquittal on the capital crime did not imply that the jury did not believe that the defendant took items from the victim's trailer; instead, it showed only that the jury did not believe that the murder occurred during the commission of a robbery. Odom v. State, 769 So. 2d 189 (Miss. Ct. App. 2000).

The constitutional guarantee against double jeopardy never attached where a nolle prosequi was granted after the court had questioned the veniremen and administered their oath before turning them over to the state for voir dire, but before a jury of 12 had been selected. Meek v. State, — So. 2d —, 2000 Miss. App. LEXIS 64 (Miss. Ct. App. Feb. 8, 2000), reversed by, remanded by 2001 Miss. LEXIS 80 (Miss. Apr. 5, 2001).

Double jeopardy was not implicated where the defendant was tried for capital murder and for the same burglary that was necessary to support the capital murder offense and he eventually pled guilty to the lesser included offense of murder and to burglary of an occupied dwelling. Pinkney v. State, 2000 Miss. LEXIS 95 (Miss. Apr. 20, 2000), opinion withdrawn by, substituted opinion at 757 So. 2d 297, 2000 Miss. LEXIS 173 (Miss. 2000).

Double jeopardy protection does not apply to a hearing to revoke a suspended sentence. Cooper v. State, 737 So. 2d 1042 (Miss. Ct. App. 1999).

The appellant's double jeopardy rights were violated where (1) the Supreme Court previously affirmed the appellant's capital murder conviction and reversed and remanded for resentencing, (2) the appellant was then reindicted, and the new indictment, unlike the original indictment, charged the appellant as an habitual offender, and (3) the appellant pled guilty to capital murder as an habitual offender, and agreed to a life sentence without parole. Willie v. State, 738 So. 2d 217 (Miss. 1999).

The dual sovereignty doctrine is not applicable where the defendant is not subjected to successive prosecutions. Brown v. State, 731 So. 2d 595 (Miss. 1999).

Where the state made a good faith mistake in ordering a nolle prosequi after the first indictment, the prohibition against double jeopardy would not bar a subsequent prosecution. State v. Shumpert, 723 So. 2d 1162 (Miss. 1998).

The criminal prosecution and conviction of the defendant for conspiracy did not violate the double jeopardy clauses of the Mississippi and United States Constitutions, notwithstanding that her vehicle was forfeited to the state prior to her criminal trial, since a civil forfeiture does not impose punishment. Smith v. State, 716 So. 2d 1076 (Miss. 1998).

Court of Appeals reviews defendant's double jeopardy claim de novo. United States v. Dixon, 132 F.3d 192 (5th Cir. 1997), cert. denied, 522 U.S. 1061, 118 S. Ct. 721, 139 L. Ed. 2d 661, 523 U.S. 1096, 118 S. Ct. 1581, 140 L. Ed. 2d 796 (1998).

"Double jeopardy" consists of three separate constitutional protections; it protects against second prosecution for same offense after acquittal, it protects against second prosecution for same offense after conviction, and it protects against multiple punishments for same offense. White v. State, 702 So. 2d 107 (Miss. 1997).

The Supreme Court was authorized to treat a circuit court's denial of a criminal defendant's motion to dismiss the indictment against him on double jeopardy grounds as a "final judgment" in a civil action under § 11-51-3, which authorizes an appeal from a final judgment, and § 9-3-9, which gives the Supreme Court jurisdiction of an appeal from any final judgment in the circuit court, since the double jeopardy claim went beyond the defendant's right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore denial of the claim was final and justified immediate determination. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

A defendant's double jeopardy right not to be re-prosecuted for the same offense accrues instantly upon the happening of some event in criminal proceedings against him or her, though the original jeopardy must have "terminated" in order for such a right to accrue; thereafter, lapse of time neither strengthens nor diminishes the right as no subsequent event affects an accrued double jeopardy right. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

A nolle prosequi entered upon the motion of the district attorney did not terminate the defendant's original jeopardy or accrue unto him the right not to be re-indicted and re-prosecuted for the same offense where the State had unsuccessfully sought the defendant's conviction through 2 successive trials which both ended when the jury became deadlocked so that there was a 'manifest necessity' to declare a mistrial in each case, there was nothing to suggest any prosecutorial misconduct or manipulation in moving for the nolle prosequi, and there was no objection by the defendant to the entry of the nolle prosequi. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art I § 9 of the United States Constitution and Art 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

A trial court's imposition of a sentence of 49 ½ years imprisonment upon finding that the defendant had violated a plea agreement which provided that the charges against the defendant would be dismissed following restitution and 3 years of good behavior pursuant to § 99-15-26, in spite of the defendant's argument that the maximum sentence he should have received was 3 years since the plea bargain required him to "go straight" for only 3 years as a condition of dismissal, since the defendant had not been adjudged guilty or sentenced for the original charges until the date when the 49 ½ year sentence was imposed, and therefore the 3-year period of conditional good behavior did not amount to a sentencing ceiling for double jeopardy purposes. Wallace v. State, 607 So. 2d 1184 (Miss. 1992).

In § 99-15-26 proceedings, the trial court never accepts the guilty plea and never imposes a sentence if the defendant fulfills the court-imposed conditions; where a guilty plea is accepted and a suspended sentence is imposed, the court cannot later impose a period of incarceration exceeding the original suspended sentence where the defendant fails to maintain a standard of good behavior because to do so would expose the defendant to double jeopardy. Wallace v. State, 607 So. 2d 1184 (Miss. 1992).

Where a defendant was charged with misdemeanor driving under the influence of alcohol, forfeiture of his bond and entry of a sentence of guilty into the docket constituted a conviction such that a subsequent trial for felonious driving under the influence was barred by the principle of double jeopardy. Bennett v. State, 528 So. 2d 815 (Miss. 1988).

Trial judge's actions were tantamount to acquittal on charge of armed robbery and thereby dismissed charge of armed robbery as to one victim where trial judge determined that state had failed to produce evidence to prove that defendant robbed alleged victim with deadly weapon, where State had attempted to establish armed robbery of alleged victim with testimony and had simply failed to prove armed robbery, rejecting claim that inability to produce alleged victim was result of manifest necessity due to his intervening illness, because state could have sought continuance but instead elected to proceed with proof until defense counsel made motion for directed verdict. Reed v. State, 506 So. 2d 277 (Miss. 1987).

In prosecution for attempted burglary of business dwelling, double jeopardy clause of United States and Mississippi Constitutions was not violated by retrial of defendant following order quashing indictment due to its insufficiency and failure to charge crime, since defendant was neither acquitted nor convicted, having successfully persuaded trial court not to submit issue of guilt or innocence to jury empaneled to try him. City of Jackson v. Keane, 502 So. 2d 1185 (Miss. 1987).

Use of burglary charge against defendant to revoke his mistaken probation resulting from an embezzlement conviction was not a trial on the merits for burglary, and defendant's subsequent trial on burglary charge did not place him twice in jeopardy. Lightsey v. State, 493 So. 2d 375 (Miss. 1986).

Double jeopardy clause does not bar successive prosecutions by two different states for the same act. Heath v. Alabama, 474 U.S. 82, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985).

Judge may impose more severe sentence upon defendant following new trial and conviction for same charge for which defendant has successfully appealed original conviction but only if judge affirmatively states in record reasons for harsher sentence and only if reasons are based upon objective information concerning identifiable conduct on part of defendant occurring after time of original sentencing proceeding, or based upon objective information concerning events occurring after time of original sentencing proceeding that may throw new light upon defendant's life, health, habits, conduct, or mental and moral propensities. Ross v. State, 480 So. 2d 1157 (Miss. 1985).

An inmate was properly denied credit for time served upon her original sentence for time spent out of prison on parole prior to its revocation, even though credit is allowed for time spent on work release, which is functionally similar to parole; nor did denying her credit for time served while on parole deprive her of rights secured under the double jeopardy clause, deny her due process of law, or subject her to an ex post facto law. Segarra v. State, 430 So. 2d 408 (Miss. 1983).

Defendant was not subject to double jeopardy, even though defendant was issued a citation for resisting arrest and was later convicted of simple assault on a law enforcement officer, where a clear reading of the statutes established that the two offenses contained an element that was lacking from the other. Pendleton Grain Growers v. Pedro, 271 Or. 24, 530 P.2d 85 (1975).

An order of the justice of peace court, dismissing the case against the accused for want of prosecution, showing that the accused was not prosecuted or put in jeopardy in that court, was insufficient to sustain the accused's plea of former jeopardy in bar of judgment and sentence upon his being convicted in a circuit court of the charge of assault. Robinson v. State, 91 So. 2d 272 (Miss. 1956).

Although it is remarked in an early case (State v Moor, Walk 134) that the double jeopardy provision is binding in state as well as in Federal courts, it is now well settled that this amendment does not affect state action (Withers v Buckley, 20 How (US) 84, 15 L Ed 816) and is directed at the exercise of Federal authority, and not at the states and their agencies. Martin v. Dix, 52 Miss. 53 (1876); Tucker v. State, 128 Miss. 211, 90 So. 845, 24 A.L.R. 1377 (1922).

6. — Administrative proceedings, double jeopardy.

Administrative proceedings did not invoke the double jeopardy clause, and as such defendant was not unconstitutionally subjected to double jeopardy where his removal from the intensive supervision program and reclassification into the general prison population, as well as the imposition of his original sentence, were administrative, not criminal proceedings; double jeopardy protections did not apply to suspension revocation hearings. Brown v. Miss. Dep't of Corr., 906 So. 2d 833 (Miss. Ct. App. 2004).

Defendant did not suffer a double jeopardy violation where the trial court's petition to revoke probation or to revoke suspension of a sentence was not a criminal case and not a trial on the merits of the case; there was no subsequent conviction and sentence, only an indictment, and defendant failed to show he had previously been convicted of the crime of possession of cocaine when the trial judge revoked his bond, and defendant did not show that jeopardy attached at probation and bail revocation hearings. Thomas v. State, 845 So. 2d 751 (Miss. Ct. App. 2003).

The transfer of a police investigator as a "punishment" was not the type of criminal punishment contemplated by the double jeopardy clause. Ladnier v. City of Biloxi, 749 So. 2d 139 (Miss. Ct. App. 1999).

An indictment which charged both burglary of a dwelling and grand larceny did not fail the same elements test where the burglary charge was based on the defendant's entry into the victim's home with the intent to commit grand larceny and the grand larceny charge was based on the defendant's taking of a cultivator and mower from a shed on the victim's property. Pool v. State, — So. 2d —, 1999 Miss. App. LEXIS 483 (Miss. Ct. App. July 27, 1999), affirmed in part and reversed in part by 764 So. 2d 440, 2000 Miss. LEXIS 191 (Miss. 2000).

The defendant's conviction for both attempted armed robbery and aggravated assault did not violate the double jeopardy provisions of the federal and state constitutions since each offense required different elements of proof. Greenwood v. State, 744 So. 2d 767 (Miss. 1999).

The defendant was properly charged with and convicted of capital murder/burglary and armed robbery, since each offense required proof of an element not necessary to the other. Bannister v. State, 731 So. 2d 583 (Miss. 1999).

Where the defendant was convicted and sentenced for rape and for simple assault on the rape victim's eight-year-old daughter, he was convicted for distinctly different offenses and was not subjected to multiple prosecutions or multiple punishments. Brown v. State, 731 So. 2d 595 (Miss. 1999).

The double jeopardy clauses of the United States and Mississippi Constitutions do not preclude criminal prosecution for violation of § 63-11-30 subsequent to administrative license suspension pursuant to § 63-11-23(2). Keyes v. State, 708 So. 2d 540 (Miss. 1998).

An appeal by the Mississippi State Bar to enhance an attorney's punishment for his violation of disciplinary rules did not violate the attorney's constitutional right against double jeopardy. Mississippi State Bar v. Blackmon, 600 So. 2d 166 (Miss. 1992).

Double jeopardy rights were not violated in attorney disciplinary proceedings where earlier proceedings before Mississippi State Bar Committee on Complaints were dismissed and no investigatory hearing held in connection therewith, such dismissal being functional equivalent of grand jury's refusal to indict or magistrate's refusal to bind defendant over to await action of next grand jury. Mississippi State Bar v. Young, 509 So. 2d 210 (Miss. 1987), petition dismissed, 523 So. 2d 323 (Miss. 1988).

Since the revocation of good time was an administrative proceeding, defendant was not unconstitutionally subjected to double jeopardy under the Fifth Amendment by the combination of the revocation of his good time and prosecution for escape. Moore v. State, 461 So. 2d 768 (Miss. 1984).

7. —Civil and criminal proceedings, double jeopardy.

Although defendant claimed that the court's decision to set his pleas aside and bring him to trial constituted a breach of the plea agreement on the State's behalf, an abuse of discretion, and double jeopardy, the circuit court did not abuse its discretion by disregarding the original plea agreement and putting the case on the trial docket because defendant's guilty pleas were involuntary. There was no reason why defendant should not have been proceeded against as if no trial had previously taken place; therefore, defendant could not get his convictions set aside and then claim that he was protected from a new trial by the Double Jeopardy Clauses of the Mississippi and United States Constitutions, Miss. Const. art. 3, § 22 and U.S. Const. amend. V. Catchings v. State, 111 So. 3d 1238 (Miss. Ct. App. 2013), writ of certiorari dismissed by 121 So. 3d 918, 2013 Miss. LEXIS 573 (Miss. 2013).

Jeopardy had not attached when the municipal court dismissed defendant's driving under the influence (DUI) charge in the municipal court, where the municipal judge received no evidence and heard no witnesses before dismissing the DUI charge. Moreover, the judge's comments on the order relative to the DUI charge did not contain any findings of the court, but rather, the court merely recorded the reasons that the prosecutor gave for not proceeding to trial on the DUI charge; such notations in the order did not constitute either an acquittal or an adjudication, such that the subsequent indictment or trial of defendant would be barred by the Double Jeopardy Clause, U.S. Const. amend. V, Miss. Const. art. 3, § 22. Deeds v. State, 27 So. 3d 1135 (Miss. 2009), writ of certiorari denied by 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S. LEXIS 5807, 79 U.S.L.W. 3196 (U.S. 2010).

During defendant's trial for second-offense DUI, the trial court did not commit reversible error by allowing the State to reopen its case-in-chief to offer proof of the first DUI conviction where it appeared that the omission of the essential element was due to the trial judge's misunderstanding of the law; defendant was not "twice placed in jeopardy" when the trial court granted the brief recess. Lyle v. State, 987 So. 2d 948 (Miss. 2008).

Defendant's convictions for murder and for shooting into an occupied dwelling did not violate the double jeopardy clause of the Fifth Amendment. In order to convict defendant for shooting into an occupied dwelling, the State was required to prove that defendant shot into a dwelling house, but no such showing was required to convict defendant under the felony-murder statute. Boyd v. State, 977 So. 2d 329 (Miss. 2008).

Dismissal of the inmate's motion for post-conviction relief was proper in part because the inmate had pled guilty to manslaughter and was never prosecuted for murder; thus, he was not twice put in jeopardy of life or limb in violation of the Fifth Amendment. Truitt v. State, 958 So. 2d 299 (Miss. Ct. App. 2007).

Under the Fifth Amendment and Miss. Const. Art. 3, § 21, a trial court's imposition of defendant's original ten-year term after his second parole violation was not an unlawful extension or increase of his sentence in violation of his right against double jeopardy because, although the written sentencing order did not reflect the court's imposition of the ten-year sentence but merely that all but 18 months of that sentence were suspended, on two occasions defendant was clearly informed in open court that his sentence was for ten years. Harvey v. State, 919 So. 2d 282 (Miss. Ct. App. 2005).

By being subject to both a criminal prosecution and civil fines for tax evasion, defendant was not exposed to double criminal prosecutions in violation of the Double Jeopardy Clause. Also, the indictment was not multiplicitous. King v. State, 897 So. 2d 981 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 224 (Miss. 2005).

Trial court 's resentencing of defendant to subsequent sentences that were more severe than the original sentence imposed upon defendant's guilty plea to transfer of a controlled substance violated double jeopardy principles despite the fact that the first resentencing had been on the motion of the defendant; as the right to a legal sentence is a fundamental right, defendant could raise the claim that the re-sentencings were illegal in an out-of-time motion for post-conviction relief. Ethridge v. State, 800 So. 2d 1221 (Miss. Ct. App. 2001).

Defendant's acquittal on criminal charges involving firearms does not preclude subsequent in rem forfeiture proceeding against same firearms because neither collateral estoppel or double jeopardy bars civil, remedial forfeiture proceeding initiated following acquittal on related criminal charges. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), overruled on other grounds, Ferguson v. United States, 911 F. Supp. 424 (C.C. Cal. 1995), but see Cooper v. Greenwood, 904 F.2d 302 (5th Cir. 1990).

8. —Juveniles, double jeopardy.

Defendant's claim of double jeopardy, pursuant to the Fifth Amendment, was without merit where application of the Blockburger test revealed that elements of each of the crimes of shooting into a vehicle, Miss. Code Ann. § 97-25-47, and aggravated assault, Miss. Code Ann. § 97-3-7(2) were not contained in the other. Graves v. State, 969 So. 2d 845 (Miss. 2007).

Juvenile who has been adjudicated delinquent in youth court may not subsequently be tried as adult on same charges. In re W.R.A., 481 So. 2d 280 (Miss. 1985).

9. —Same elements, double jeopardy. Defendant's right to protection against double jeopardy was not violated because he was subject to multiple punishments for possession with intent to distribute five separate controlled substances, because to obtain a verdict on each count, the State was required to prove beyond a reasonable doubt that each of the substances found in defendant's house was in fact a controlled substance under Miss. Code Ann. § 41-29-139 (Rev. 2009), and that defendant possessed and intended to sell each drug. Watkins v. State, 90 So. 3d 1283 (Miss. Aug. 16, 2012), modified by 2012 Miss. LEXIS 624 (Miss. Dec. 13, 2012).

Court properly denied defendant's motion for a directed verdict because the crime of statutory rape did not encompass the crime of gratification of lust. The crime of gratification of lust did not require any proof of sexual intercourse or proof of a laceration/tearing of the child's genitalia, and as such, statutory rape required proof of an additional element not required by gratification of lust, and there was no double jeopardy. Branch v. State, 998 So. 2d 411 (Miss. 2008).

Defendant's prosecutions for both shooting into a vehicle under Miss. Code Ann. § 97-25-47 and murder under Miss. Code Ann. § 97-3-19(1)(a), did not subject him to double jeopardy since the crimes charged required additional facts separate from each other; murder, unlike shooting into a vehicle, required the deliberate killing of an individual and did not require defendant to have shot into a vehicle, while shooting into a vehicle required only that defendant willfully shot into or at a vehicle. Further, the facts were such that it was not clear whether defendant shot into the vehicle when he killed the victim, as there was testimony to the effect that the victim may have had all or part of his head outside the vehicle when he was shot; in essence, the facts were such that defendant could have been found guilty of murder and of shooting into a vehicle without any risk of exposure to double jeopardy. Peacock v. State, 970 So. 2d 197 (Miss. Ct. App. 2007).

Offenses of kidnapping under Miss. Code Ann. § 97-3-53 and armed robbery under Miss. Code Ann. § 97-3-79 were clearly separate and distinct, with each requiring proof of additional facts the other did not; kidnapping, for example, required proof of intent to cause such person to be secretly confined or imprisoned against their will, whereas armed robbery did not, and armed robbery required the taking of personal property of another, but kidnapping did not. Thus, the crimes were separate and distinct regardless of their temporal overlap or their arising from a common nucleus of operative facts, and defendant's double jeopardy rights were not violated through being convicted of both kidnapping and armed robbery. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

Where the defendant was tried on a multicount indictment and convicted of both aiding and abetting another in the sale of cocaine and selling cocaine in concert with the other person, since there was only one transaction, the conviction for aiding and abetting was barred by double jeopardy. Wilson v. State, 775 So. 2d 735 (Miss. Ct. App. 2000).

A prior conviction for reckless driving does not present a bar to a prosecution for felony murder, arising out of the same nucleus of facts, based on the underlying felony of driving while intoxicated as a third offender because proof of reckless driving is not necessary to prove felony driving while intoxicated or felony murder. Lee v. State, 759 So. 2d 390 (Miss. 2000).

Convictions for both participating in drug conspiracy and engaging in continuing criminal enterprise (CCE) violated double jeopardy, where alleged CCE was same enterprise as the conspiracy. United States v. Dixon, 132 F.3d 192 (5th Cir. 1997), cert. denied, 522 U.S. 1061, 118 S. Ct. 721, 139 L. Ed. 2d 661, 523 U.S. 1096, 118 S. Ct. 1581, 140 L. Ed. 2d 796 (1998).

Vacation of defendant's drug conspiracy conviction on appeal, based on determination that convictions for both participating in drug conspiracy and engaging in continuing criminal enterprise (CCE) violated double jeopardy, did not require remand for resentencing, where drug conspiracy conviction did not lead the district court to impose a harsher sentence on defendant for engaging in a CCE than it would have in the absence of the drug conspiracy conviction. United States v. Dixon, 132 F.3d 192 (5th Cir. 1997), cert. denied, 522 U.S. 1061, 118 S. Ct. 721, 139 L. Ed. 2d 661, 523 U.S. 1096, 118 S. Ct. 1581, 140 L. Ed. 2d 796 (1998).

Treble civil penalty of $84,460.60 for Medicaid fraud, and imposition of prison sentence after defendant failed to pay penalty, did not constitute double jeopardy when considered with other punishment received when defendant pleaded guilty, such as a fine for actual amount of fraud and two-year probation; all punishment was imposed in a single proceeding, and punishment was within statutory authority. Jennings v. State, 700 So. 2d 1326 (Miss. 1997).

Blockburger or "same-elements test" of whether double jeopardy bar applies in context of multiple punishment or multiple prosecution inquires whether each offense contains an element not contained in the other; if not, they are same offense for double jeopardy purposes. Cook v. State, 671 So. 2d 1327 (Miss. 1996).

Convictions for both murder during course of armed robbery and grand larceny violated double jeopardy prohibition against multiple punishments for same offense, where robbery charge, which was used to elevate case to capital murder, encompassed elements of grand larcency. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Although state may freely define crimes and assign punishments, it is not allowed to punish defendant for crime containing elements which are completely enveloped by offense for which defendant was previously convicted. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A defendant's convictions for both murder-for-hire capital murder under § 97-3-19(2)(d) and conspiracy to commit capital murder under § 97-1-1 violated the constitutional protection against double jeopardy, since the definition of murder-for-hire in § 97-3-19(2)(d) completely encompasses the agreement or conspiracy to commit capital murder. Colosimo v. Senatobia Motor Inn, Inc., 662 So. 2d 552 (Miss. 1995).

Since conspiracy and burglary are separate and distinct crimes requiring proof of different elements, a defendant did not have a double jeopardy claim based on the prosecution of these 2 crimes arising from the same incident, despite the fact that the prosecution chose to prosecute the defendant for these crimes at separate trials. House v. State, 645 So. 2d 931 (Miss. 1994).

A defendant's right to be free from double jeopardy was not violated, even though the defendant was tried, convicted and sentenced for 2 distinct offenses—simple assault and simple assault upon a law enforcement officer—arising from the same incident, because the defendant engaged in conduct which was severable into 2 separate offenses where he intervened in an ongoing assault to aid another perpetrator by preventing a third party from assisting the victim, and he subsequently committed an assault against the same victim by pointing his pistol at him. Moore v. State, 617 So. 2d 272 (Miss. 1993).

The offenses of aggravated assault under § 97-3-7 and shooting into a dwelling house under § 97-37-29 did not constitute the "same offense" for double jeopardy purposes where at least 18 shots were fired into the house and the victim was not struck with all 18 shots; the 2 statutes require proof of different facts in that shooting into a dwelling house is not required to establish an aggravated assault, and neither injury nor attempt to injure is required to prove the offense of shooting into a dwelling house. Shook v. State, 552 So. 2d 841 (Miss. 1989).

A defendant's conviction and sentence on a charge of rape did not subject him to double jeopardy even though he had also been convicted and sentenced on a burglary charge which arose out of the same facts and circumstances as the rape charge. Norman v. State, 543 So. 2d 1163 (Miss. 1989).

The prosecution of a defendant for robbery with a deadly weapon after a prior conviction for kidnapping arising from the same incident was not barred by double jeopardy since the crimes of armed robbery and kidnapping required different elements of proof. Brock v. State, 530 So. 2d 146 (Miss. 1988).

Defendant's constitutional double jeopardy right was violated where he had previously been acquitted of the crime of murder while in commission of rape, which was based on same series of acts upon which subsequent conviction of kidnapping was based. Dixon v. State, 513 So. 2d 951 (Miss. 1987).

Defendant's prior conviction for rape did not preclude, on double jeopardy grounds, his prosecution for burglary, even though both arose out of the same general set of facts and testimony in both trials was essentially the same, since the essential statutory elements of the two charges are entirely different. Smith v. State, 429 So. 2d 252 (Miss. 1983).

Defendant's motion to dismiss, on double jeopardy grounds, an indictment charging him with armed burglary of an inhabited dwelling at nighttime was improperly denied, where there was a common nucleus of operative facts from which arose the prosecution for burglary and an earlier prosecution for rape, where defendant had earlier been acquitted of the rape, where the not guilty verdict in the rape trial was well within the evidence, where defendant's only defense at the rape trial was that another person committed the crime, where the jury could not rationally have acquitted him on any other basis, and where the state offered substantial evidence during the rape trial to show that he broke and entered the rape victim's home. Sanders v. State, 429 So. 2d 245 (Miss. 1983).

In a prosecution for aggravated assault arising out of an automobile accident, the trial court properly quashed the indictment on the grounds of double jeopardy and collateral estoppel where defendant had previously been acquitted of manslaughter in the death of another victim of the accident and where the pivotal issue of whether defendant had grabbed the steering wheel of the truck in which he was riding, thereby causing the collision, was the same in both cases and had previously been resolved in defendant's favor in the manslaughter prosecution. State v. Clements, 383 So. 2d 818 (Miss. 1980).

10. — Separate incidents, double jeopardy.

Death sentence of a petitioner for postconviction relief was not barred by the double jeopardy clause because the evidence presented by the State in a trial for the murder of a fourth victim was sufficiently different from the proof presented in a second trial for the murders of the other three victims to prove each element of the murders. Simon v. State, 857 So. 2d 668 (Miss. 2003), writ of certiorari denied by 541 U.S. 977, 124 S. Ct. 1885, 158 L. Ed. 2d 475, 2004 U.S. LEXIS 2641, 72 U.S.L.W. 3632 (2004).

The defendant was not subjected to double jeopardy where he was tried and convicted for armed robbery after a prior conviction for simple assault because the two convictions arose out of separate encounters with the victim, despite the fact that both encounters occurred in the same vehicle and only several minutes apart. Brooks v. State, 769 So. 2d 218 (Miss. Ct. App. 2000).

The defendant was not subjected to double jeopardy where he was tried and convicted for kidnapping after a prior conviction for simple assault which arose from the defendant's hitting the victim after a failed attempt to kidnap him. Brooks v. State, 769 So. 2d 218 (Miss. Ct. App. 2000).

The defendant was not previously convicted on the same forgery charge in one county for which he was subsequently convicted in another county; therefore, there was no double jeopardy violation because he never pleaded guilty to any of the charges in the first county and only paid restitution on two checks for which he was indicted in the first county, which charges were not the same as the charges in the second county. Rush v. State, 749 So. 2d 1024 (Miss. 1999).

Conviction of defendant for individual operation of chop shop violated double jeopardy under *Pockburger* test, as defendant was convicted of operating the same chop shop on different days, and was convicted of joint operation of chop shop; operation of chop shop is continuing offense when based on same evidence, and offenses of individual and joint operation of chop shop arose from single transaction, same evidence, and same proof. White v. State, 702 So. 2d 107 (Miss. 1997).

Separate prosecutions for sales of illegal controlled substances, arising from incidents occurring one week apart from each other, do not violate double jeopardy even where same undercover agent has induced sales at same general location using same modus operandi. Barnette v. State, 478 So. 2d 800 (Miss. 1985).

Prosecution for aggravated assault on police officer is not barred by prior prosecution for aggravated assault on another police officer arising out of same incident. Lee v. State, 469 So. 2d 1225 (Miss. 1985).

Where the body of the victim was severely burned by a fire, which also consumed his house, and where the defendant was acquitted of the murder, the double jeopardy clause of the Fifth Amendment did not bar the subsequent prosecution of the defendant for the arson of the victim's home. Harden v. State, 460 So. 2d 1194 (Miss. 1984).

A defendant's Fifth Amendment right against double jeopardy was not violated where he had been convicted in a first trial for robbing one of the victims and kidnapping both of them and was being prosecuted for these underlying felonies in his subsequent trial for the murder of the second victim, in that the defendant was not being retried for a crime which grew out of the same transaction, the murder of the first victim was distinct from the murder of the second victim, and the underlying felonies constituted only a portion of the two distinct crimes. Wilcher v. State, 455 So. 2d 727 (Miss. 1984), cert. denied, 470 U.S. 1034, 105 S. Ct. 1411, 84 L. Ed. 2d 794 (1985), denial of habeas corpus aff'd in part, rev'd in part, 978 F.2d 872 (5th Cir. 1992), reh'g denied, 981 F.2d 1254 (5th Cir. 1992), cert. denied, 510 U.S. 829, 114 S. Ct. 96, 126 L. Ed. 2d 63 (1993), vacated in part, 635 So. 2d 789 (Miss. 1993).

A defendant previously convicted of kidnapping was not subjected to double jeopardy at his subsequent trial for rape of his kidnap victim since he had committed two separate offenses when he had raped his kidnap victim. The trial court properly admitted evidence and exhibits of the crime of rape at the kidnapping trial since evidence of other crimes is admissible to prove motive and a connection between the act proposed to be proved and the crime charged. Hughes v. State, 401 So. 2d 1100 (Miss. 1981).

11. — Same episode, no double jeopardy.

Defendant's double jeopardy rights were not violated by her convictions for three counts of driving under the influence and negligently causing death because the State was not required to specifically list the substance or substances that defendant allegedly was driving under the influence of at the time of the accident. Defendant was only convicted of one count of driving under the influence of hydrocodone and negligently causing the death or injury of another for each death or injury so caused. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Defendant's motion for post-conviction relief was properly denied where defendant's convictions for conspiracy to commit capital murder, accessory before the fact of grand larceny, and accessory before the fact of burglary of a dwelling with intent to commit assault did not subject defendant to double jeopardy; defendant's crimes were completely different and required proving different sets of elements. Byrom v. State, 978 So. 2d 689 (Miss. Ct. App. 2008).

Trial court properly dismissed defendant's motion for post-conviction relief where he was not subjected to double jeopardy by being convicted of three criminal offenses arising out of a single incident; a criminal defendant could be convicted of more than one offense that arose out of a single event where each offense required proof of a different element.

Ward v. State, 944 So. 2d 908 (Miss. Ct. App. 2006).

Protection guaranteed by the Double Jeopardy Clauses of the Fifth Amendment and Miss. Const. Art. 3, § 22, and the doctrine of collateral estoppel, did not preclude the State from charging defendant with a cocaine offense that was the basis for an unsuccessful petition to revoke his probation, because there were different issues and burdens of proof involved in a revocation hearing and a trial on the indictment. A revocation hearing is conducted to enforce the court's order imposing conditions on a defendant under a suspended sentence, and the issue to be determined at trial on the indictment is whether the State has proven beyond a reasonable doubt the elements of the charge; therefore, collateral estoppel does not apply. Oliver v. State, 922 So. 2d 36 (Miss. Ct. App. 2006).

Inmate's convictions for aggravated assault and aggravated robbery did not violate his Fifth Amendment right to be free from double jeopardy because even though the charges arose from the same set of facts, the two charges had different elements that the State needed to prove and one was not a lesser-included offense of the other. Thomas v. State, 930 So. 2d 1264 (Miss. Ct. App. 2005).

Convictions for armed carjacking and armed robbery occurring during the same episode did not constitute double jeopardy where the car jacking charge was based on the taking of a delivery truck and the robbery charge was based on the theft of money from one of the occupants of the truck. McCline v. State, 856 So. 2d 556 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

Defendant was not subjected to double jeopardy where the crimes of aggravated assault and armed robbery. although they arose from the same incident, were separate. Johnson v. State, 848 So. 2d 906 (Miss. Ct. App. 2003).

Petitioner was indicted on two methamphetamine precursor counts, and though both counts may have concerned the same ephedrine, one count was retired, and petitioner was not prosecuted, tried or convicted on both the counts; accordingly, petitioner's right not to be submitted to double jeopardy was not violated. McDonald v. State, 847 So. 2d 281 (Miss. Ct. App. 2003).

12. —Lesser included offenses, double jeopardy.

In context of double jeopardy, underlying felony in felony-murder is, by definition, included in greater offense and may not be punished separately. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A trial court erred in allowing a defendant to plead guilty to both capital murder and the underlying felony of burglary which elevated the murder to capital murder; sentencing the defendant separately for both felony murder and the underlying felony violated his right against double jeopardy. Fuselier v. State, 654 So. 2d 519 (Miss. 1995).

Section 63-11-30 proscribes the act of drunk driving rather than the act of negligent killing; thus, an indictment charging the defendant with 2 counts of violating § 63-11-30 based on only one act of drunk driving subjected the defendant to double jeopardy and required reversal of the conviction on the second count. Mayfield v. State, 612 So. 2d 1120 (Miss. 1992).

A defendant's right to be shielded from double jeopardy was violated where the defendant was convicted and punished for both kidnapping under § 97-3-53 and capital murder while engaged in the crime of kidnapping under § 97-3-19(2)(e); since the defendant was indicted, tried and found guilty of capital murder under § 97-3-19(2)(e) with the kidnapping as the underlying felony, and thereafter exposed to trial for his life, the State was precluded from punishing him further for the § 97-3-53 kidnapping. Meeks v. State, 604 So. 2d 748 (Miss. 1992).

Double jeopardy clauses of federal and state constitutions were not violated where defendant was originally indicted for capital murder of rape victim, which was subsequently reduced to murder as result of plea bargain, and later charged with rape; in capital murder indictment, defendant was charged with underlying felony of burglary, and nothing in that indictment suggested defendant committed rape. McFee v. State, 511 So. 2d 130 (Miss. 1987).

13. — Conspiracy, double jeopardy.

Appellate court affirmed the denial of the inmate's motion for postconviction relief because the inmate was not subjected to double jeopardy for the separate convictions of conspiracy to commit capital murder and attempted capital murder as they are two separate crimes. Lee v. State, 918 So. 2d 87 (Miss. Ct. App. 2006).

The decision of the manifest necessity for declaring a mistrial because of juror problems is a matter vested in the sound discretion of the trial court; the standard for determining whether a mistrial was a manifest necessity is not so absolute as the phrase would seem to imply. Jenkins v. State, — So. 2d —, 1999 Miss. App. LEXIS 301 (Miss. Ct. App. May 18, 1999), affirmed by 759 So. 2d 1229, 2000 Miss. LEXIS 123 (Miss. 2000).

The defendant's retrial was not barred by double jeopardy where the defendant's first trial ended in a mistrial declared by the trial court, on its own motion, when it was discovered that one juror had failed to take his seat in the jury box and that, instead, another member of the venire not selected as a juror had taken that seat, notwithstanding that the court denied the defendant's motion for a mistrial made when the problem was first discovered, but later declared the mistrial on its own motion without seeking the views of the state or the defense. Jenkins v. State, — So. 2d —, 1999 Miss. App. LEXIS 301 (Miss. Ct. App. May 18, 1999), affirmed by 759 So. 2d 1229, 2000 Miss. LEXIS 123 (Miss. 2000).

Because conspiracy and transfer of a controlled substance have been shown to be separate crimes, the defendant did not have a valid double jeopardy claim as the crime of conspiracy was complete when the defendant agreed with others to unlawfully possess and transfer a controlled substance. Thomas v. State, 711 So. 2d 867 (Miss. 1998).

Test for determining when separate conspiracy exists, for purpose of determining whether subsequent prosecution is barred by double jeopardy, requires government to prove, by preponderance of the evidence, a separate conspiracy focusing upon elements of time, persons acting as coconspirators, statutory offenses charged in indictments, overt acts charged by government or any other description of offense charged which indicates nature and scope of activity which government sought to punish in each case, and place where events alleged as part of conspiracy took place. Cook v. State, 671 So. 2d 1327 (Miss. 1996).

Subsequent prosecution of defendants, who had been acquitted of conspiracy to commit forgery and/or defraud corporation out of money for forged soybean weight certificates, on charge of conspiracy to defraud Farmer's Home Administration was barred by double jeopardy clause, even though second prosecution accused defendants of trying to defraud different victim, as corporation was named in both indictments and, in addition, same time frame was involved, persons named as coconspirators were substantially the same, offenses charged in both indictments were conspiracy to defraud and to cheat, overt acts by defendants amounted to same course of conduct of transferring forged soybean certificates to company which issued checks in defendants' names representing payment for soybeans purportedly delivered to corporation, and conduct occurred in same counties. Cook v. State, 671 So. 2d 1327 (Miss. 1996).

Although a substantive offense and a conspiracy to commit are 2 separate offenses, where there is a common nucleus of operative facts existing in both indictments, and where the ultimate fact has been determined in a prior acquittal of the substantive offense by a final judgment, a conspiracy trial is barred thereafter under the constitutional double jeopardy provision. Griffin v. State, 545 So. 2d 729 (Miss. 1989).

14. —Nolle prosequi, double jeopardy.

In a case in which defendant appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that he was subjected to double jeopardy because he was charged with armed robbery on three occasions: (1) in Count II of his indictment, (2) in Count IV of his indictment, and (3) when he pled guilty to the charge of armed robbery. The State filed an Order of Nolle Prosequi on Counts I, II, III, and V; therefore, the burglary charge in Count II was passed to the file, and defendant was no longer charged with nor convicted of Count II. Ewing v. State, 34 So. 3d 612 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Defendant's voluntary refusal to testify against his co-defendant constituted a material breach of his plea bargain agreement with the State, and, as a result of his breach, the parties were returned to the status quo ante; thus, defendant had no double jeopardy defense available concerning re-indictment and conviction on the charges. Also, the transcript of defendant's guilty plea hearing clearly showed that he was aware that the State would seek to invalidate his plea and reinstate the charges if he failed to testify truthfully against his co-defendant; additionally, as to the reinstatement of a kidnapping charge, it was fully within the State's authority to re-indict defendant for the same offense after an order of nolle prosequi had been entered. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

The defendant's entry of a guilty plea did not violate double jeopardy where (1) the defendant was initially indicted for grand larceny, but subsequently agreed to enter a pre-trial intervention program and agreed with the district attorney to nolle prosse the charge, (2) the defendant thereafter failed to comply with the terms of the pre-trial intervention program, (3) the district attorney then filed a motion to remove the defendant from the program and filed an information charging him with grand larceny, (4) the circuit court judge entered an order for the defendant's removal from the pre-trial intervention program, and (5) the defendant waived his right to be re-indicted for grand larceny, pled guilty, and was sentenced. Martin v. State, 766 So. 2d 812 (Miss. Ct. App. 2000).

13. —Mistrial, double jeopardy.

Trial court did not err in failing to dismiss an indictment on the basis of double jeopardy because the prosecution had not deliberately provoked a mistrial by failing to disclose to defendant prior to trial that an officer would testify that defendant had surrendered defendant's driver's license prior to running from officers. Daniels v. State, 9 So. 3d 1194 (Miss. Ct. App. 2009).

Where the State moved for a mistrial, no double jeopardy emanated from the first trial because a manifest necessity arose, when the State, during direct examination, discovered that its first witness (defendant's companion, charged as an accessory) was unrepresented by counsel. That witness had made incriminating statements and it was his rights, not defendant's, that the State believed were violated; and there was no showing of harm to defendant, bad faith or prosecutorial misconduct. Knox v. State, 912 So. 2d 1004 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 686 (Miss. 2005).

Trial court did not err in declaring a mistrial in an armed robbery case because, by the time a Batson challenge was raised, other jurors in the case had already been dismissed; jeopardy did not attach because the record indicated that the jury had not been sworn, despite a trial court's order that stated otherwise. Gaskin v. State, 873 So. 2d 965 (Miss. 2004).

Where defendant's first trial resulted in a mistrial, based on a Batson challenge, because the jury had not been sworn, the rules prohibiting double jeopardy were not violated; as such double jeopardy protection did not attach to defendant's first proceeding so as to preclude a second trial. Gaskin v. State, 856 So. 2d 363 (Miss. Ct. App. 2003).

A trial court cannot declare a mistrial on its own motion after a trial has begun, without seeking the view of the state or defense and where a qualified alternate juror is available and seated; thus, a mistrial declared in such a way is not based on manifest necessity for purposes of double jeopardy. Jenkins v. State, 759 So. 2d 1229 (Miss. 2000).

There was no double jeopardy violation where the defendant did not want to be tried by a jury duly constituted to hear the state's charges against him and moved repeatedly for a mistrial, and where his motion was ultimately granted because the trial court had made an unintended error. Jenkins v. State, 759 So. 2d 1229 (Miss. 2000).

Defendant who moves for mistrial generally is barred from later complaining of double jeopardy violation; to overcome bar, defendant must show that error occurred and that it was committed by the prosecution purposefully to force defendant to move for mistrial. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

Double jeopardy does not arise from grant of mistrial on defendant's motion without proof of judicial error prejudicing defendant or bad faith prosecutorial misconduct. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

Alleged error committed by the prosecution in requesting and receiving information on jury panel members from circuit clerk, resulting in mistrial on defendant's request, was insufficient to trigger double jeopardy so as to bar second trial where defendant failed to prove prosecutor's intent to force defendant to request mistrial. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

In a defendant's second trial conducted approximately one week after the declaration of a mistrial during his first trial did not violate the constitutional prohibition against double jeopardy where the first trial ended in a mistrial declared by the court on its own motion when the prosecutor brought to his attention that a juror had failed to divulge that she was related to a law enforcement officer. Box v. State, 610 So. 2d 1148 (Miss. 1992).

A reindictment and retrial after the first trial, resulted in a mistrial due to a hung jury, did not violate the prohibition against double jeopardy, in spite of the defendant's argument that there was no manifest necessity for dismissing the first indictment and that the reindictment and retrial was for the purpose of allowing the prosecution to strengthen its case, where there was no variance between the indictments, the proof offered and the defense asserted, and the second indictment did not charge the defendant with a different or additional offense. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

If the trial judge's declaration of a mistrial was a manifest necessity, and there was no abuse of discretion, then a criminal defendant may be tried again on the same charge. If there was not a manifest necessity for the mistrial, then a retrial is barred. Whether the standard has been met depends on the facts and circumstances of each case. Spann v. State, 557 So. 2d 530 (Miss. 1990).

A retrial of a defendant for rape, after the trial judge declared a mistrial sua sponte during a previous trial for the same offense, would not violate the double jeopardy provisions of the Mississippi and United States Constitutions, in spite of the defendant's argument that the mistrial was the fault of prosecution witnesses whose behavior could be imputed to the State, where the State did not elicit or provoke the witnesses' questionable behavior, the problem occurred on cross-examination, there was no evidence of bad faith on the part of the State, and it was the defendant's wife's outbursts from the gallery which finally triggered a mistrial. Spann v. State, 557 So. 2d 530 (Miss. 1990).

The grant of a mistrial in a homicide case upon defendant's motion and on the ground that the jurors had failed to follow the trial judge's instruction to avoid media coverage of the trial did not form the basis of a double jeopardy claim in absence of showing of bad faith on the part of anyone connected with state having to do with the release of information to a news reporter, although a police officer had talked by phone with the reporter. Watts v. State, 492 So. 2d 1281 (Miss. 1986).

In a prosecution for aggravated assault in which the defendant was convicted after a second trial, a mistrial having been declared by the trial judge in the first trial at the request of the prosecution when it was learned that the defendant's tape-recorded confession commenced with his demand that he see an attorney, the second trial of the defendant violated the prohibition against double jeopardy where jeopardy had already attached in the first trial with the swearing in of the jury and where the prosecution's complaint that it could not proceed with the first trial because the jury had heard the defendant's request for an attorney at the time of his alleged confession did not constitute such manifest necessity as to permit the granting of a mistrial; the failure of the defendant's attorney to object to the granting of the mistrial did not permit retrial where there was no question but that the court intended to grant the prosecution's request. Jones v. State, 398 So. 2d 1312 (Miss. 1981).

A retrial did not place defendant in double jeopardy where reversal of his manslaughter conviction was due to the error of the lower court in compelling defendant's wife to testify for the state and was not based on insufficiency of the evidence; however, it was error to retry defendant for murder instead of manslaughter where he had been charged with but not convicted of murder in the first trial. Tapp v. State, 373 So. 2d 1029 (Miss. 1979).

15. — Multiple punishments, double jeopardy.

Trial court sentenced defendant to criminal contempt for refusal to testify in co-defendant's trial; because his failure to testify constituted a material breach of the plea agreement, the State reinstated the kidnapping charge, for which defendant was subsequently convicted and sentenced to 25 years' imprisonment. Defendant contended that the kidnapping conviction and sentence constituted a second punishment for his refusal to testify, thus subjecting him to double jeopardy; however, defendant was punished once for his refusal to testify against his co-defendant and once for the separate and distinct crime of kidnapping the victims, and, thus, his right double jeopardy rights were not violated as he was not punished multiple times for the same crime. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

16. —Capital sentencing, double jeopardy.

Harsher sentence imposed on defendant was proper where, in his second sentencing hearing, the judge heard new evidence concerning the events of the crimes and that evidence led him to believe that the crime was more heinous than the judge originally believed. There was no indication of vindictiveness and neither the double jeopardy provision nor the Equal Protection Clause imposed an absolute bar to the more severe sentence upon reconviction. Fowler v. State, 919 So. 2d 1129 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 56 (Miss. 2006).

Jury was not improperly required to weigh same facts twice against mitigating evidence, in violation of double jeopardy clause, when sentencing court allowed defendant's conviction for capital murder of second victim to be considered as an aggravating circumstance; court was not faced with one action for which defendant could be prosecuted on either underlying crime or capital murder, but rather, there were actually two murder victims—the product of two separate criminal actions by defendant. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Aggravating circumstances used to determine whether to impose the death penalty do not themselves carry any penalty, as their only purpose is to narrow class of individuals most worthy of receiving the death penalty and to furnish guidance to the jury, so that use of aggravating circumstance, such as sexual battery, which has also been the basis for conviction for an offense does not violate double jeopardy. Blue v. State, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Submission to a capital sentencing jury of the mitigating factor that the defendant had no "significant" history of criminal activity was not improper, in spite of the defendant's argument that the factor was unconstitutionally applied in his particular case because it implied that he had at least some criminal history when in fact he had none, where the mitigating factor was taken verbatim from the list provided by the legislature to be considered in imposing sentence, and the defendant had the opportunity during closing argument to dispel any notion the jury might have had that he had a history of criminal activity. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Since Mississippi's capital sentencing procedure requires the jury to determine whether the State has proved its case for the death penalty, the double jeopardy clause will protect a defendant from any subsequent attempt to subject him or her to the death penalty after a jury has impliedly acquitted him or her of the death penalty by determining that only a life sentence was warranted. Lanier v. State, 635 So. 2d 813 (Miss. 1994).

The double jeopardy clause did not afford a capital murder defendant protection against further capital sentencing procedures where he was originally sentenced to death by a jury, the death sentence was subsequently reversed due to a confrontation clause problem but there was no finding that the State had failed to prove its case for the death penalty, and the defendant and the State then entered into a sentencing agreement which was found to be void; since there was no acquittal of the death penalty, the double jeopardy clause would not prohibit the State from seeking the death penalty at a subsequent sentencing hearing. Lanier v. State, 635 So. 2d 813 (Miss. 1994).

The holding of a hearing on the issue of habitual offender status, which resulted in a sentence of life without parole, following a bifurcated guilt and sentencing trial on a charge of capital murder, which resulted in a jury verdict of a life sentence, meaning life with parole, rather than death, did not violate the defendant's right against double jeopardy. At the capital murder sentencing hearing on the matter of whether the defendant should be sentenced to death, the defendant was not put in jeopardy on the issue of sentence enhancement based on recidivism. Hoover v. State, 552 So. 2d 834 (Miss. 1989).

The constitutional principles of double jeopardy are not violated by the "double use" of the pecuniary gain factor in elevating a murder to the status of capital murder because it was perpetrated by one who had been given something of value for the killing pursuant to § 97-3-19(2)(d) and in imposing the death penalty for committing murder by pecuniary gain pursuant to § 99-19-101(5)(f). Nixon v. State, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

Where there is a conviction for both capital murder and the underlying felony, at the most the double jeopardy clause is violated only if the charges for the felony murder and the underlying felony are tried separately. Woodward v. State, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

A continuance in a bench trial is not sufficiently like a mistrial in all situations so as to invoke an analysis for determining whether the resumed hearing is barred by double jeopardy. King v. State, 527 So. 2d 641 (Miss. 1988).

Submission of aggravating circumstance of pecuniary gain did not constitute double jeopardy and fail meaningfully to narrow class of persons eligible for death sentence. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct.

1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Instructions at penalty phase of trial did not deprive defendant of his constitutional rights by failing adequately to inform jury of their option to recommend life sentence, where court clearly instructed jury that it should weigh mitigating circumstances against aggravating circumstances and if former outweighed latter, then it should return sentence of life imprisonment. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Although the jury in a capital murder trial had already determined beyond a reasonable doubt that defendant had murdered while committing the crimes of robbery and kidnapping, consideration of those aggravating circumstances again in the sentencing phase of the same trial did not constitute double jeopardy as contemplated in the Fifth Amendment of the US Constitution. Wilcher v. State, 448 So. 2d 927 (Miss. 1984), cert. denied, 469 U.S. 873, 105 S. Ct. 231, 83 L. Ed. 2d 160 (1984), habeas corpus conditionally granted, 978 F.2d 872 (5th Cir. 1992), reh'g denied, 981 F.2d 1254 (5th Cir. 1992), cert. denied, 510 U.S. 829, 114 S. Ct. 96, 126 L. Ed. 2d 63 (1993), vacated in part, 635 So. 2d 789 (Miss. 1993).

A defendant who in 1960 entered a plea of guilty to an indictment for murder and received a life sentence which he was currently serving, following the decision in 1968 of the United States Supreme Court in United States v Jackson, 390 US 570, 20 L Ed 2d 138, 88 5 Ct 1209, filed a petition for a writ of habeas corpus alleging that the death penalty provision of Code 1942 § 2217 of the Mississippi code violated the Fifth and Sixth Amendments of the United States Constitution and § 14 of the Mississippi Constitution. In affirming the denial of the writ, the court held that the Jackson rule was inapplicable to the Mississippi general statute on murder for the reason that an accused entering a plea of guilt to a charge of murder under Code 1942 § 2217 is not assured of not receiving the death penalty: for the trial court cannot be required to accept a guilty plea in a capital case and pronounce a sentence of less than death, but may require a jury trial in which the imposition of the death sentence is within the sole province of the jury. King v. Cook, 211 So. 2d 517 (Miss. 1968).

The 1968 decision of the United States Supreme Court in United States v Jackson, 390 US 570, 20 L Ed 2d 138, 88 S Ct 1209,is not retroactive and was not applicable to a guilty plea entered in 1960 by a defendant charged with murder who, at the time of the decision of Jackson, was serving a life sentence in the penitentiary as a consequence. King v. Cook, 211 So. 2d 517 (Miss. 1968).

17. — Habitual offenders, double jeopardy.

The use of the defendant's prior convictions for driving under the influence of alcohol (DUI) to obtain a conviction for felony DUI did not violate the double jeopardy clause. Smith v. State, 736 So. 2d 381 (Miss. Ct. App. 1999).

Post-arrest statements made by a defendant which are inconsistent with his trial testimony may be used by the state against him during cross-examination; to hold otherwise would not only afford the defendant the right not to incriminate himself by remaining silent but would also afford him the right not to incriminate himself by making voluntary statements which are inconsistent with his testimony at trial, which would ultimately grant a defendant who chooses to be a witness in his own defense more protection than that granted to any other witness. Puckett v. State, 737 So. 2d 322 (Miss. 1999).

Mississippi law does not require law enforcement personnel to cease with a lawful interview and re-advise the defendant that he has the right to a lawyer or inform him that there is a lawyer outside where the defendant himself has not requested or otherwise indicated that he wished to speak with an attorney before further questioning. McGilberry v. State, 741 So. 2d 894 (Miss. 1999), writ of certiorari denied by 529 U.S. 1006, 120 S. Ct. 1273, 146 L. Ed. 2d 222, 2000 U.S. LEXIS 1788, 68 U.S.L.W. 3565 (2000).

The defendant's privilege against self-incrimination was not violated when the prosecutor argued that the defendant "pled not guilty. And he doesn't have to do a thing. He sits there. We have to prove the case," since (1) such argument was made in response to the defendant's argument that the state prolonged the trial by putting forth unnecessary or redundant evidence and attempted to place the blame for his crimes on those who failed to obtain proper treatment for him, and (2) the jury was given several instructions which clarified any confusion resulting from the arguments. McGilberry v. State, 741 So. 2d 894 (Miss. 1999), writ of certiorari denied by 529 U.S. 1006, 120 S. Ct. 1273, 146 L. Ed. 2d 222, 2000 U.S. LEXIS 1788, 68 U.S.L.W. 3565 (2000).

The prohibition against double jeopardy did not preclude the State at resentencing from enhancing a defendant's life sentence for murder with the habitual offender statute where the defendant was initially sentenced to death and therefore his status as an habitual offender was not determined until after the sentencing trial on remand; since the defendant's status as an habitual offender had not previously been determined, the finding of habitual offender status on resentencing was not barred by double jeopardy. Gray v. State, 605 So. 2d 791 (Miss. 1992).

A habitual offender's sentencing hearing, as a trial on the sentence, constitutes jeopardy for the purpose of the constitutional right against double jeopardy. Ellis v. State, 520 So. 2d 495 (Miss. 1988).

Remanding case for resentencing under habitual offender statute would offend double jeopardy clause because habitual offender sentencing is itself trial on eligibility for harsher sentence and therefore constitutes jeopardy. Young v. State, 507 So. 2d 48 (Miss. 1987).

Indictment charging sale of drugs did not violate prohibition against double jeopardy by including the information that the defendant had been previously convicted on a separate charge since, in order for punishment to be enhanced for a second conviction (as provided for in § 41-29-147), an indictment authorizing enhanced punishment must include both the principal charge and a charge of the previous convictions. Ellis v. State, 326 So. 2d 466 (Miss. 1976).

18. —Reversal of conviction, double jeopardy.

The double jeopardy clause did not bar reprosecution of a defendant for murder following the Supreme Court's reversal of his conviction where the conviction was reversed on procedural grounds and the defendant was allowed to plead guilty to lesser offenses pursuant to the bargain, but the defendant subsequently refused to plead guilty to the lesser offenses. The defendant could be prosecuted for the murder under the original indictment since the reversal of his murder conviction on procedural grounds did not constitute a rendering of the case nor a discharge of the defendant, and the defendant's refusal to plead guilty to the lesser offenses was a breach of the bargain. State v. Danley, 573 So. 2d 691 (Miss. 1990).

There was no violation of the double jeopardy clause in the retrial of a defendant after reversal of his manslaughter conviction where the reversal was based upon trial error in having forced the defendant's wife to testify against him and not upon the insufficiency of the evidence; however, retrial for murder was improper and the conviction for murder was properly modified by the Mississippi Supreme Court to a conviction for manslaughter where the defendant had been acquitted of murder at the first trial. Tapp v. Lucas, 658 F. 2d 383 (C.A. 5th Miss. 1981), certiorari denied, 102 S. Ct. 2233, 456 U.S. 972, 72 L. Ed. 2d 845.

19. — Resentencing, double jeopardy.

Reinstatement of defendant's suspended sentence did not constitute double jeopardy because the trial court did not attempt to impose a greater sentence than that already levied on defendant. Leech v. State, 994 So. 2d 850 (Miss. Ct. App. 2008), writ of certiorari dismissed by 999 So. 2d 852, 2009 Miss. LEXIS 50 (Miss. 2009).

Federal district court correctly denied state death row inmate's habeas corpus petition; the venue chosen for petitioner's resentencing hearing was proper, even though it was in the county in which the crimes occurred, and even though the trial venue had been changed to a different county due to excessive pretrial publicity, because years had passed since petitioner had been found guilty, and although two selected resentencing jurors had some knowledge of the case, petitioner failed to prove that the resentencing jury was tainted. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Defendant did not receive a greater sentence than the one originally imposed and the trial judge could amend a sentence provided that a punishment already partly suffered not be increased; the record did not reflect that defendant was given two sentences for committing one offense, but rather, the result of the first hearing was the supplementation of the terms of post-release supervision, such that the initial modification of defendant's post-release supervision did not constitute a separate sentence for purposes of double jeopardy. Lambert v. State, 904 So. 2d 1150 (Miss. Ct. App. 2004).

Constitutional considerations of double jeopardy prevent the assessment of a harsher punishment at resentencing than that already adjudicated as to each count under the Double Jeopardy Clause of the Constitution of the United States. Davidson v. State, 850 So. 2d 158 (Miss. Ct. App. 2003), remanded by 2003 Miss. App. LEXIS 724 (Miss. Ct. App. June 3, 2003).

It was a violation of the prohibition against double jeopardy for the court to resentence the defendant to a term of 30 years where (1) the defendant was originally sentenced to a term of 20 years, with five years suspended, on condition that he would later give testimony against "any unindicted person in the case," and (2) the defendant failed to fulfill the condition of his sentence. Johnson v. State, 753 So. 2d 449 (Miss. Ct. App. 1999).

20. Self-incrimination — In general.

In the absence of the sort of affirmative assurances embodied in the Miranda warnings, it does not violate due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand; a State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post-arrest silence may be deemed to impeach a criminal defendant's own testimony. Hurt v. State, 34 So. 3d 1191 (Miss. Ct. App. 2009).

Although defendant challenged his convictions for fondling a child under Miss. Code Ann. § 97-5-23(1) and for sexual battery of a child between the ages of 14 and 16 under Miss. Code Ann. § 97-3-95(1)(c) on the ground that the trial court had erred in admitting a statement he made to police that the girls' acts had been consensual, but defendant conceded that he had not objected to the statement at trial. Defendant's claim of error did not rise to the level of plain error where the evidence did not support his claim that his sole reason for testifying was to explain the statement; defendant had been given his Miranda warnings two days earlier and was not being questioned at the time he gave the statement; since consent was not an issue in sex crime cases involving children, thus there was no violation of defendant's self-incrimination privilege or his Miranda rights. Smith v. State, 907 So. 2d 389 (Miss. Ct. App. — 2005), writ of certiorari denied by 910 So. 2d 574, 2005 Miss. LEXIS 452 (Miss. 2005).

Defendant's capital murder conviction was proper because his Fifth Amendment and Sixth Amendment rights were not violated by the prosecutor's comments during closing arguments. Wide latitude was given to attorneys in making closing arguments and, given the evidence presented, the court could not say that the verdict was occasioned by unjust prejudice. Davis v. State, 914 So. 2d 200 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 746 (Miss. 2005), writ of certiorari denied by 549 U.S. 856, 127 S. Ct. 133, 166 L. Ed. 2d

98, 2006 U.S. LEXIS 6743, 75 U.S.L.W. 3167 (2006).

Trial court's refusal to allow defendant's testimony from former murder prosecution to be read into evidence at current trial for same murder did not constitute error, despite defendant's contention that he was over 73 years old, had several serious physical problems, was on numerous medications that affected his mental abilities, and had testified at his speedy trial hearing to the effect of his memory loss; defendant declined court's offer to present testimony recorded at previous trial if his memory failed him, and instead invoked his Fifth Amendment right to not testify. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Social worker's interview of defendant to investigate allegations of sexual battery was not "custodial interrogation"; social worker was not law enforcement official, and defendant voluntarily went to his office, could have left at any time, and was thus not in "custody." Hennington v. State, 702 So. 2d 403 (Miss. 1997).

Mere investigation by social worker in noncustodial setting does not require alleged abuser to be advised of *Miranda* rights. Hennington v. State, 702 So. 2d 403 (Miss. 1997).

A trial judge does not have a duty to inform a witness of the privilege against self-incrimination. Moore v. Moore, 558 So. 2d 834 (Miss. 1990).

In a prosecution for aggravated assault on a law enforcement officer, the trial court properly admitted into evidence an incriminating oral statement made by the defendant to his cellmate, a prison trusty, although the defendant had not been advised of his Fifth Amendment rights at the time, where there was no evidence to support the argument that the cellmate had interrogated the defendant when the incriminating statements were made or that he had acted as an agent of law enforcement officials or that he had been planted in the cell for the purpose of hearing incriminating statements. Mansell v. State, 403 So. 2d 871 (Miss. 1981).

Where the record revealed that all persons who wanted to do business with the defendant were impliedly invited to approach the house in which he was staying along a circular driveway to a point where the defendant met law enforcement officers to ascertain what he could do for them, and where the officers purchased and received from the defendant a bottle of intoxicating liquor but made no search of the person or premises of the defendant, the testimony of the officers was not inadmissible on the ground that the purchase was an illegal search or that their testimony was in effect a method of requiring the defendant to testify against himself. Lyons v. State, 195 So. 2d 91 (Miss. 1967).

Where accused, after having been arrested but before being formally charged with murder, voluntarily testified before a coroner's jury that he had accidentally killed his wife while shooting in self-defense at his father-in-law, and none of this testimony was admitted in the trial on the merits, accused's constitutional privilege not to incriminate himself was not violated. Dykes v. State, 232 Miss. 379, 99 So. 2d 602 (1957).

21. —Statutes and court rules, self-incrimination.

Although Rule 3.03(3)(B), Miss. Unif. Crim. R. Cir. Ct. Prac. only requires a judge to inquire and determine whether the defendant understands the maximum and minimum penalties when he or she wishes to plead guilty to the offense charged, trial judges should inform criminal defendants on the record of the minimum and maximum penalties for the charged offense in order to insure that no question ever be raised. Banana v. State, 635 So. 2d 851 (Miss. 1994).

In a prosecution for driving a motor vehicle while under the influence of intoxicating liquor, the admission into evidence under § 63-11-41 of the defendant's refusal to take a breathalyzer test did not violate the Fifth Amendment to the United States Constitution and Article 3, § 26 of the Mississippi Constitution, even though the defendant was not specifically warned that his refusal could be admitted into evidence against him; the penalty of introducing a refusal serves an important state interest in encouraging defendants to submit to a chemical test, and as the refusal is physical instead of testimonial, its introduction into evidence violates neither the Fifth Amendment nor § 26. Ricks v. State, 611 So. 2d 212 (Miss. 1992).

Rule requiring each attorney in a criminal case to number his jury instructions and file them with the clerk, and to submit to opposing counsel a numbered copy of the instructions so filed at least 24 hours prior to the time that the case is set for trial, was not an unconstitutional invasion of the defendant's right against self-incrimination. Vaughn v. Creely, 310 So. 2d 703 (Miss. 1975).

22. —Administrative proceedings, self-incrimination.

Defendant's motion to suppress his confession, contending that his rights under Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, Miss. Const. Art. 3, §§ 14, 26 and 28, and Miss. Unif. Crim. R. Cir. Ct. Prac. 6.03 were violated was properly denied where a psychiatrist testified that defendant was not so impaired by mental disease or defect as to make him clearly incompetent to make a confession. Further, in defendant's original direct appeal, he challenged the admission of his confession on five separate grounds and that adverse decision constituted the law of the case. Thorson v. State, 895 So. 2d 85 (Miss. 2004), writ of certiorari denied by 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177, 74 U.S.L.W. 3203 (2005), remanded by 994 So. 2d 707, 2007 Miss. LEXIS 497 (Miss. 2007).

Privilege against self-incrimination exists in bar disciplinary proceedings, even though no criminal charges are pending against attorney being charged at time, although questions concerning personal history, unrelated to charges in formal complaint, should be answered. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

An attorney who takes the witness stand in a disciplinary proceeding against him may, on a question-by-question basis, make valid assertion of the Fifth Amendment privilege as to those questions which would tend to incriminate him of a state or federal criminal offense. Mississippi State Bar v. Attorney-Respondent in Disciplinary Proceedings, 367 So. 2d 179 (Miss. 1979).

23. —Pro se defense of action, self-incrimination.

A defendant has the constitutional right to make an opening statement pro se without being put under oath and subject to cross examination, and action of trial court preventing him from doing so is reversible error. Trunell v. State, 487 So. 2d 820 (Miss. 1986).

The law does not require a defendant to make a choice between proceeding pro se and exercising his right against self-incrimination. He may conduct his entire defense without ever being sworn in as a witness or being subject to cross examination. Trunell v. State, 487 So. 2d 820 (Miss. 1986).

A defendant who chooses to argue his case to a jury and at the same time invokes the Fifth Amendment must confine his remarks to the evidence in the record. Thus, in a prosecution for capital murder, a defendant who argued pro se to the jury and clearly went beyond the evidence in the record had to accept as a consequence the prosecution's comment on his failure to swear to the testimony, since defendant's remarks constituted a waiver of both the constitutional privilege against self-incrimination and the prohibition against the prosecution from commenting on his failure to testify. Rigdon v. Russell Anaconda Aluminum Co., 381 So. 2d 983 (Miss. 1980), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81 (1980).

24. —Witnesses, self-incrimination.

Although cross-examination of the victim of an armed robbery regarding his indictment on an aggravated assault charge might have caused the jury to disbelieve the victim's testimony against defendant, the trial court properly excluded the evidence because the victim had invoked his Fifth Amendment right against self-incrimination and defendant's Sixth Amendment rights had to yield to the victim's Fifth Amendment rights. Renfro v. State, 118 So. 3d 560 (Miss. 2013).

Regardless of the availability of defendant's sister as a witness, where if called she would invoke her Fifth Amendment privilege in that she was also charged with capital murder along with defendant, it was improper to exclude testimony of her father as inadmissible hearsay under Miss. R. Evid. 804 because the statements were admissible as statements against interest in that they were sufficiently against the sister's penal interest by indicating her intention to murder her husband, they were sufficiently trustworthy, and they were corroborated by other evidence. Edmonds v. State, 955 So. 2d 787 (Miss. 2007), writ of certiorari denied by 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868, 76 U.S.L.W. 3287 (2007).

Trial judge did not err in prohibiting the owners from impeaching the witness with his own deposition as the trial judge had previously ruled that the deposition was inadmissible for all purposes and once a witness invoked his Fifth Amendment self-incrimination privilege, his silence did not constitute grounds for impeachment. Gibson v. Wright, 870 So. 2d 1250 (Miss. Ct. App. 2004).

In a case related to defendant's conviction for gratification of lust, a voluntary statement defendant gave to two police officers was properly admitted because there were no requirements regarding the form in which the statement had to be memorialized. Jordan v. State, 868 So. 2d 1065 (Miss. Ct. App. 2004).

Defendant's due process rights were not violated by a prosecutor's question regarding the invocation of the right to remain silent because defense counsel referred to the issue during direct examination; moreover, defendant failed to invoke the right during questioning after an arrest for sexual battery. McCoy v. State, 878 So. 2d 167 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 910 (Miss. 2004).

Because defense counsel, at the very least, had notice of the fact that the mental competency examination would take place, since he signed off on the examination order, the trial court did not err in failing to suppress the inmate's confessions. Crawford v. State, 867 So. 2d 196 (Miss. 2003), writ of certiorari denied by 543 U.S. 866, 125 S. Ct. 205, 160 L. Ed. 2d 110, 2004 U.S. LEXIS 6519, 73 U.S.L.W. 3210 (2004).

Petitioner's Fifth and Sixth Amendment rights were not violated when doctors, outside the presence of counsel, performed a psychiatric evaluation to determine his ability to stand trial; the doctors advised the petitioner that anything he said could be used against him during the sentencing phase of trial, and they offered to allow the petitioner to call his attorneys. Wilcher v. State, 863 So. 2d 719 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Where a police chief testified that defendant "stopped talking" after admitting being in the city where a murder occurred, defendant was not entitled to a mistrial based on the alleged inappropriate comment on his right to remain silent under the Fifth Amendment or Miss. Const. Art. 3, § 26; merely stating that defendant stopped talking did not give grounds for mistrial. Shelton v. State, 853 So. 2d 1171 (Miss. 2003).

Where a police chief testified that defendant "stopped talking" after admitting being in the city where a murder occurred, defendant was not entitled to a mistrial based on the alleged inappropriate comment on his right to remain silent under the Fifth Amendment or Miss. Const. Art. 3, § 26; merely stating that defendant stopped talking did not give grounds for mistrial. Shelton v. State, 853 So. 2d 1171 (Miss. 2003).

It was not error for the court not to allow the defendant to continue to question a witness after the witness took the stand and read a statement informing the court that he would not answer any questions from the defense or the state. Woodham v. State, 779 So. 2d 158 (Miss. 2001).

Criminal defendant must be allowed to call witnesses to stand even though defendant is aware that witness, if called, will invoke Fifth Amendment to every question. Butler v. State, 702 So. 2d 125 (Miss. 1997).

Witness had Fifth Amendment privilege to refuse to testify in murder trial; witness refused to answer any further questions after merely acknowledging that he knew defendant and another witness who had pled guilty to involvement in crime, it was plausible that witness' presence at scene of crime could have resulted in charges being brought against him, and witness was subject to prosecution for other crimes that might have been revealed in his testimony. Butler v. State, 702 So. 2d 125 (Miss. 1997).

Invoking Fifth Amendment privilege against self-incrimination makes the witness unavailable and any hearsay statements from another witness about what the unavailable witness said fall within hearsay exception. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

When witness invokes his Fifth Amendment right, his response is not the proper subject for impeachment. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A police detective's testimony concerning the fact that the defendant fainted after he was informed of his Miranda rights was not a violation of the defendant's constitutional rights since the defendant did not give a statement and the detective did not comment on his silence; the detective's stating that the defendant fainted was not the same as stating that the defendant refused to testify. Stogner v. State, 627 So. 2d 815 (Miss. 1993).

Where a defense witness invoked the Fifth Amendment, so that his testimony on direct-examination yielded nothing, the trial court erred in permitting the prosecutor to cross-examine the witness concerning a prior statement made by him; when the prosecutor, through the use of leading questions, parades before the jury the "testimony" of a silent witness, this violates the confrontation clause since the prosecutor cannot take the stand to be cross-examined by the defendant about the silent witness' "testimony". Balfour v. State, 598 So. 2d 731 (Miss. 1992).

A defense witness who invoked the Fifth Amendment could not be impeached by the State with respect to a prior statement made by him since the silence of a witness who invokes the Fifth Amendment does not constitute a denial which may be impeached. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

At a hearing on a former wife's petition to hold her former husband in contempt for failure to pay child support, the wife could not invoke her right against self-incrimination to shield herself from questions on cross-examination as to whether she maintained that the husband had an account at a particular bank, where the wife had voluntarily taken the stand on direct examination and unequivocally identified the signature on the bank account as the husband's. A party may not testify as to material facts in proceedings which he or she initiated, and later invoke the privilege against self-incrimination on those same matters. Thus, when the wife voluntarily took the stand and testified to material matters on direct examination, she also waived her right against self-incrimination. Wallace v. Jones, 572 So. 2d 371 (Miss. 1990).

An individual may not be compelled to testify against himself or herself or to offer testimony which might render him or her liable to a criminal prosecution, whether he or she is a witness in a civil, criminal, or quasi-criminal proceeding. Moore v. Moore, 558 So. 2d 834 (Miss. 1990).

A witness was properly allowed to invoke his Fifth Amendment rights against self-incrimination at a retrial on the ground that his testimony might result in perjury charges brought against him flowing from his testimony at the first trial. Stringer v. State, 548 So. 2d 125 (Miss. 1989).

A defendant's right to the testimony of a witness extends only to the limit of the witness' right against self-incrimination. Smith v. State, 527 So. 2d 660 (Miss. 1988).

Mere calling of witness by State who invoked Fifth Amendment privilege against self-incrimination would not be sufficient grounds for reversal of capital murder conviction; however, where state was allowed to call other witnesses to testify regarding alleged confession given by that witness, wherein he had detailed events of murder and implicated defendant as party to murder, defendant's right to confront and cross-examine witnesses presented against her was violated. Witness invoking Fifth Amendment privilege against self-incrimination and refusing to answer any questions regarding confession effectively prevented defendant from conducting meaningful cross-examination in violation of her constitutionally protected rights; fact that defendant was allowed to cross-examine both witnesses concerning circumstances under which confession was given could not substitute for meaningful cross-examination of declarant himself; state's contention that this evidence was properly admitted to impeach testimony given by witness was rejected, where state was allegedly attempting to impeach witness concerning statement that was accurate and truthful, which was that jury had previously decided whether he had killed decedent; court stated that it knew of no authority where truthful statements were held to be impeachable; instruction to jury that testimony was to be viewed only for impeachment purposes did nothing to diminish importance of this testimony and certainly did not cure constitutional error. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

Witness in capital murder case was improperly compelled to testify in violation of Fifth Amendment privilege against self-incrimination where witness was under indictment for conspiracy to commit arson at time he was called to stand, and charge of arson was so intertwined with murder case being tried that any testimony given by witness concerning murder could have been used in subsequent trial on arson charges. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

The Fifth Amendment privilege is intended to protect the witness and has no proper application when the witness is not in danger of prosecution or conviction. Hentz v. State, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

Requiring witness, who had already pled guilty to the murder, to answer questions concerning that murder did not expose witness to prosecution for the murder and did not infringe upon his Fifth Amendment rights, where the witness' petition for writ of habeas corpus or, in the alternative, petition to withdraw his guilty plea, came months after the term of court expired wherein he had pled and sentence had been entered. Hentz v. State, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

In a robbery prosecution, the state properly elicited from defendant that his purpose in buying marijuana from the victim was to sell it at a later time, where defendant testified in his own defense that he had purchased the marijuana from the victim, notwithstanding his contention that his Fifth Amendment rights were violated thereby. Davis v. State, 431 So. 2d 468 (Miss. 1983).

There was no error in refusing to quash the indictment of a defendant who, when summoned before the grand jury, answered in response to the first question propounded to him that he claimed his rights under the Fifth Amendment and was thereupon immediately excused; for in his appearance before the grand jury he had not testified to a single fact. Byrd v. State, 228 So. 2d 874 (Miss. 1969).

In a creditor's suit seeking disclosure of certain assets, the chancellor did not commit error in holding that the judgment debtor was entitled to assert his privilege against self-incrimination, under statutes making it a crime to remove property subject to liens out of the state or out of the county without consent or with intent to defraud. Ferguson v. Johnson Implement Co., 222 So. 2d 820 (Miss. 1969).

An individual who in applying to a surety for a performance and payment bond, obligated himself to furnish financial statements to the surety, and who was adjudged liable to the surety on the bond, was estopped from claiming a privilege against self-incrimination in the surety's creditor's suit against the individual, respecting the location of the individual's assets. Ferguson v. Johnson Implement Co., 222 So. 2d 820 (Miss. 1969).

25. —Transactional immunity, self-incrimination.

The constitutional right against self-incrimination requires a transactional immunity grant when a witness is granted immunity from prosecution in exchange for the witness' agreement to testify before the grand jury. In order to place an individual in a position where he or she has no right to refuse to testify and may be held in contempt if he or she refuses to testify, the prosecution is required to grant immunity from prosecution for the witness' involvement in the transaction which is the subject of the grand jury investigation and for or on account of any transaction, matter or thing concerning which the witness may testify or produce evidence. Moreover, no testimony or evidence produced by the witness, nor any information directly or indirectly derived from such testimony or evidence, may be used against the witness in any criminal prosecution, except perjury. Only such broad immunity will make the individual as secure as if he or she had remained silent. Wright v. McAdory, 536 So. 2d 897 (Miss. 1988).

26. —Privilege, self-incrimination.

Where defendant confessed to participating in the wife's plan to murder her husband, the victim's wife invoked the Fifth Amendment and therefore was an unavailable witness at trial; it was error for the circuit court to accept her blanket invocation of her privilege against self-incrimination without making a searching inquiry into what her testimony might be. Edmonds v. State, — So. 2d —, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

A father in a child support proceeding would be required to assert his claim of privilege against self-incrimination on a question by question basis with respect to questions regarding his tax returns, and would be required to tender sufficient information to allow the court to make an informed decision concerning the claim of privilege. Harrell v. Duncan, 593 So. 2d 1 (Miss. 1991).

In a prosecution for capital murder in which, when pressured to admit that he had acted alone and without an accomplice, defendant twice replied "I prefer not to speak on that," defendant effectively invoked his privilege against further self-incrimination under the Fifth Amendment, and, because his request was not scrupulously honored, his subsequent incriminating statements were, as a matter of law, unconstitutionally obtained and should not have been received in evidence against him at trial. Jones v. State, 461 So. 2d 686 (Miss. 1984).

27. —Request for counsel, self-incrimination.

Trial court manifestly erred in failing to suppress defendant's statement to the police because the police subjected defendant to interrogation after he had invoked his right to counsel, and the State failed to prove that defendant's waiver of rights was knowing, intelligent, and voluntary. Benjamin v. State, 116 So. 3d 115 (Miss. 2013).

In a case in which defendant argued that the trial court should have suppressed her statements because they were taken in violation of her constitutional right to counsel. The record supported a finding that defendant received the Miranda warning, that she knowingly and intelligently waived the rights, and that she freely and voluntarily made the statements, and, pursuant to the Davis decision, she failed to make an unambiguous, unequivocal request for an attorney. Barnes v. State, 30 So. 3d 313 (Miss. 2010).

Confronting a suspect with the incriminating evidence compiled against him after he has invoked his right to counsel, and without any initiation on the part of the suspect, is precisely the kind of psychological ploy that definition of interrogation in Innis was designed to prohibit. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's right to counsel was violated by police-initiated interrogation after he asserted his right to counsel because an officer showed defendant the evidence file in an attempt to have him reconsider his request for counsel; a tactic that proved successful as defendant was not prompted to speak until he reviewed the evidence. Because the actions of the officer constituted police-initiated custodial interrogation, a valid waiver could not be established simply by showing that defendant responded to the interrogation. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's capital murder convictions were proper where his Fifth, Sixth, and Fourteenth Amendment rights to counsel and to remain silent were not violated. He made no objection at trial; there was no testimony concerning defendant's use of counsel or his right to remain silent; and the State's questioning was designed solely to elicit a chronological version of the events involved in the investigation of the murders not the fact that the defendant requested an attorney during the State's investigation. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Defendant's conviction for capital murder was proper where he was not denied his right to counsel because, at the time of his confession, he was merely a suspect who had been brought to the sheriff's department for questioning and thus, his U.S. Const. amend. VI right to counsel had not yet attached. Further, as his confession occurred during a custodial interrogation, he had a U.S. Const. amends. V and XIV right to have counsel present, but the lower court found the testimony of the officers that defendant had not invoked his right to counsel more credible than defendant's assertion that he had done so. Brink v. State, 888 So. 2d 437 (Miss. Ct. App. 2004), writ of certiorari denied by 888 So. 2d 1177, 2004 Miss. LEXIS 1475 (Miss. 2004), writ of certiorari denied by 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744, 2005 U.S. LEXIS 3129, 73 U.S.L.W. 3620 (2005).

When counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney; if the accused indicates in any manner that he wishes access to counsel, interrogation without counsel is allowed only if the accused himself initiates it; waiver of Fifth Amendment protections after counsel has been requested is not foreclosed, provided the accused has initiated the conversation or discussions with the authorities; defendant's voluntary statement after requesting counsel, that he had dug a deep hole for himself, was admissible. Randolph v. State, 852 So. 2d 547 (Miss. 2002), modified by 2002 Miss. LEXIS 365 (Miss. Nov. 21, 2002).

Requesting assistance of counsel at an initial appearance or bail hearing to defend a pending charge is not the same type of invocation of counsel contemplated by the Fifth Amendment Miranda-Edwards interest against compulsory self-incrimination, which is associated with police-initiated custodial interrogations; in order to invoke the Fifth Amendment right against compulsory self-incrimination, some "expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police" is required. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

An accused invoked her Fifth Amendment right to counsel at the time of her arrest when she asked for an attorney and stated that she was not going to sign any papers or answer any questions without having a lawyer present; the accused invoked her Sixth Amendment right to counsel and the state counterpart right secured by Article 3, § 26 of the Mississippi Constitution at her initial appearance when she indicated a desire for representation and an interest in contacting her family to ascertain their progress in hiring a lawyer for her. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

A trial court erred in admitting a defendant's confession evidence since the confession was tainted by the constitutional violation of the defendant's Sixth Amendment right to counsel and rights secured by Article 3, § 26 of the Mississippi Constitution, where the defendant "waived her rights" and made the confession after a sheriff department investigator and deputy initiated contact with her within less than 4 hours after she invoked the right to counsel at her initial appearance; the confession was also tainted by violation of the defendant's Fifth and Fourteenth Amendment rights since the defendant had also requested a lawyer and declined to waive any rights at the time of her arrest. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

When an accused makes an equivocal statement suggesting a request for counsel, the interrogation may only continue "on the narrow road" to ascertain the meaning of the equivocal statement. The interrogating officer has an affirmative duty to attempt to clarify the request before proceeding with the substance of the interrogation; the officer's subsequent finding will determine whether or not interrogation may continue. Kuykendall v. State, 585 So. 2d 773 (Miss. 1991).

Once an accused has requested an attorney, it is improper for either the same or another law enforcement officer to question the accused about his or her criminal conduct. If the accused indicates in any manner at any time prior to or during questioning that he or she wishes to remain silent or to have access to counsel, the officers must cease interrogation. When the accused asks for counsel, the officers may not resume interrogation until counsel has been provided, except where the accused voluntarily reinitiates the discussion of the charges. If the accused requests access to counsel, all officers of the prosecution force are bound thereby, including those who have no actual knowledge of the request. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

A defendant's confession should not have been admitted into evidence where the confession was obtained by law enforcement officers after the defendant made a request for an attorney to the justice court judge who was considering binding him over to await the action of the grand jury, and one of the officers heard the defendant's request. Although the defendant may only have meant that he wanted a lawyer for court proceedings and did not want a lawyer to advise him before being questioned about the crime, the officers did not seek to make such a determination, but simply proceeded to question the defendant, knowing that he was a cocaine addict and to some extent, because of such addiction, judgment-impaired at the time. No intelligent, knowing waiver of the right to counsel, which the defendant had expressed to the justice court judge, could be found from an officer testifying that he simply orally gave the defendant the Miranda warning. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

Admission of written statement into evidence violated defendant's constitutional rights where, after Miranda rights were read, father of defendant informed police that attorney was desired and that no statement would be made until one was present. After this right had been invoked, officer continued questioning at which point defendant gave oral statement, which was reduced to writing following day. Prosecution could not show that defendant understood and waived his rights where officer stated that Miranda rights were read to him and defendant was asked if he understood it, to which he replied "yes", but rights were not discussed with defendant. Impermissible questioning which occurred in police station after defendant had invoked right to counsel bears on admissibility of written statement which was obtained following morning. Reuben v. State, 517 So. 2d 1383 (Miss. 1987).

Statement made by defendant to deputy sheriff, in response to questioning, after defendant had requested a lawyer but before he had arrived, was not admissible by the state on its case in chief against defendant for murder; but, since the statement was not a product of coercion or promises, it was admissible to impeach defendant's credibility as a witness. Murphy v. State, 336 So. 2d 213 (Miss. 1976), certiorari denied, 97 S. Ct. 819, 429 U.S. 1076, 50 L. Ed. 2d 795.

28. —Request for mental health or spiritual advisor, self-incrimination.

A defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel were not violated by the admission of his confession into evidence, even though the confession was obtained after the defendant initially refused to sign a waiver of rights form and had stated that he would not sign anything until he talked to his mental health counselor. The defendant's refusal to sign the waiver of rights form was not a per se invocation of his Fifth Amendment rights. Additionally, the defendant's request for a mental health counselor was not a per se invocation of his Fifth Amendment rights; a request for someone other than an attorney does not invoke a defendant's Fifth Amendment rights, and a mental health counselor is not qualified to protect a defendant's Fifth Amendment rights. Similarly, neither the defendant's request to speak to his mental health counselor nor his temporary refusal to sign the waiver form constituted a request for counsel so as to invoke his Sixth Amendment right. Mohr v. State, 584 So. 2d 426 (Miss. 1991).

29. —Failure to testify generally, self-incrimination.

Alleged improper comment on a defendant's right to remain silent under the Fifth Amendment is reviewed for harmless error. Smith v. State, 848 So. 2d 195 (Miss. Ct. App. 2003).

Prosecution is prohibited from making direct comment, or reference by innuendo or insinuation, to defendant's failure to testify on his or her own behalf. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

30. —Comment by counsel on failure to testify, self-incrimination.

Defendant's capital murder conviction was appropriate because the trial court did not err in not declaring a mistrial after a witness's comment regarding defendant's exercise of his right to remain silent. The trial court's instruction, to which the defense did not object, cured the error of the testimony of the investigator; therefore, the investigator's comment on defendant's exercise of his right to remain silent did not constitute abuse of discretion by the trial court, nor reversible error. Birkhead v. State, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Prosecutor's statement "she can't come here with a straight face and tell you I lied for whatever kind, sweet reason counsel opposite might have you believe" was not a comment on defendant's failure to testify. The prosecutor simply responded to the comments that defense counsel made during closing argument. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Prosecutor's statement was a permissible comment on the absence of evidence to support defendant's defense as the prosecutor's statement neither referred to defendant's failure to testify, nor by masked implication suggested defendant's silence was evidence of guilt; therefore, the circuit court did not abuse its discretion in overruling defendant's motion for a mistrial. Dora v. State, 986 So. 2d 917 (Miss. 2008), writ of certiorari denied by 555 U.S. 1142, 129 S. Ct. 1009, 173 L. Ed. 2d 302, 2009 U.S. LEXIS 780, 77 U.S.L.W. 3429 (2009).

Where the prosecutor in no way, either directly or inferentially, put a negative spin on the fact that the defendant exercised his constitutional right not to testify, but merely addressed defendant's failure to present any case at all, the prosecutor did not violate Miss. Const. Art. 3, § 26 and the Fifth Amendment in her closing arguments, and no error was committed by the trial court in denying defendant's motion for a mistrial. Wright v. State, 958 So. 2d 158 (Miss. 2007), writ of certiorari dismissed by 964 So. 2d 508, 2007 Miss. LEXIS 501 (Miss. 2007).

Denial of the inmate's petition for postconviction relief pursuant to Miss. Code Ann. §§ 99-39-1 et seq., was appropriate in part because his Fifth Amendment right against self-incrimination was not violated since the prosecutor's comment was a fair response to the defense's claim that the state failed to call some witnesses who could have been helpful to the jury; the argument at issue did not specifically mention the inmate or refer to his failure to testify. Turner v. State, 953 So. 2d 1063 (Miss. 2007).

Statements by the prosecutor during cross-examination of a witness and during his closing statements did not warrant a mistrial because the remark had not created negative inferences based upon defendant's choice to exercise his right not to testify. It was clear from the context of the sentences that the prosecutor was referring to the attorneys and not defendant. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Court rejected husband's claim that the State's closing remark that neither parent had offered an adequate explanation of how the child was injured violated his Fifth Amendment right not to testify in his own defense because the statements did not penalize the husband for asserting his constitutional privilege but rather were comments on the husband and wife's lack of a defense. Not every comment on the absence of a defense or on the defense presented is equivalent to a comment on the defendant's failure to testify. Scarbough v. State, 893 So. 2d 265 (Miss. Ct. App. 2004), writ of certiorari denied by 893 So. 2d 1061, 2005 Miss. LEXIS 103 (Miss. 2005).

In the mother and stepfather's appeal of their convictions for felonious child abuse, the State's comments during closing argument did not violate the stepfather's right under the Fifth Amendment and Miss. Const. Art. 3, § 26 not to be compelled to be a witness against oneself, which included the right not to have the prosecution make any comment upon a defendant's exercise of that right, because the comments were comments on the defense presented, or lack thereof, and not comments on the failure to testify. Not every comment regarding the lack of any defense or upon the defense presented is equivalent to a comment on the defendant's failure to testify; the State is entitled to comment on the lack of any defense, and such comment will not be construed as a reference to a defendant's failure to testify by innuendo and insinuation. Scarbough v. State, 2004 Miss. App. LEXIS 910 (Miss. Ct. App. Sept. 14, 2004), opinion withdrawn by, substituted opinion at 893 So. 2d 265, 2004 Miss. App. LEXIS 1119 (Miss. Ct. App. 2004).

In a drug case, a prosecutor's comment to the jury regarding its duty to weigh the testimony of several police officers did not violate defendant's right not to testify because it was merely directed to a lack of a defense. Stubbs v. State, 878 So. 2d 130 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 936 (Miss. 2004).

State's comments on defendant's failure to explain the fact that his shotgun had killed the victim were not improper comments on defendant's failure to testify, but merely comments on defendant's failure to put on a successful defense. Cox v. State, 849 So. 2d 1257 (Miss. 2003).

Where the prosecution asked a question that elicited a response commenting on defendant's exercise of defendant's right to remain silent, this infringement upon defendant's Fifth Amendment right to remain silent was harmless error, because defendant had been identified as the perpetrator by the codefendant, who testified against defendant at trial, and the facts of the crime were largely beyond dispute. Smith v. State, 848 So. 2d 195 (Miss. Ct. App. 2003).

Defendant's exercise of his Fifth Amendment right not to testify had not been violated by the State's closing argument; the prosecutor did not comment on defendant's failure to testify but on his failure to put on a successful defense. Cox v. State, — So. 3d —, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), opinion withdrawn by, substituted opinion at 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Prosecutor did not make any remarks in his closing arguments that violated defendant's Fifth Amendment right to silence when the prosecutor stated that "defendant is the only one that knows why they let him [the victim] off with just $ 21 dollars." Hughes v. State, 807 So. 2d 426 (Miss. 2001).

The defendant's right against self-incrimination was not compromised by the prosecutor's reference, in his closing argument, to voluntary statements made by the defendant, notwithstanding the defendant's contention that a reasonable juror could have viewed these comments as a reference to the fact that he had not testified in his own defense, since the state did not call the jury's attention to the defendant's failure to testify at trial. Hill v. State, 774 So. 2d 441 (Miss. 2000).

In a prosecution for sale of marijuana to an undercover agent in which the defendant implied that the state mistakenly identified him as the person who sold the marijuana, the prosecutor's comment during closing arguments was a comment on the defendant's failure to successfully back up the claim of mistaken identity he raised in closing arguments, rather than a comment on his failure to take the stand in his own defense. Heatherly v. State, 757 So. 2d 357 (Miss. Ct. App. 2000).

Government's exploitation of silence, after government has helped induce that silence by informing defendant of his right to remain silent, violates due process. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Alternative tests for determining whether prosecutor's or witness's remarks constitute comment on a defendant's silence are whether "manifest intent" was to comment on defendant's silence or, alternatively, whether character of remark was such that jury would "naturally and necessarily" construe it as comment on defendant's silence, determining both intent of prosecutor and character of remarks in relevant context. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Where defendant's testimony at trial does not deal with same subject matter as his pretrial statement, prosecutor's remarks on omissions in pretrial statement is considered plea for jury to infer guilt or other negative inferences from defendant's exercise of his *Miranda* rights. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Witness' invocation of his Fifth Amendment privilege to refuse to testify was not relevant evidence, and thus defense counsel could not refer to such refusal in counsel's closing argument. Butler v. State, 702 So. 2d 125 (Miss. 1997).

Even if prosecutor's statement during closing argument that referred to witness' testimony, in which witness told defense counsel to ask defendant if he had told witness about committing crime, was improper reference to defendant's refusal to testify, statement did not require reversal; defense counsel did not object when witness made comment, prosecutor's remarks could be characterized as summary of witness' testimony rather than remark on defendant's failure to testify, evidence supported conviction beyond reasonable doubt without prosecutor's statement, and comment had almost no persuasive force. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Right not to give compelled testimony is violated by direct statement regarding defendant's decision not to testify, or comment which could reasonably be construed by jury to be comment about defendant's failure to testify. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prosecutor did not improperly comment on defendant's failure to testify during sentencing phase of capital murder trial when he made comments concerning defendant's credibility, where defendant had testified during guilt phase and stipulated to use of guilt phase testimony during sentencing phase. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prosecutor did not comment on defendant's failure to testify by stating that sole issue, in prosecution against defendant for arson, was whether defendant recruited arsonist to burn building on the day in question. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by pointing out that not one defense witness testified that prosecution witness was lying. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating that no evidence was presented, in prosecution against defendant for arson, that arsonist, allegedly recruited by defendant to burn building on the day in question, was a professional criminal; rather, comment merely referred to paucity of evidence supporting defense theory that arsonist burned building to get revenge on defendant. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that it was not likely that government witness fabricated his testimony, in that if he had, he would have fabricated a better story; rather, comment merely referred to paucity of evidence supporting defense theory witness was publicity seeker who would fabricate testimony. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that there was no testimony supporting defense theory that defendant could not have committed the crime inasmuch as he was doctor who derived sense of closeness from the community because he was "their" doctor; rather, comment merely referred to paucity of evidence supporting that defense theory. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that there was no testimony supporting defense theory that arsonist was blackmailing defendant; rather, comment merely referred to fact that blackmail theory was put forth by defense attorneys rather than by defense witnesses. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecution did not improperly comment on capital murder defendant's failure to testify, when he stated that accomplice's testimony regarding a ripped shirt was the "only testimony" and the "only reliable information" made available; reading of full remarks made it plain that prosecutor was simply summarizing account of night's events as told by accomplice and rebutting defense efforts to show that accomplice was lying. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not impermissibly comment upon failure of capital murder defendant to testify when he told jury, following defendant's speech to jury, that "for 11 months [defendant] had wanted to say something" and "if all he had to say was what he said in those less than 2 minutes he stood here before you, I can see why he hasn't bothered until now"; prosecutor's remarks were in direct response to defendant's attempt to show some degree of remorse. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not impermissibly comment on defendant's failure to take the stand during resentencing hearing in capital murder case when he attempted to question witness about defendant's confession given during his guilt phase testimony; trial court refused to allow prosecution to question witness as to defendant's earlier testimony, and at time, defendant had not informed trial court he would not testify during sentencing phase. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Prosecutor is prohibited from commenting on defendant's failure to testify, whether by direct comment or by innuendo and insinuation. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutorial comment on defendant's failure to testify is incurable, and defendant is entitled to mistrial; instruction to jury to disregard prosecutor's comments is insufficient to correct impropriety. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Defendant's constitutional interest in privilege against compelled self-incrimination is balanced on case-by-case basis against rule allowing attorneys wide latitude in making closing arguments, except where attorney makes direct reference to defendant's failure to testify. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutor may comment on lack of any defense, and such comment is not construed as reference to defendant's failure to testify through innuendo and insinuation. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Whether prosecutorial comment is improper comment on defendant's failure to testify is determined on facts and circumstances of each case; question is whether comment can reasonably be construed as comment upon failure of defendant to take stand. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutor did not make improper comments on defendant's failure to testify, and defendant was thus not entitled to mistrial, when prosecutor commented about what defendant might or might not have said to arresting officer, objected to defense counsel's statement that defendant was a family man who should be sent home to his family, and noted that jury had not heard any proof about where defendant was going if jury did not convict him. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

A prosecutor's remarks during the penalty phase of a capital murder prosecution did not constitute an improper comment on the defendant's failure to testify where the prosecutor stated that the defendant "showed no compassion, but would send a lawyer up here and ask you for compassion," since the argument pointed out the lack of a mitigation defense presented by the defendant, and that he was reduced to sending his lawyer in to plead for his life after all else had failed. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

The prosecutor's closing argument in the guilt phase of a capital murder prosecution did not constitute an improper comment on the defendant's right to remain silent following arrest where the prosecutor, while discussing a county jail inmate's testimony as to statements made by the defendant while he was in the jail, referred to the relationship between the defendant and the witness, and described the circumstances under which the statements were made. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's closing argument in a capital murder case did not constitute a comment on the defendant's failure to testify at trial, in spite of the defendant's argument that the prosecutor's comments highlighted the fact that the only people alive who could have testified as to the events surrounding the murders were the defendant and his accomplice, where the prosecutor merely stated that the defendant and his accomplice saw to it that there were no eyewitnesses, and that "people who kill their victims and kill their eyewitnesses cannot be set free." Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the State's closing argument did not constitute a comment on the defendant's failure to take the witness stand in his own defense where the State made the following argument: "Do you think she was suffering? Do you think that's cruel and atrocious, and what's even more than that, what do you think was running through [defendant's] head as he sat through watching her gag on her own blood? What do you think he was thinking?" Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A prosecutor's remarks during closing argument did not constitute improper comment on the defendant's decision not to testify where the prosecutor did not comment on the defendant's failure to take the stand, but merely attempted to turn the jury's attention to the defendant's confession to the police which had been admitted into evidence. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A prosecutor's comments on the defendant's failure to testify reached a constitutional dimension so egregious that failure on the part of the defense counsel to make a proper objection either at trial or in his motion for a new trial did not waive the error where the prosecutor made 4 separate statements telling the jury that the State's witness' testimony was "unopposed," "unimpeached," "unrebutted," and that there was "no evidence whatsoever toward their unreliability." Whigham v. State, 611 So. 2d 988 (Miss. 1992).

A prosecutor did not improperly comment during closing argument on the defendant's right to remain silent where the prosecutor remarked that the victim could not talk because she was dead and stated that only the defendant and God knew what happened, but he did not observe the defendant's silence during trial; the prosecutor's comments would be a reference to the defendant's failure to testify only if innuendo and insinuation were employed. Alexander v. State, 610 So. 2d 320 (Miss. 1992).

A prosecutor improperly commented during closing argument on a capital murder defendant's failure to testify where the prosecutor stated that the defendant "hasn't told you the whole truth yet," that "you still don't know the whole story," and that the defendant was the only person alive who could give the whole story. Butler v. State, 608 So. 2d 314 (Miss. 1992).

A prosecutor did not improperly comment on the defendant's failure to testify when he stated during closing argument:"That's what you have got before you, and that's all you have got before you. All the evidence in this case points to one thing and one thing only"; the prosecutor's comment related to the evidence presented in the trial by both the State and defense as a whole, rather than the failure of the defendant to take the stand. Rogers v. State, 599 So. 2d 930 (Miss. 1992).

In a capital murder prosecution in which the defense counsel had argued that "there is only one person who can tell you if a reasonable doubt exists insofar as this case, and that's each and every one of you," the prosecutor's rebuttal constituted an improper comment on the defendant's failure to testify where it included a statement that "they tell you, there's one man alive today who can tell you what happened, and I agree with that. There is one person who could tell you what happened and we have... a statement from him. We have a confession, an oral confession, we have a written confession...." Such remarks directed the jury's attention to the failure of the defendant to take the stand and admit or deny the contents of the confession. Griffin v. State, 557 So. 2d 542 (Miss. 1990).

A prosecutor's statement in closing argument that "they" hadn't bothered to tell the jury what the defendant was doing at a certain location was not an impermissible comment on the defendant's failure to testify since it was proper for the prosecutor to question the defense's inability to successfully explain the defendant's presence in the area where the crime took place, and the prosecutor's use of the word "they" appeared to be a reference to the defendant's 2 attorneys rather than the defendant himself. Jimpson v. State, 532 So. 2d 985 (Miss. 1988).

An assignment of error based on the prosecutor's comment on the defendant's failure to testify was not procedurally barred for failure to make a contemporaneous objection because the right not to take the witness stand is a fundamental constitutional right. Livingston v. State, 525 So. 2d 1300 (Miss. 1988).

Argument that comment by prosecutor, who stated he had observed defendant and saw no remorse in him whatsoever, was made on defendant's Fifth Amendment privilege against self-incrimination did not constitute reversible error when viewed in light of all evidence. Livingston v. State, 525 So. 2d 1300 (Miss. 1988).

No breach of constitutional right not to testify occurred where comment by counsel allegedly related to failure of accused to testify was in fact statement which court found had not been intended as reference to defendant's silence, but was instead merely mention of other parties who had testified. Russell v. State, 506 So. 2d 974 (Miss. 1987).

An accused who had failed to testify or to put on proof at his capital murder trial was not entitled to a mistrial because of remarks by prosecutor in closing argument asking jury to recall defense's assertion in opening statement as to witnesses to be called. West v. State, 485 So. 2d 681 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574 (1986).

An accused sentenced to death on a capital murder charge was denied a fair trial by prosecutor's comments in closing argument as to accused's failure to testify, and by defense counsel's attempted "explanation" in closing argument as to the reason his client had failed to testify. West v. State, 485 So. 2d 681 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574 (1986).

If capital murder defendant gives exculpatory testimony during sentencing phase of trial, prosecutor may comment on defendant's exercise of right not to testify during prior trials and during penalty phase. Jordan v. State, 464 So. 2d 475 (Miss. 1985), vacated, 476 U.S. 1101, 106 S. Ct. 1942, 90 L. Ed. 2d 352 (1986), on remand, 518 So. 2d 1186 (Miss. 1987).

Neither § 13-1-9 [repealed] nor defendant's Fifth Amendment rights were violated by the prosecutor's comment on the defense's failure to dispute the state's evidence, where the defense failed to introduce any evidence at all in a prosecution for drug related crimes, even though they could have presented the testimony of a witness who was present at the time a search of their home was made. Lee v. State, 435 So. 2d 674 (Miss. 1983).

In a prosecution for rape, statements made by the prosecutor concerning defendant's failure to deny guilt when arrested were improper but did not mandate reversal of the conviction where the defense attorney neither asked the trial court to instruct the jury to disregard the statements, nor moved for a mistrial, thereby failing to properly preserve the issue for appeal, and where such error was harmless in view of the overwhelming evidence of defendant's guilt beyond a reasonable doubt. Austin v. State, 384 So. 2d 600 (Miss. 1980).

31. —Comment by counsel on inconsistency of testimony, self-incrimination.

Defendant's post-arrest statement, that victim "come out on me with a gun," was sufficiently inconsistent with his trial testimony, that third-party shook defendant's rifle and shooting was accidental, to establish that prosecutor's comments on statement were designed and had effect of highlighting arguable inconsistency, rather than commenting improperly on defendant's exercise of his right to remain silent. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Where defendant's postarrest statement addresses same subject matter as his trial testimony and is arguably inconsistent with that testimony, prosecutor's questions and comments designed to highlight inconsistency do not violate due process. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Prosecutorial statements that are either intended to or have necessary effect of raising negative inference simply because of defendant's exercise of his right to remain silent are prohibited, but where prosecutor's questions and comments are aimed at eliciting explanation for arguably prior inconsistent statement, no due process violation occurs. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

A defendant's out of court signed statement was properly used to impeach his testimony, though the statement was inadmissible in the State's case-in-chief because the defendant signed the statement without being informed of his Miranda rights, since the statement was voluntarily given where the defendant was not threatened or mistreated when he made the statement, no one made any promises to him, he was not intoxicated or under the influence of any drugs, and the defendant admitted that he could have stopped talking at any time and could have left the room. Bowen v. State, 607 So. 2d 1159 (Miss. 1992).

A prosecutor's question on cross-examination of the defendant, asking if "today is the first time you have told any official the version you've given today?", did not constitute an improper comment on the defendant's right to remain silent where the defendant, on direct examination, had testified to a version of the events in question that had never before been given to the sheriff's office and the defendant had given the sheriff four other versions of the story. Once the defendant related this new sequence of events on direct examination, the prosecution was well within its rights on cross-examination to inquire further about the novelty of the story. Shell v. State, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

32. —Accomplices and codefendants, self-incrimination.

While codefendants' Fifth Amendment rights would not have been violated by having handwriting exemplars examined by an expert to authenticate a statement allegedly written by the codefendant because the evidence would not have been used as testimonial evidence at trial, there was not a substantial need for expert assistance shown in that nothing in the record indicated that defendant ever attempted to have these statements authenticated by locating someone familiar with the handwriting of the codefendants under Miss. R. Evid. 901(b)(2). Therefore, the trial court did not err in denying defendant's motion to compel handwriting exemplars. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

Letters written by defendant to accomplice after he had asserted his constitutional rights to silence and to counsel were properly admitted into evidence in capital murder prosecution; accomplice did not produce letters in attempt to get favorable treatment from state given that state was not aware of their existence until after accomplice had pled guilty, there was no evidence that accomplice was acting as agent of state when letters were received, and there was no evidence that accomplice deliberately attempted to elicit incriminating statements from defendant. Brown v. State, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Statements made by a defendant's sister in the defendant's presence that she intended to get an attorney were not sufficient to trigger the defendant's right to counsel during police questioning and to preclude any subsequent waiver on his part where the record was devoid of any evidence that the defendant attempted to adopt, or even understood, the statements made by his sister. Lee v. State, 631 So. 2d 824 (Miss. 1994).

Cross-examination of accomplice was legitimate attempt by prosecutor to impeach his testimony and was not calculated to raise defendant's silence in jurors' minds, where comments were directed principally toward accomplice, and not toward defendant's failure to testify. Monroe v. State, 515 So. 2d 860 (Miss. 1987).

Trial court committed reversible error by preventing armed robbery defendant, who contended another had committed the crime, from asking questions, in jury's presence, concerning such other person's description and characteristics, of a witness, an accused accessory, who, out of jury's presence, had refused, on self-incrimination grounds, to answer questions concerning the robbery, but had answered questions concerning the description of the other person. Hall v. State, 490 So. 2d 858 (Miss. 1986).

Refusal of the trial court to permit a defendant to continue to ask his codefendant questions with reference to the ownership of articles seized by officers during a search, after the witness had refused to answer questions on the ground that her answers might tend to incriminate her, was proper, contrary to the defendant's assertion that he had a right to ask her in detail about each article exhibited and obtained in the search. Boring v. State, 253 So. 2d 251 (Miss. 1971), cert. denied, 405 U.S. 1040, 92 S. Ct. 1310, 31 L. Ed. 2d 581 (1972).

33. —Pre-arrest statements of defendant, self-incrimination.

Incriminating statements made by a murder defendant were properly admitted into evidence where the defendant was not under arrest at the time of the questioning, the law enforcement officers were merely seeking information about a missing person, the defendant voluntarily went with the officers to the sheriff's office, he was free to leave, and he was taken home by an officer when the questioning was over. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A defendant was under arrest and was therefore entitled to Miranda warnings where he was taken into custody by a deputy sheriff, he was told to go with the officer and was told that it was a very serious matter, he was not allowed to drive his own truck, and he was never released even though he told the officers no more about his whereabouts at the time of the crime then they had already been told. Although the questioning officer may have assumed that the defendant was not under arrest when he questioned him, that is not the test; if the officer had any intention of questioning the defendant without first giving him the Miranda warnings, it was incumbent upon him to have ascertained clearly from the officer who brought the defendant in that the defendant had not been taken into custody and that there was no reason for the defendant to believe that he was in custody. Bevill v. State, 556 So. 2d 699 (Miss. 1990).

34. —Statements regarding post-arrest silence, self-incrimination.

During defendant's trial for sexual battery of a child, the State did not impermissibly comment on his initial post-Miranda refusal to speak with investigators prior to his later statement about fondling the victim because the prosecutor's statement and an officer's testimony about his prior refusal to speak were simply a recitation of the facts concerning a preceding interview. Beasley v. State, 74 So. 3d 357 (Miss. Ct. App. 2010).

Complained of comments and testimony, even if improper, could not be said to amount to plain error in light of the significant circuit split as to whether the use of a defendant's post-arrest, pre-Miranda silence as substantive evidence of the defendant's guilt offended the Fifth Amendment; the references to appellant's post-arrest, pre-Miranda silence did not meet all the elements of the plain-error test in that those references could not be said to be plain, clear, or obvious under the law in Mississippi. Hurt v. State, 34 So. 3d 1191 (Miss. Ct. App. 2009).

In an aggravated assault case, defendants' rights to remain silent under U.S. Const. Amend. V were not violated as the deputy's statement regarding defendants' post arrest silence was harmless error in that their silence was not being used against them, and only one reference was made to their intentions to remain silent. Byrd v. State, 977 So. 2d 405 (Miss. Ct. App. 2008).

35. — Noncustodial interrogation, self-incrimination.

Defendant's convictions for felonious child abuse were appropriate because her statements to a family protection specialist were admissible since defendant was not subjected to custodial interrogation. Defendant was questioned by the specialist, and not the law enforcement officers who accompanied her; during the questioning, defendant was not under arrest, she was in her own home and free to terminate the interview; and nothing in the testimony of defendant or the specialist indicated that defendant believed that she was going to jail rather than temporarily being detained. Clark v. State, 40 So. 3d 531 (Miss. 2010).

Defendant was not under interrogation when he told the detective he had committed the offenses; therefore, his statement was voluntary and not the subject of any interrogation by the detective; therefore, no Miranda warnings were needed, and his Fifth Amendment right to counsel and his right not to incriminate himself were not violated. Alexander v. State, 910 So. 2d 704 (Miss. Ct. App. 2005).

Investigator was not required to inform defendant of the Fifth Amendment rights during two secretly recorded interviews regarding the death of defendant's stepdaughter because defendant was not in custody; it was irrelevant that defendant was the primary target of a police investigation. Starns v. State, 867 So. 2d 227 (Miss. 2003).

There was no custodial interrogation where (1) the first contact between the parties was made by the defendant, not the police officer; (2) the officer advised the defendant that he needed to talk with him in person; (3) the defendant was questioned by the officer in his office, not in an interrogation room; (4) officer was in his office with other sheriff's office employees during regular office hours; (5) the officer, one other sheriff's office employee, and the defendant were the only people present at the meeting; (6) no force or physical restraint was used to get the defendant to the meeting as he came voluntarily; and (7) the allegations against the defendant, kidnapping and aggravated assault, were discussed, as was his ownership of a .45 caliber pistol which was allegedly involved in those alleged crimes. Godbold v. State, 731 So. 2d 1184 (Miss. 1999).

A minor has no constitutional right to have his parents present during his interrogation for a capital crime; and a minor's parents can not assert his constitutional right against self-incrimination on his behalf. Hill v. State, 749 So. 2d 1143 (Miss. Ct. App. 1999).

Defendant's confession was not rendered involuntary by his IQ where (1) the police officer who advised the defendant of his rights and took his statement testified that he understood his rights and voluntarily waived them, (2) no threats, promises of leniency, or coercion were used, (3) the defendant's father was present when his son was advised of his rights and, in fact, signed the waiver along with his son, and (4) the judge found that the defendant was capable of understanding the warnings and that his statement was voluntarily, knowingly, and intelligently given. Biggs v. State, 741 So. 2d 318 (Miss. Ct. App. 1999).

The defendant's statement that he had shot his mother was not made in response to a custodial interrogation or any police action designed to elicit an incriminating response where, after a traffic accident, the defendant was handcuffed and placed in the back of a police car and an officer asked him where he was staying and where his parents were. Greenlee v. State, 725 So. 2d 816 (Miss. 1998).

Probationer's discussion with probation officer, after probationer's release from jail, regarding how probationer came to be arrested on possession charges is not custodial interrogation to which Miranda rights would be applicable. Jones v. State, 481 So. 2d 798 (Miss. 1985).

Where homicide victim's wife saw defendant working on courthouse lawn and stopped to inquire of him whether her husband had lived very long after he was shot, and defendant voluntarily told her he thought victim was dead before he left, and he took the gun and billfold and ran because he was scared, this statement was free and voluntary and admissible in evidence and it was not the result of custodial interrogation as contemplated by Miranda. Glass v. State, 278 So. 2d 384 (Miss. 1973).

36. — Custodial interrogation, self-incrimination.

When the police encourage a parent to pressure a 14-year-old suspect to talk, and the police foster the suspect's mistaken belief that talking would allow him to avoid a night in jail, the police should know their conduct is reasonably likely to elicit an incriminating response; the tactics used by police that encouraged defendant's belief that, by talking to the police, he could avoid a night in jail, and that allowed his mother to speak with defendant after instructing her on how he could reinitiate questioning constituted the functional equivalent of interrogation because they were reasonably likely to elicit an incriminating response from the 14-year-old defendant. Benjamin v. State, 116 So. 3d 115 (Miss. 2013).

Where the police used tactics that constituted the functional equivalent of interrogation, because they were reasonably likely to elicit an incriminating response from defendant, defendant was subjected to interrogation after invoking his right to counsel. Benjamin v. State, 116 So. 3d 115 (Miss. 2013).

Defendant was subjected to a custodial interrogation and, therefore, Miranda was required because (1) defendant was handcuffed and questioned under his carport soon after law enforcement officers had executed a search warrant; (2) while various law enforcement officers were going in and out of the house, at least four officers were in the vicinity where defendant was being questioned; and (3) an officer placed a copy of the search warrant in a chair next to defendant so that he could read it and be aware of the situation. Armstead v. State, 978 So. 2d 642 (Miss. 2008).

37. —Confessions generally, self-incrimination.

Trial court did not err in not suppressing defendant's statement to the police that defendant shot a victim in self defense because although defendant's initial denial of shooting the victim, followed by defendant's recantation of the denial in the face of a witness's accusation, which the jury subsequently saw and heard the witness testify to, was prejudicial, defendant would have been convicted beyond a reasonable doubt even without the tainted statement. Walton v. State, 998 So. 2d 1011 (Miss. Ct. App. 2007), affirmed by 998 So. 2d 971, 2008 Miss. LEXIS 572 (Miss. 2008).

Defendant's convictions for murder, sexual battery, and first degree arson were appropriate because, although the circuit court erred when it admitted his confession into evidence in violation of his Fifth

Amendment right because defendant had already requested counsel, the admission was actually harmless in light of the other evidence connecting defendant to the crime, which included his DNA and finger prints that were found at the crime scene. Haynes v. State, 934 So. 2d 983 (Miss. 2006), writ of certiorari denied by 549 U.S. 1306, 127 S. Ct. 1874, 167 L. Ed. 2d 365, 2007 U.S. LEXIS 3602, 75 U.S.L.W. 3511 (2007).

Defendant was not denied his various constitutional rights where the court did not impermissibly consider the truthfulness of defendant's confession in deciding it admissible at a suppression hearing because much of the inquiry into truthfulness occurred as a result of impeaching defendant and attempting to ascertain his credibility. Carter v. State, 956 So. 2d 951 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 302 (Miss. 2007).

In a murder and aggravated assault case, incriminating statements made to police as defendant was being led to a patrol car were not suppressed because they were not the product of an interrogation; defendant made the statements as police were trying to read him his rights, and he was not questioned until after these warnings were given. Wilson v. State, 936 So. 2d 357 (Miss. 2006).

Defendant's right against self-incrimination was not violated where the trial court admitted his confession to armed robbery into evidence because four full days had elapsed between the time that defendant took crack cocaine and Lorcet and the time that he confessed; his confession could not be said to be the result of intoxication. Thomas v. State, 936 So. 2d 964 (Miss. Ct. App. 2006).

Refusal of trial judge to hold a pre-trial hearing on the admissibility of certain statements in no way prevented defendant from objecting to the admission of the statements when offered; the ruling simply decided that the trial proceedings would not be halted for a separate pretrial hearing; nevertheless, had a timely objection been interposed, the appellate court would still find no error, as the record showed no basis for a finding that the confessions had been obtained illegally: law enforcement officials who took the statements from defendant testified that (1) defendant freely and voluntarily made the statements after being advised of Miranda rights and after voluntarily executing a waiver-of-rights form; and (2) they did not use promises or threats to extract the statements from defendant. Conner v. State, 875 So. 2d 253 (Miss. Ct. App. 2004).

Where defendant was charged with capital murder, defendant testified at trial that defendant was not promised, threatened or coerced to give the videotaped statement, and also testified to giving the statement of defendant's own free will, even though defendant's father told defendant not to speak to anyone until a lawyer arrived. Based on the totality of the circumstances, defendant's constitutional rights were not violated because defendant's statement was given freely without coercion, and the fact that defendant was 18 years old at the time of the arrest had no bearing on defendant's ability to comprehend the questions and waive defendant's rights. Jacobs v. State, 870 So. 2d 1202 (Miss. 2004).

Suppression of defendant's statement to police — "As soon as I get out I'm going to do it again. Y'all can't stop me" — was not required, as it was voluntarily and spontaneously given without coercion or interrogation. Murphy v. State, — So. 2d —, 2003 Miss. App. LEXIS 683 (Miss. Ct. App. Aug. 5, 2003), opinion withdrawn by, substituted opinion at 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003).

Generally, for confession to be admissible, it must have been given voluntarily and not given as result of promises, threats, or inducements. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

A murder defendant's confession was not the product of an illegal arrest, since conflicting statements regarding the events surrounding the killing related by the defendant to law enforcement officers provided probable cause for his arrest; moreover, the defendant's confession was not the product of the arrest, since he gave his confession only after incriminating physical evidence was found by the officers, and the discovery of the physical evidence was the result of separate questioning of another witness and was therefore unconnected with the arrest. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

Statements made by sheriffs to a defendant that "it was always best to tell the truth" and that "it would be better for him to tell the truth" were mere exhortations to tell the truth and not an inducement to confess, where the defendant was a 22-year-old adult who had several prior convictions and was therefore familiar with the criminal justice system, the defendant's first statement after the sheriff's alleged inducements was a denial rather than a confession, and the defendant testified at his suppression hearing that the sheriffs did not make any specific promises. Willie v. State, 585 So. 2d 660 (Miss. 1991).

It is not necessary that statements made during a custodial interrogation be tape-recorded in order to be admissible at trial. Williams v. State, 522 So. 2d 201 (Miss. 1988), vacated in part, 635 So. 2d 805 (Miss. 1993).

In order for a confession to be valid, it must be an acknowledgment in express terms of the crime charged but, generally, all voluntary statements or confessions of the defendant are admissible when offered by the state for what weight they may have in the case. Dedeaux v. State, 519 So. 2d 886 (Miss. 1988).

When state is unable to introduce confession into evidence in case in chief, not because serious factual issue has been raised that confession is involuntary but because there has been something less than 100 percent compliance with court imposed rule, defendant who, on direct testimony, makes statements conflicting with confession may be impeached with it. Powell v. State, 483 So. 2d 363 (Miss. 1986).

Incriminating statement elicited from capital murder defendant by deputy sheriff in violation of Fifth and Sixth Amendment rights to counsel is inadmissible in sentencing phase of prosecution. Mhoon v. State, 464 So. 2d 77 (Miss. 1985).

38. —Age of confessor, self-incrimination.

Statement of a thirteen-year-old defendant was properly admitted at his murder trial where he and his mother both signed a Miranda statement, there was no requirement that his mother be present during questioning, and the court was bound to apply the same standards for the voluntariness of defendant's confession as it would for any other confession. Edmonds v. State, — So. 2d —, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), opinion withdrawn by, substituted opinion en banc at, modified and rehearing denied by 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

Two confessions made by the 16-year-old defendant were properly admitted into evidence notwithstanding the defendant's contention that he was too young to comprehend his rights or to waive his rights, where the defendant was very articulate and poised for a boy of his age and was read his Miranda rights three times. Woodham v. State, 779 So. 2d 158 (Miss. 2001).

Defendant's age, 17 years, did not have any bearing on whether he had the ability to voluntarily waive his Miranda rights. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A trial court did not err in allowing a defendant's statement to the police into evidence, in spite of the defendant's argument that his statement was not voluntary because of his age, education, and intelligence, where the defendant was 17 years old at the time of his arrest and interrogation, he had an 8th grade education, his parents were uneducated, he had suffered head injuries as a young child which allegedly sometimes caused impairment of his mental faculties, and the arresting officers testified that the defendant was read his Miranda rights at least twice before any interrogation, he stated that he understood those rights and the waiver of those rights, and he stated that he did not have any trouble reading or writing. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A defendant's statement of his birth date elicited by the police after his arrest was obtained during routine "booking"-type questioning, so that the questioning by the police did not amount to impermissible interrogation. Testimony concerning the defendant's admission of age was, therefore, admissible in his prosecution for rape of a female child under the age of 12, regardless of whether Miranda warnings were given. Wesley v. State, 521 So. 2d 1283 (Miss. 1988).

Confessions were held to be voluntary, despite defendants' assertions to the contrary, where defendants' alleged involuntariness was based on: their youth, one being 17, the other 22; their lack of education, one went through tenth grade and other graduated from high school; holding of both defendants incommunicado for 3 days after their initial incarceration, allowing no visits by friends or family until a statement was given; and, one defendant was confined for that period in "drunk tank" with no bed, shower, or change of clothes; both defendants had signed waiver of rights forms prior to giving statements. Johnson v. State, 512 So. 2d 1246 (Miss. 1987), cert. denied, 484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402 (1987).

Under totality of circumstances, confession by juvenile is freely and voluntarily given, and is free of taint of prior improper confession, where juvenile has been warned of rights under Miranda, juvenile has verbally waived rights and agreed to talk, juvenile's mother has been called to police station before interrogation begins, has been advised of nature of charges, is given opportunity to consult with juvenile prior to questioning, and thereafter gives permission to interrogation, and juvenile then signs acknowledgment of right and waiver. In re W.R.A., 481 So. 2d 280 (Miss. 1985).

39. —Mental acuity of confessor, self-incrimination.

Defendant's statements to police were voluntary and admissible against him where he understood the content and substance of his Miranda warnings and there was no coercion and, even though defendant had an IQ of 67, expert was of the opinion that he would understand the terms of the waiver if it was explained to him. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

There is no per se rule that mental retardation renders confession involuntary and inadmissible. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Confession is not rendered involuntary simply because person making it is mentally weak. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Doctrines of res judicata and waiver barred capital murder defendant's postconviction claims that his alleged mental retardation prevented him from giving free and voluntary confession and from understanding his Miranda rights, where only issue raised on direct appeal concerning defendant's confession was whether he was effectively prevented from making jury arguments about confession's credibility, and it was clear that defendant's low intelligence level was considered during suppression hearing in determining voluntariness of his confession. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Although there is no constitutional requirement to examine the mental capacity of the defendant in making a determination as to whether a confession was voluntary, it remains true as a matter of evidence that before any confession is admissible, it must have been given by a person with enough intelligence to be a competent witness. Butler v. State, 608 So. 2d 314 (Miss. 1992).

There is no constitutional requirement to examine the mental capacity of the defendant in making a determination as to whether a confession is free and voluntary; the focus is directed entirely to the conduct on the part of the State. Butler v. State, 608 So. 2d 314 (Miss. 1992).

A defendant's confession was not the product of mental deficiency, and therefore the defendant "knowingly" confessed, even though there was evidence that the defendant was mildly mentally retarded, where the defendant graduated from high school though he flunked 3 grades in school, there was no evidence that he was ever placed in special education classes, he admitted that he could read and write and that he understood the charges against him, and all who witnessed the interrogation said they saw no evidence that the defendant suffered mental abnormalities such that he could not understand the interrogation process or its consequences. Veal v. State, 585 So. 2d 693 (Miss. 1991).

The trial court in a capital murder prosecution properly concluded at the end of a lengthy suppression hearing that defendant's confession was admissible as having been freely and voluntarily given, notwithstanding the fact that defendant was mentally retarded, where there was no evidence of any threats, promises, or any form of physical abuse of coercion, where defendant never requested the assistance of counsel, where there was no evidence that on any occasion during the questioning defendant had been under the influence of drugs or liquor, where the record was replete with the inference that the detective who interrogated defendant had been courteous, considerate, patient and persistent, and where that detective testified that the confession had been given at a time when defendant had understood and appreciated the gravity of the charges against him, and that it had been given at a time when defendant was fully aware of his constitutional privilege against self-incrimination and his right to counsel. Neal v. State, 451 So. 2d 743 (Miss. 1984), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984), denial of post-conviction relief aff'd, 687 So. 2d 1180 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

40. — Intoxication, self-incrimination.

During defendant's trial for felony DUI, third offense, the admittance of defendant's refusal to submit to a breath test was not a violation of his right against self-incrimination under either Miss. Const. Art. 3, § 26 or U.S. Const. Amend. 5; thus, defendant's challenge to the constitutionality of Miss. Code Ann. § 63-11-41 failed. Starkey v. State, 941 So. 2d 899 (Miss. Ct. App. 2006).

Defendant's self-incrimination rights were not violated because all law enforcement personnel who testified stated that defendant did not appear to have been under the influence of drugs and there was no corroboration to defendant's assertions to the contrary; additionally, defendant's actions on the day of the murders indicated a mind capable of perceiving the world around him and taking control of his own actions. Scott v. State, 947 So. 2d 341 (Miss. Ct. App. 2006), writ of certiorari denied by 956 So. 2d 228, 2007 Miss. LEXIS 262 (Miss. 2007).

Despite defendant's claims that he had taken LSD and heroin and smoked marihuana before his interrogation, his confession was voluntary, as the interrogating officer, a former narcotics officer, testified that defendant did not appear to be under the influence of substances during questioning. Bryant v. State, 853 So. 2d 814 (Miss. Ct. App. 2003), writ of certiorari denied by 852 So. 2d 577, 2003 Miss. App. LEXIS 880 (Miss. Ct. App. 2003).

While the admission of a drug-induced confession would violate a defendant's right against self-incrimination, a voluntary statement does not trigger Miranda rights; thus the fact that a defendant was under the influence of drugs while making voluntary self-incriminating statements is not of consequence. Wright v. State, 730 So. 2d 1106 (Miss. 1998).

Where the defendant was in an acute, rampant state of intoxication equivalent to mania he could not have rationally, voluntarily, and intentionally waived his constitutional rights guaranteed by the Fifth Amendment to the U.S. Constitution and by Article 3, § 26 of the Mississippi Constitution, and his confession made while in that condition that he had committed armed robbery and murder in 1947 was properly excluded at his trial. State v. Williams, 208 So. 2d 172 (Miss. 1968).

41. —Admissions antecedent to Miranda warning, self-incrimination.

There was no physical evidence linking defendant to a burglary but the jury was provided with physical evidence connecting his accomplice to the crime. Then, the jury was told that defendant was able to identify his accomplice close to the crime scene when this identification had already been suppressed due to the violation of defendant's Fifth and Sixth Amendment rights at the time of his arrest (Miranda violation); thus, the identification testimony by the officer was unquestionably prejudicial, the prosecutor's closing argument further compounded the problem by linking the physical evidence connecting the accomplice to the crime to defendant, and the trial court committed reversible error in denying defendant's motions for a mistrial and for a new trial. Carpenter v. State, 910 So. 2d 528 (Miss. 2005).

In a murder prosecution, police officers' questions about the defendant's injured hand, after he had invoked his right to counsel, did not violate Miranda since they were asked in order to determine if medical assistance was necessary. Jones v. State, 841 So. 2d 115 (Miss. 2003).

Miranda did not prohibit an officer from photographing a defendant's injured hand after he had invoked his right to silence. Jones v. State, 841 So. 2d 115 (Miss. 2003).

Answer to question of "why" defendant had shot victim was admissible under Miranda exception for on-scene investigation where question had followed defendant approaching officer at scene of shooting and saying "I shot my best friend." Luster v. State, 515 So. 2d 1177 (Miss. 1987).

Statement of defendant that "I shot her" was admissible into evidence, falling within exclusion to Miranda which recognizes that where interrogation is part of "general on-the-scene investigation" Miranda warnings are not prerequisite to admissibility of statements. Tolbert v. State, 511 So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

A volunteered statement, voiced without prompting or interrogation, is admissible in evidence if made prior to Miranda warning and of course if it were voluntarily and spontaneously made subsequent thereto, it would remain admissible in evidence. Burge v. State, 282 So. 2d 223 (Miss. 1973), certiorari denied, 108 S. Ct. 723, 484 U.S. 1016, 98 L. Ed. 2d 672.

Voluntary statements made by the defendant as he was walking toward the officer who placed him under arrest, which statements constituted an admission or confession that he had committed the theft for which he was subsequently convicted, do not violate this amendment and constituted a recognized exception to the Miranda Rule. Nevels v. State, 216 So. 2d 529 (Miss. 1968).

42. — Miranda warnings prior to confession, self-incrimination.

There was no Miranda violation when officer approached hospitalized defendant third time for confession, because officer gave adequate warning and because defendant voluntarily and knowingly waived his rights before giving statement. Keller v. State, 138 So. 3d 817 (Miss. 2014).

Court properly denied a motion to suppress under the Fifth Amendment because defendant was adequately advised of his Miranda rights; an officer read defendant his Miranda rights prior to the first interrogation, defendant signed a Miranda form, and the second interrogation commenced just eight minutes after the first interrogation ended. Additionally, the waiver was voluntary; defendant had no difficulty reading the rights, he appeared to understand and recall everything very well, and when the officer asked defendant whether he understood his rights, defendant responded affirmatively. Ruffin v. State, 992 So. 2d 1165 (Miss. 2008).

There was substantial evidence to support a trial court's finding that defendant was adequately advised of his constitutional rights under Miranda because only a short time transpired between the time that an agent with the Mississippi Bureau of Narcotics read defendant his Miranda rights and a police officer's questioning. Armstead v. State, 978 So. 2d 642 (Miss. 2008).

Although a voluntary statement made by defendant was in violation of the Fifth and Sixth Amendments because defendant had asked for an attorney, it was properly used for impeachment purposes during a murder trial; moreover, the failure to provide a limiting instruction on such was not error since defendant did not make such a request, and therefore a motion for a mistrial was properly denied. Sipp v. State, 936 So. 2d 326 (Miss. 2006).

Defendant voluntarily went to the police station, was told about the 15-year-old victim's accusations that defendant had fondled him, and agreed to give a statement to police, he was not placed under arrest before questioning, and the officers emphasized that he was free to end his questioning at any time; thus, defendant was not in custody and therefore was not entitled to the Miranda protections, but out of caution the officers did read defendant his Miranda warnings, and he signed a waiver indicating that he fully understood those rights, and therefore his statement to the police before his arrest was admissible. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

Trial court did not err in admitting defendant's confession to the police that he was walking by the victim's business and decided to take some things as defendant blurted out the statement after he was read his Miranda rights. Wess v. State, 926 So. 2d 930 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 218 (Miss. 2006).

The fact that Miranda warnings were not given to the defendant was irrelevant where the defendant did not make any inculpatory statements and the state did not seek to introduce any statements. Hodnett v. State, 787 So. 2d 670 (Miss. Ct. App. 2001).

The defendant was properly advised of her rights prior to making her confession because (1) the five to 10 minutes that elapsed between one interview and another interview by a different officer constituted only a brief pause in questioning that did not require a renewal of Miranda warnings, and (2) the defendant had been advised of her Miranda rights three times in a period of less than 24 hours. Taylor v. State, 789 So. 2d 787 (Miss. 2001).

Security guards working for a private security company employed by a public housing authority are not under the same constitutional constraints as police officers and are not required to give Miranda warnings. DeLoach v. State, 722 So. 2d 512 (Miss. 1998).

Finding that defendant understood his right to remain silent was supported by defendant's testimony that he understood that he had right to stop answering questions and by videotape of confession showing that detective explained to defendant that he could stop answering questions at any time and have attorney appointed, which defendant indicated he understood. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

A trial court erred by admitting testimony concerning a defendant's confession where the defendant testified that he could not recall being read his Miranda rights and that he thought he would be incarcerated that same day if he did not confess, the prosecution did not produce all officers who were present when the defendant was questioned and his confession given, and no adequate reason for the officers' absence was given. Lettelier v. State, 598 So. 2d 757 (Miss. 1992).

An accused person who has been given the Miranda warnings is not obliged to answer any questions or to make any explanation. The accused need not invoke the presence of counsel in order to obtain the benefits of these rights. It is improper and, ordinarily, reversible error to comment on the accused's post-Miranda silence. The accused's right to be silent then is equally as strong as the right not to testify and it is error to comment on either. It is therefore improper to inquire of a testifying defendant as to whether he or she made any protest or explanation to the arresting officers. Quick v. State, 569 So. 2d 1197 (Miss. 1990).

A warning advising a suspect "that anything he said might be used against him in a court of law" is constitutionally adequate; an officer is not required to advise a suspect of all specific possible criminal consequences. One of the virtues of Miranda is its clarity; the warnings are the same in every case. Adding the requirement that the officer inform the suspect of specific criminal consequences would add a component variable from case to case and undermine the simplicity and bright-line character of the rule as it stands. Fowler v. State, 566 So. 2d 1194 (Miss. 1990).

Court did not err in admitting into evidence statement made by defendant, after getting in patrol car, telling officers where gun was and that he "didn't mean to do it, that it was only an accident," where officers gave defendant Miranda warnings prior to statement. Tolbert v. State, 511

So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

Argument that Miranda warning given defendant which concluded with the words "we have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to court", was insufficient and ineffective since it left the impression with defendant that he was entitled to an attorney only during trial, but not during interrogation, was persuasive in isolation, but when considered in context with the remainder of the related warning, a part of which advised of the right to an attorney before responding to question, the plausibility disappeared; however peace officers would be well advised to delete the words "if and when you go to court" from future warnings. Burge v. State, 282 So. 2d 223 (Miss. 1973), certiorari denied, 108 S. Ct. 723, 484 U.S. 1016, 98 L. Ed. 2d 672.

43. — Voluntariness of confession, self-incrimination.

Defendant's pre-trial statements were admissible because the trial court did not manifestly err in finding that defendant's affirmative nod to an officer and signing of a rights waiver form constituted an effective waiver of defendant's Miranda rights. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Trial court's ruling that defendant made a knowing, intelligent, and voluntary waiver of his Miranda rights was supported by substantial evidence because a police officer's threat to arrest defendant's wife if defendant did not confess that drugs belonged to him was insufficient to render defendant's statement involuntary because probable cause existed to arrest defendant's wife because cocaine was found in the kitchen, a common area of the home, and defendant's wife had been living in the home and was listed on the lease. Armstead v. State, 978 So. 2d 642 (Miss. 2008).

In a capital murder case, a motion to suppress defendant's confession was properly denied because the statement was voluntarily given, despite cultural differences; defendant, who completed 10 years of education, waived Miranda rights and entered a partial confession before police mentioned religious beliefs. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Trial court did not err in finding that a statement made by defendant during the booking process for the crime of driving while impaired was admissible because the statement was freely and voluntarily given; the admission of the spontaneous statement was not barred by the Fifth Amendment. Watson v. State, 835 So. 2d 112 (Miss. Ct. App. 2003).

The defendant's confession was voluntarily given because (1) he had been read his Miranda warnings, (2) the arresting officers did not interrogate the defendant about his involvement in the crime at issue, and (3) the defendant spoke freely without prompting by the officers; a contrary determination was not required by the fact that the defendant had an apparent friendship with one of the officers because the friendship did not create a compelling influence on the defendant. Stallworth v. State, 797 So. 2d 905 (Miss. 2001).

The defendant's confession was voluntary, notwithstanding that he was in the emergency room with two self-inflicted stab wounds, neither of which turned out to be life threatening, and the assertion that he was involuntarily intoxicated, where (1) law enforcement officers testified that the defendant was alert, aware of his surroundings, and answered all their questions rationally, and that he voluntarily waived his Miranda rights, and (2) the emergency room physician and the attending nurse corroborated the officers' view that the defendant understood everything they asked, answered all their questions, was alert, stable, oriented and not in shock. Kircher v. State, 753 So. 2d 1017 (Miss. 1999).

A statement made by the defendant was volunteered information, unprompted by the equivalent of interrogation, where, while he was being booked for stealing a truck, the defendant asked how the officer could charge him with such an act, the officer explained the facts that led to the charge, and the defendant responded that he thought he should only be charged with unauthorized use of a motor vehicle. Bryant v. State, 748 So. 2d 780 (Miss. Ct. App. 1999).

Confessions made by a 14 year old defendant in a murder prosecution were not voluntary where the strategy of the interrogating officers to procure a confession was to convince the defendant that he might receive religious salvation for his sins and see his murdered parents again if he told them the truth; the defendant's will was overborne and his confession was induced by the investigating officers' invocation of the deity, references to heaven and hell, and promises of leniency and religious salvation which, according to the officers' testimony at the suppression hearing, could only be attained by a confession. Carley v. State, 739 So. 2d 1046 (Miss. Ct. App. 1999).

The trial judge did not err in finding that the defendant's statements were made voluntarily where the interrogating officers testified (1) that the defendant never refused to speak to them, but initially denied any involvement in the crime at issue, (2) that the defendant understood his rights, including his right to remain silent, voluntarily spoke with them, and never requested an attorney, (3) that no one promised anything to the defendant or threatened him in any way, and (4) that the defendant stated that he understood his rights before voluntarily signing a rights waiver form. Underwood v. State, 708 So. 2d 18 (Miss. 1998).

Prosecution shoulders burden of proving beyond reasonable doubt that defendant's confession was voluntary. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Prosecution's burden of showing that confession was voluntary is met and prima facie case made out by testimony of officer, or other persons having knowledge of facts, that confession was voluntarily made without threats, coercion, or offer of reward. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Determination that defendant was not threatened into making confession was supported by testimony of all detectives present at time of alleged threat, in which detectives all denied that threat was made. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Delay of approximately 24 hours between time of arrest and initial appearance before magistrate did not warrant suppression of confession given by defendant prior to initial appearance; defendant was arrested by warrant while he was already in jail, defendant was informed of his right to remain silent, his right to attorney, and his right to stop answering questions at any time and to ask for attorney, and defendant did not ask for appointment of counsel on charge for which he was arrested. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

A defendant's confession was freely and voluntarily given, and was therefore admissible into evidence in his murder trial, where law enforcement officers testified that he was given all the Miranda warnings prior to giving his confession and that he did not ask for an attorney at any time, he was familiar with his constitutional rights as evidenced by his refusal to sign a waiver form and the fact that he had previously been convicted of a felony, and his video-taped confession did not suggest any coercion. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

The principle enunciated in Agee v State (1966, Miss) 185 So 2d 671 with respect to proving the voluntariness of a confession remains sound, but its importance to an accused has receded in view of the strong affirmative mandates of Miranda; only those persons who are claimed to have induced a confession through some means of coercion are required to be offered by the State as a witness under Agee. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

Where the State has laid the "proper predicate" for admission of a defendant's confession, the onus is then on the defendant to provide other evidence or testimony on the issue of voluntariness to rebut the State's assertion. Haymer v. State, 613 So. 2d 837 (Miss. 1993).

In a prosecution for driving a motor vehicle while under the influence of intoxicating liquor, the defendant's statement to a police officer that the breathalyzer machine would "probably show I'm in a coma" was essentially a confession that the defendant was drunk, and was therefore admissible into evidence as a voluntary statement where it was made spontaneously after the defendant had been given the Miranda warnings. Ricks v. State, 611 So. 2d 212 (Miss. 1992).

A trial court followed the correct legal standards to determine the admissibility of the content of a defendant's confession and there was substantial evidence to support a finding of voluntariness, where no pre-trial motion to suppress was filed, the trial court conducted a hearing in chambers during the trial after the defendant's in-court objection to the voluntariness of his confession, the trial court found that the State had established a "proper predicate" on the testimony of a fire marshal who was present at the time of the confession, and the defendant did not rebut the State's predicate during arguments on the motion, so that the State was not required to produce all of the witnesses to the confession to establish voluntariness. Cox v. State, 586 So. 2d 761 (Miss. 1991).

Trial court did not commit error in determining that statements were voluntarily given after knowing and intelligent waiver where defendant contended statements were made when he was misled as to their import, arguing that he was arrested on one charge but questioned concerning a more serious charge. Testimony at suppression hearing supported trial court's determination that waiver was voluntary despite questioning related to crime not charged, where defendant was presented warrants for his arrest on charges of forgery and credit card misuse, but before statement was taken was informed that sheriff was present in regard to investigation into death of man who owned credit cards he was accused of illegally using. Transcript of defendant's recorded statement made clear that he was informed that officers wanted to talk with him about murder investigation. Lutes v. State, 517 So. 2d 541 (Miss. 1987).

Determination of whether confession is voluntary and freely given, and not product of coercion, is finding of fact which will not be reversed on appeal unless manifestly in error, or contrary to overwhelming weight of evidence; factual determination that confession was voluntarily and freely given was not clearly erroneous where interrogating officer testified that no mental or physical pressure was placed on defendant, no promises of freedom or leniency were offered in exchange for confession, and police officer called attorney for defendant; rejected was defendant's argument that confession was involuntary because it was result of threats, pressure, and coercion, defendant had only 6-grade education, and at time of confession was wearing colostomy bag, which impaired ability of defendant to freely and voluntarily waive his rights against self-incrimination. Sims v. State, 512 So. 2d 1256 (Miss. 1987).

Admission of defendant's confession into evidence is proper where there is voluntary and knowing waiver of Miranda rights and confessions are free and voluntary as evidenced by testimony of officers involved in obtaining the confessions, defendant initiated statement about previous rape, police officer who took defendant to station testified that defendant was not intoxicated and was in control of himself, jailer testified that he never noticed defendant experiencing severe withdrawal symptoms, and nurse assigned to jail did not recall defendant asking to see doctor and observing that defendant appeared to know what was going on and to understand questions and make appropriate responses. Coulter v. State, 506 So. 2d 282 (Miss. 1987).

44. —Induced confessions, self-incrimination.

A confession by the defendant was not the product of threats or promises made by police, notwithstanding statements by the police that defendant should tell the truth so she would feel better about herself, that she and her boyfriend were "going down" if she did not tell the truth, and that she would be better off if she told the truth and should explain what occurred so she could have peace of mind. Taylor v. State, 789 So. 2d 787 (Miss. 2001).

Defendant's confession was not unlawfully induced by detective's comment that defendant should tell truth and that "the truth shall set you free"; defendant had history of legal problems and had opportunity to become familiar with criminal justice system, there was nothing to indicate that defendant placed trust or confidence in detective, and defendant testified that he was not offered any promises or inducements to make written or videotaped confessions. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

A defendant's statement to police was admissible and not the product of improper inducement, even though a police officer had told the defendant that "it'd be best for him to tell us to help himself," where the defendant received Miranda warnings twice, he understood his constitutional rights, his statement was a denial rather than a confession, no specific promise was made to him by a law enforcement officer, and he maintained that he would have told the truth regardless of the officer's comments to him. Chase v. State, 645 So. 2d 829 (Miss. 1994), cert. denied, 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995), reh'g denied, 515 U.S. 1179, 116 S. Ct. 20, 132 L. Ed. 2d 903 (1995), post-conviction relief denied, 699 So. 2d 521 (Miss. 1997).

The trial court in a capital murder prosecution erred in refusing to suppress the defendant's confession as involuntary where a former teacher and retired minister was called in by the sheriff to meet privately with the defendant, the minister communicated to the defendant, at the sheriff's direction, the notion that there might be a chance for mercy if he volunteered to cooperate, the minister and the defendant discussed the death penalty and the religious ramifications of the defendant's action, a sheriff's deputy told the defendant that he thought it would look better if the defendant confessed, and an investigator who conducted the interrogation with the sheriff admitted that the defendant may have been given the impression by the investigator and the sheriff that cooperation could be of some benefit. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

Trial court was well within evidence in determining treatment of wife of defendant not to be indicative of impropriety undermining defendant's waiver of rights concerning self-incrimination where defendant was advised that his wife was under arrest for possession of marijuana found growing on premises, defendant inquired if charges could be dropped but was told that officers had no authority to do so, and officer who was present during defendant's questioning specifically denied that defendant was told "you don't want us to have to take her to jail." Lutes v. State, 517 So. 2d 541 (Miss. 1987).

45. — Coerced confession, self-incrimination.

Inmate's voluntary act of pleading guilty to the crime of manslaughter foreclosed an appellate court from considering issues relating to the voluntariness of a confession or the right to a speedy trial in a motion seeking postconviction relief. Young v. State, 877 So. 2d 552 (Miss. Ct. App. 2004).

The trial court did not err in finding that a waiver of rights form signed by the defendant prior to his later contrary statement was in accordance with the law and that the defendant had waived his rights knowingly in a statement where he made an admission of guilt, where (1) no physician was produced, either during the suppression hearing or at trial, to attest to the fact that the defendant suffered from anxiety or that he had been taking medications for that condition, and (2) there was no testimony from the defendant or anyone else that his medication had been withheld by an officer until he confessed. Sistrunk v. State, 773 So. 2d 419 (Miss. Ct. App. 2000).

The evidence did not establish that the defendant was coerced into making a confession where the videotape of the confession did not show any coercion and the presence of the defendant's girlfriend was at his own request. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Although the court should have suppressed a statement made by the defendant in response to an officer's question about why a man his age was selling drugs, as the defendant had already invoked his right to counsel, the error was harmless in light of the overwhelming evidence of guilt. Handford v. State, 736 So. 2d 1069 (Miss. Ct. App. 1999).

By alleging that his confession was coerced, defendant secured due process entitlement to reliable determination that his confession was not given as a result of coercion, inducement, or promises. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

In order to establish the admissibility of a murder defendant's confession, the State was not required to offer as witnesses law enforcement officers who allegedly yelled at the defendant and were abusive when he was initially questioned, since the alleged statements made by the officers had no bearing on the defendant's confession which was made 2 days later after he was given the Miranda warnings. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

The evidence was sufficient to support a finding that the defendant knowingingly, intelligently, and voluntarily waived his Miranda rights, even though the defendant had been drinking prior to his arrest, he had not slept for nearly 24 hours prior to waiving his rights, and he had periodic bouts of crying, where the defendant repeatedly acknowledged that he understood his Miranda rights and expressed this acknowledgment both orally and in writing, he was 49 years old, had a high school and vocational education, and considered himself to be a "very intelligent person," his criminal past provided him with some experience and knowledge about a suspect's Miranda rights, 5 witnesses testified that he did not appear to be impaired by alcohol and did not slur his speech, the defendant testified that he had been a chronic drinker, the defendant was for the most part calm and cooperative throughout the investigation and particularly at the moment he waived his rights, the defendant had meticulously schemed to "cover his tracks" to avoid arrest which reflected a coherent, unimpaired state of mind, and the defendant's taped confession contained the admission that no one had "threatened," "intimidated," or "promised him anything." Holland v. State, 587 So. 2d 848 (Miss. 1991).

Trial judge's finding that capital murder defendant's confession was voluntary was neither manifestly wrong nor against the overwhelming weight of the evidence where, at the hearing outside the presence of the jury, the defendant stated that he had signed confession to help his brother and father, who were implicated in the crime, and testified as to threats made by police officer, but the threats were denied by the officer alleged to have made them. Cabello v. State, 490 So. 2d 852 (Miss. 1986).

46. —Delay in arraignment affecting voluntariness of confession, self-incrimination.

The delay from the time of a defendant's arrest until he was taken before a judicial officer did not violate Rule 1.04, Miss. Unif. Crim. R. Cir. Ct. Prac. and the 4th Amendment to the United States Constitution where his initial hearing was held within 48 hours of the time he was taken into custody for questioning, and there was no indication that the officers were purposely holding him in custody to gather sufficient evidence to justify his arrest; thus, his confession was not a product of any delay in taking him before a magistrate and was therefore admissible. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

47. —Suppression of confession, self-incrimination.

Trial court did not err in denying defendant's motion to suppress his pre-trial confession to police because the State presented sufficient evidence to show that defendant's statements were voluntarily made without threats, coercion, or an offer of reward. The State introduced a police officer's testimony that stated that no threats were made and a videotape of the confession; also defendant signed a Miranda warning form and four forms waiving his rights to counsel and to remain silent. Manix v. State, 895 So. 2d 167 (Miss. 2005).

Defendant was not entitled to reopening of suppression hearing concerning tape-recorded confession at resentencing following affirmance of capital murder conviction, where basis for attempting to reopen suppression hearing was defendant's lack of experience with *Miranda* rights at time of confession; lack of knowledge concerning *Miranda* rights could have been asserted in original hearings. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

A defendant's statements should have been suppressed where he invoked his right to remain silent and to have an attorney present after he was taken into custody and Mirandized by Tennessee authorities, and he was subsequently Mirandized by Mississippi officers without his having initiated the conversation. Duplantis v. State, 644 So. 2d 1235 (Miss. 1994), cert. denied, 514 U.S. 1123, 115 S. Ct. 1990, 131 L. Ed. 2d 876 (1995), appeal after remand, 708 So. 2d 1327 (Miss. 1998).

Where a defendant objects to the prosecution's use of a confession at trial as evidence against him or her, the prosecution bears the burden of proving beyond a reasonable doubt each fact which is prerequisite to admissibility. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

Trial court's decision to admit defendant's confession was supported by substantial evidence and therefore proper where, at hearing on motion to suppress all oral and written confessions, officers testified that statements of defendant were voluntary and not result of coercion or pressure, defendant testified that officers did not pressure him, and only testimony offered by defendant that could be inferred as evidence of coercion was that he was high on day of his arrest when he made statements. Further, defendant signed waiver of rights before making confession and statements were made over course of several days, with each statement occurring after valid, written waiver. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

In the absence of a clear showing that the warnings required in Miranda v Arizona, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR3d 394, were given, the testimony of a sheriff as to certain admissions alleged to have been made to him by the defendant which was disputed by the defendant's evidence, should not have been admitted. Williams v. State, 220 So. 2d 325 (Miss. 1969).

48. —Guilty plea generally, self-incrimination.

In defendant's "petition to enter plea of guilty," he swore that his lawyer had advised him of the elements of the charge to which defendant was pleading and that he had not been forced, intimidated or coerced in any manner to plead guilty. The colloquy also showed that he was advised that by pleading guilty, he was waiving his right to a trial by jury, the right to protection against self-incrimination, and the right to confront witnesses; thus, the trial court did not err in finding that his plea was freely, voluntarily, understandingly, and knowingly made. Willcutt v. State, 910 So. 2d 1189 (Miss. Ct. App. 2005).

A trial court's failure to inform a defendant of the mandatory minimum sentence for the crime charged did not render the defendant's guilty plea involuntary where no misrepresentation as to the mandatory minimum sentence was made to the defendant, he did not expect to receive the mandatory minimum sentence, he did not claim that there was a misrepresentation of the sentence which he was to receive, he was fully apprised and understood the consequences of the sentence the State intended to recommend, and he did not allege that the failure to be informed of the minimum sentence induced him to enter his guilty plea. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial, and the right that the prosecution prove each element of the offense beyond a reasonable doubt. Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

Admission of guilt is not a constitutional requisite of an enforceable plea. Reynolds v. State, 521 So. 2d 914 (Miss. 1988).

A plea of guilty constitutes a waiver of some of the most basic rights of free Americans, those secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Miss. Const, Art 3, §§ 14 and 26. Sanders v. State, 440 So. 2d 278 (Miss. 1983).

49. — Voluntariness of guilty plea, self-incrimination.

In defendant's manslaughter case, his confession was voluntary because defendant conceded that he gave the statement voluntarily, and he was given Miranda warnings and understood his rights; an officer testified that he was outside of the interrogation room, another officer and defendant came out of the room, and the officer told him that defendant had said "he just lost it and shot her and he would show us where the body was." McBride v. State, 934 So. 2d 1033 (Miss. Ct. App. 2006).

Valid guilty plea operated as a waiver of all nonjurisdictional rights or defects that were incidental to trial; defendant was fully advised of his rights and the maximum sentences he faced if he chose to go to trial, and he was provided a detailed admonishment prior to accepting his guilty plea, such that defendant's plea was made knowingly, intelligently, and voluntarily and he waived any rights regarding the allegedly coerced confession. Swindoll v. State, 859 So. 2d 1063 (Miss. Ct. App. 2003).

Where a defendant claimed his confessions were involuntary because he was on pain medication and in physical pain when he made them, unrebutted police testimony that he was read his rights, was not coerced, appeared coherent, and voluntarily confessed, supported the trial court's decision to admit the confessions. Wimberly v. State, 839 So. 2d 553 (Miss. Ct. App. 2002).

The constitutional standard for voluntariness of a guilty plea does not mention knowledge of the mandatory minimum sentence as an essential element; instead, it merely states that the accused should understand the effects of a guilty plea. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A defendant's claim that he blindly entered a plea of guilty because his attorney told him that his mother advised him to do so was not sufficient to render his plea involuntary. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A plea is voluntary if not induced by fear, violence, deception or improper inducements. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A defendant's plea of guilty to 2 counts of forgery was not involuntarily entered, even though the trial court did not personally advise the defendant of the minimum and maximum penalties provided by law for the crimes of forgery, where the defendant's attorney explained to him the maximum and minimum penalties for the charges, the defendant made no claim about the sentence he expected to receive or his belief as to the minimum sentence for the offense charged, and he did not claim that his alleged ignorance was the basis for his guilty plea. Banana v. State, 635 So. 2d 851 (Miss. 1994).

A defendant was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether his guilty plea was entered voluntarily and intelligently where the transcript of the defendant's plea hearing did not reflect that he was advised concerning the rights of which he alleged he was ignorant; the State would be entitled to prove at the evidentiary hearing that the defendant learned of the rights in question, either from the trial judge or from some other source, prior to pleading guilty. Alexander v. State, 605 So. 2d 1170 (Miss. 1992).

A defendant who pleaded guilty without an affirmative expression by the trial court informing him that by pleading guilty he waived his constitutional right against self-incrimination, was entitled to an evidentiary hearing on the issue of whether his guilty plea was involuntarily and unintelligently made. Although the defendant's petition to the court to accept his plea of guilty recited that there was "no constitutional right or reason why this court should not accept this plea and enter sentence thereon," this was not sufficient to show that he was advised or informed of his constitutional right against self-incrimination. Horton v. State, 584 So. 2d 764 (Miss. 1991).

Defendant was entitled to a hearing on his petition for leave to withdraw his guilty plea, on the asserted basis that he had received incorrect advice from counsel regarding the length of his sentence and the terms of his plea bargain. Tiller v. State, 440 So. 2d 1001 (Miss. 1983).

50. —Videotapes, self-incrimination.

Admission of videotape of drug transaction did not force defendant to testify against himself. Crenshaw v. State, 513 So. 2d 898 (Miss. 1987).

51. — Physical evidence, self-incrimination.

Because defendant's Fifth Amendment right against self-incrimination was not violated when defendant gave her statements to the officers that evidence of the murders could be found at the county dump, the trial court did not err in denying her motion to suppress that evidence as fruit of the poisonous tree. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

Miranda warnings protected defendant's Fifth Amendment right to be free of compulsory self-incrimination, but did not extend to nontestimonial evidence, such as the vials of crack cocaine defendant took from his pockets on police orders after he was lawfully arrested; therefore, that he had not been advised of his Miranda rights did not affect the admissibility of the cocaine. McKee v. State, 878 So. 2d 232 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 961 (Miss. 2004).

Although rape defendant's consent to procurement of pubic hairs was improperly obtained in violation of the constitutional right against self-incrimination after defendant had invoked the right to counsel, the error was harmless, as the evidence was of a scientific nature, and not of a communicative nature, and the evidence was not protected by the right against self-incrimination; additionally, the evidence obtained was subject to a search warrant, for which probable cause clearly existed. Forrest v. State, — So. 2d —, 2003 Miss. App. LEXIS 706 (Miss. Ct. App. Aug. 12, 2003), opinion withdrawn by 2004 Miss. App. LEXIS 112 (Miss. Ct. App. Aug. 12, 2003), opinion withdrawn by, substituted opinion at, modified en banc by 863 So. 2d 1056, 2003 Miss. App. LEXIS 1255 (Miss. Ct. App. 2003).

Section 63-11-8, which mandates that blood be taken from any driver involved in a fatal accident regardless of the existence of probable cause to believe that alcohol or drugs were involved, does not violate the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution and Article 3, § 26 of the Mississippi Constitution. McDuff v. State, 763 So. 2d 850 (Miss. 2000).

There was no violation of the defendant's right not to incriminate himself when the state presented evidence at trial of the defendant's refusal to submit to the gunpowder residue test. Hubbert v. State, 759 So. 2d 504 (Miss. Ct. App. 2000).

The taking of a handwriting exemplar does not violate the Fifth Amendment privilege against self-incrimination. Burns v. State, 729 So. 2d 203 (Miss. 1998), cert. denied, 527 U.S. 1041, 119 S. Ct. 2406, 144 L. Ed. 2d 804 (1999).

The obtaining of samples of the defendant's blood, hair and saliva did not violate his constitutional right against self-incrimination. Wesley v. State, 521 So. 2d 1283 (Miss. 1988).

Requiring a defendant to exhibit his scarred hands to a witness for identification purposes was not a violation of the defendant's constitutional right against self-incrimination. Porter v. State, 519 So. 2d 1230 (Miss. 1988).

Defendant was not denied constitutional right to fair trial where he alleged that small particle of skin from abrasion on his right index finger was material, exculpatory evidence that had been intentionally destroyed or lost by state, where there was nothing in testimony suggesting prosecutorial bad faith and where record contained little suggesting that skin particle would have played significant role at trial. Tolbert v. State, 511 So. 2d 1368

(Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

The taking of a blood sample from a defendant's body following his arrest did not amount to forced self-incrimination in violation of his Fifth Amendment rights. Williams v. State, 434 So. 2d 1340 (Miss. 1983), but see Fisher v. Eupora, 587 So. 2d 878 (Miss. 1991).

To require a prisoner to exhibit himself for the purpose of identification or to submit to the taking of photographs and fingerprints does not violate the prisoner's constitutional rights against self-incrimination. Smith v. State, 229 So. 2d 551 (Miss. 1969).

Admission of testimony of chief of police that he required defendant to put on overcoat found in his room for purposes of identification was not error as requiring defendant to give evidence against himself. Richardson v. State, 168 Miss. 788, 151 So. 910 (1934), error overruled, 151 So. 558 (Miss. 1934).

53. —Fingerprints, self-incrimination.

While defendant clearly has right not to testify, he may not invoke that right and avoid cross-examination while claiming right to have his former testimony put before jury. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Obtaining fingerprint evidence violates the Fourth and Fourteenth Amendments to the federal constitution, so as to make such evidence inadmissible in a state criminal trial, where (1) the fingerprints were obtained while the accused was detained at police headquarters without probable cause for his arrest, (2) the detention at police headquarters of the accused was not authorized by a judicial officer, (3) the accused was unnecessarily required to undergo two fingerprinting sessions, and (4) the accused was not merely fingerprinted during the first of the two sessions, but was also subjected to interrogation. Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969).

54. — Psychiatric examination, self-incrimination.

In a capital murder case, the inmate's counsel were not ineffective for failing to protect the inmate's Fifth Amendment right against self-incrimination and Sixth Amendment rights to counsel and due process when his attorneys allowed him to be interviewed by the State's psychological and psychiatric experts because the inmate answered the doctors' questions with full knowledge of his rights. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

There was no violation of the defendant's privilege against self-incrimination where the defendant requested appointment of a psychiatrist to explore possible mental health issues as mitigating factors in his defense and the trial court, over defense objection, ordered that a copy of the report be provided to the prosecution, notwithstanding the defendant's claim that he had no intention of offering the expert testimony of the psychiatrist. Jordan v. State, 786 So. 2d 987 (Miss. 2001), writ of certiorari denied by 534 U.S. 1085, 122 S. Ct. 823, 151 L. Ed. 2d 705, 2002 U.S. LEXIS 318 (2002).

The Fifth Amendment was not implicated by the testimony of a court-appointed physician where (1) the defendant refused to speak to the physician whose testimony was based solely on his observation of the defendant's appearance, demeanor, and participation in his competency hearing, and (2) the physician's testimony was presented only for rebuttal during the sentencing proceeding. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

The Fifth Amendment privilege against self-incrimination is not violated by a court order compelling a defendant to submit to a psychiatric examination, even though the defendant may plan to use no expert testimony at trial to support his insanity defense. Porter v. State, 492 So. 2d 970 (Miss. 1986).

55. —Cross-examination, self-incrimination.

When criminal defendant, with no prompting by state, on own volition chooses to mislead jury into thinking that no person has even asked him about crimes for which he is charged, state is entitled to challenge statement by cross-examining defendant about defendant's pretrial silence when questioned by authorities. Brock v. State, 483 So. 2d 358 (Miss. 1986), but see McCarty v. State, 554 So. 2d 909 (Miss. 1989).

Where defendant voluntarily took the stand as a witness in his own defense, he became subject to cross-examination as to the reason why the victim was shot and cut, and why he had the victim's car; by voluntarily assuming the stand, defendant waived his right to invoke the Fifth Amendment privilege against self-incrimination. Brewer v. State, 459 So. 2d 293 (Miss. 1984).

In a prosecution of a pastor of a church for allegedly assaulting with intent to kill a former treasurer of the church, it was error for the trial court to preclude defense counsel from asking, on cross-examination, whether former treasurer had had shortage in his account while treasurer, especially where former treasurer had not claimed for himself the constitutional protection against self-incrimination. Ridgeway v. State, 245 Miss. 506, 148 So. 2d 513 (1963).

56. — Waiver of rights, self-incrimination.

Defendant called the State witness on her cell phone immediately after the shooting and made incriminating admissions, and approximately a month after the shooting, law enforcement provided defendant with Miranda warnings, and upon being so advised, he chose not to exercise his right to remain silent. Instead, he made oral statements to law enforcement disclaiming his connection to the shooting, which was admissible under Miss. R. Evid. 801(d)(2); therefore, the case presented no violation of post-Miranda silence. Robinson v. State, 40 So. 3d 570 (Miss. Ct. App. 2009).

Pursuant to the Fifth Amendment, defendant's statements were properly obtained in accordance with her Miranda rights because the police stopped questioning her when she stated that she did not want to answer questions, she waived her right to remain silent, she did not explicitly request that she be provided counsel, and she initiated one interview with the police. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

There was substantial evidence that defendant understood English and validly waived his Miranda rights because (1) he had completed nine years of formal education, which included two years of English classes; (2) all conversations between defendant and the arresting officers were in English; (3) the arresting officers testified that defendant never asked the police officers to explain any English words to him; (4) all of the officers testified that defendant understood and spoke the English language without an interpreter; (5) defendant was given a chance to read the Miranda waiver form before signing it; (6) he gave his statement in English; (7) defendant was not threatened or intimidated, nor was he offered any promises, hopes, or rewards for his confession; and (8) defendant's estranged wife testified that she and defendant communicated in English during their marriage. Chim v. State, 972 So. 2d 601 (Miss. 2008).

Because an officer's informing defendant that his requested counsel would not represent him was not interrogation, defendant's subsequent statement that he wanted to talk was on his own initiative, and since he then executed an express waiver of rights, his confession was voluntary. Bryant v. State, 853 So. 2d 814 (Miss. Ct. App. 2003), writ of certiorari denied by 852 So. 2d 577, 2003 Miss. App. LEXIS 880 (Miss. Ct. App. 2003).

Defendant's right against self-incrimination was not violated when he gave statements implicating himself in a murder as defendant waived his right against self-incrimination by agreeing to talk to police and telling them how the murder occurred. Grayson v. State, 806 So. 2d 241 (Miss. 2001), writ of certiorari denied by 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329, 2002 U.S. LEXIS 7800, 71 U.S.L.W. 3281 (2002).

Evidence was sufficient to establish that the defendant waived his privilege against self-incrimination, notwithstanding that the Miranda warning procedure did not include delivering a written listing of his rights to the defendant and that the officers did not obtain a written statement from him of his understanding and knowing waiver of those rights, where the defendant did not testify in support of his suppression motion and did not present any other witnesses to contradict an officer's testimony that the defendant was informed, understood, and waived his right against self-incrimination. Dees v. State, 758 So. 2d 492 (Miss. Ct. App. 2000).

Under a totality of the circumstances analysis, the defendant knowingly, understandingly, freely and voluntarily waived her Miranda rights, and her statements were admissible; while it certainly would have been permissible, and perhaps desirable, for law enforcement officials to inform the defendant that her parents were in the process of hiring an attorney for her and that an attorney had called to speak with her, they were not under a legal obligation to do so. Wilhite v. State, 791 So. 2d 231 (Miss. Ct. App. 2000).

The defendant waived any right against self-incrimination with regard to the introduction into evidence of oral statements made by the defendant to an inmate where (1) the other inmate was not in any way involved or implicated in the crimes charged against the defendant, and (2) the other inmate approached the state with the information and was not solicited by the state to act as an informant against the defendant. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

The refusal of the defendant to sign a waiver of rights form did not constitute an invocation of his Fifth Amendment rights; thus, where the officer who had started the questioning of the defendant honored his wishes and stopped questioning him, thereby giving him the opportunity to exercise his rights to remain silent and to obtain an attorney, the defendant's subsequent volunteering of information reasonably led to the conclusion that he did not, in fact, wish to invoke his right to remain silent. Pool v. State, — So. 2d —, 1999 Miss. App. LEXIS 483 (Miss. Ct. App. July 27, 1999), affirmed in part and reversed in part by 764 So. 2d 440, 2000 Miss. LEXIS 191 (Miss. 2000).

A criminal defendant does not waive his Fifth Amendment right against self-incrimination by demonstrating the fit of shoes introduced by the state. Lewis v. State, 725 So. 2d 183 (Miss. 1998).

The court rejected the defendant's contention that he did not make a knowing and intelligent waiver of his right to remain silent where (1) he drafted and signed a waiver form which allowed the use of his statement by federal, but not state, authorities, (2) it appeared that the form was intended to protect the defendant's attorney from future claims if ineffective assistance of counsel, and (3) the form was not discussed with law enforcement officers and they were not aware of the limiting language inserted by the defendant. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

A murder defendant's initial refusal to sign a waiver of rights form did not constitute a demand for an attorney where he was not questioned again until more than 32 hours had lapsed when he was presented with incriminating physical evidence connecting him to the crime, and he was again advised of his rights before further questioning; thus, admission of his confession into evidence did not violate his constitutional right against compulsory self-incrimination or right to an attorney. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A defendant's waiver of his right to counsel and his right to remain silent when he executed a written waiver prior to confessing could not be found to be voluntary where his confession given immediately thereafter was involuntary due to improper collusion by law enforcement interrogators, since the defendant's waiver of his right and his confession were inextricably bound and were the product of prolonged coercive police interrogation. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

A former husband waived his privilege against self-incrimination when he took the witness stand and testified on the merits of the case in a contempt action brought by his former wife who alleged that he failed to abide by their judgment of divorce; an objection made at the close of trial was much too late to object to testimony which was incriminating. Since the contempt hearing was a quasi-criminal proceeding, the former husband had no right to forbid questioning altogether, but once he was asked anything outside of the innocuous arena—the introductory questions—he should have invoked his privilege on a question by question basis. Moore v. Moore, 558 So. 2d 834 (Miss. 1990).

There are practical and institutional limitations upon the Supreme Court's ability to find facts; consequently, much deference is placed upon the trial judge's full discharge of his or her responsibility to make findings of fact as to the question of whether Miranda rights have been intelligently, knowingly and voluntarily waived. However, when the trial judge fails to make specific findings and only makes general findings thereby allowing admissibility of evidence, the Supreme Court's scope of review is considerably broader particularly when the trial judge's findings on the precise points at issue on appeal are not clearly inferable from the findings made. McCarty v. State, 554 So. 2d 909 (Miss. 1989).

In determining whether a confession was freely and voluntarily given, the circuit court sits as the factfinder. The trial judge first must determine whether the accused has been adequately warned and, under the totality of circumstances, the court then must determine if the accused voluntarily and intelligently waived his or her privilege against self-incrimination. McCarty v. State, 554 So. 2d 909 (Miss. 1989).

The fact of a waiver of the privilege against self-incrimination in one proceeding is limited to a waiver for that proceeding and that proceeding only. In re Knapp, 536 So. 2d 1330 (Miss. 1988).

A criminal defendant's deposition in a civil action arising out of the same transaction as the criminal action was admissible in the later criminal trial in which the defendant elected not to testify. The defendant waived his right against self-incrimination by answering the deposition questions even though he was not aware that any criminal prosecution was likely at the time he was deposed, was not represented by an attorney at the deposition, and was not advised by anyone that his answers could be termed voluntary and used against him in a criminal proceeding. Reed v. State, 523 So. 2d 62 (Miss. 1988).

When witness voluntarily took the stand in a perjury trial and testified on behalf of the defendant therein as to the truthfulness of witness' brother's statements concerning a murder, to which witness had pled guilty and had been sentenced, witness waived his Fifth Amendment right and was subject to cross-examination on all relevant and material matters. Hentz v. State, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

If the right to counsel or the privilege against self-incrimination is waived at an initial trial which is later reversed, on appellate review, on retrial defendant can reinvoke rights previously waived. State v. Caldwell, 492 So. 2d 575 (Miss. 1986).

Under totality of circumstances test, waiver of Miranda rights is not rendered involuntary merely because suspect is in hospital when confession is taken, and is experiencing some pain and discomfort, where suspect is not under sedative or medication that would impair memory or ability to voluntarily waive rights. Gavin v. State, 473 So. 2d 952 (Miss. 1985).

Where the police read the defendant her Miranda rights and she responded "I understand, but I don't understand if I should have a lawyer or not," her waiver of her rights, as guaranteed under the Fifth Amendment, was knowing and intelligent in that, although she may not have been able to decide whether she wanted an attorney, the record was clear that she understood that she had the right to one; it is not the responsibility of police officers to decide for an accused whether the accused should retain an attorney, it is sufficient that the accused understand that the retention of counsel is a viable option. Lockett v. State, 459 So. 2d 246 (Miss. 1984).

A defendant in a capital murder prosecution knowingly and voluntarily waived his right to remain silent and, accordingly, the questioning to which he was submitted was not constitutionally prohibited, where, although he was not pleased with the "waiver of rights" language in the written waiver form that he signed, he nevertheless discussed the homicide in question with officers and gave a videotaped statement after having been warned of his constitutional prerogatives, after he had executed a formal waiver of those rights, and after he had visited with his mother who was present when the statement was given, where there was no inducement or coercion to obtain the statement from defendant by way of promise of hope or reward, and where there was no evidence of physical or mental coercion for the statement through delay or any violation of defendant's Miranda rights. Lanier v. State, 450 So. 2d 69 (Miss. 1984).

Where a judgment debtor by written agreement bound himself by all the provisions of an application for a surety bond, wherein he promised the surety access to all books and records, and agreed to furnish financial statements and pledged all of his assets to indemnify the surety in the event of loss, and thereby induced the surety to right a performance and payment bond in excess of $2,000,000, the judgment debtor waived his privilege against self-incrimination and was estopped from claiming the privilege as a ground for refusing to furnish a financial statement, where there was some question whether he had concealed or removed from the state assets subject to a judgment lien, and the debtor's refusal to furnish the statement in compliance with a Mississippi chancery court decree justified an adjudication of civil contempt. Morgan v. Thomas, 321 F. Supp. 565 (S.D. Miss. 1970), rev'd on other grounds, 448 F.2d 1356 (5th Cir. 1971), cert. denied, 405 U.S. 920, 92 S. Ct. 948, 30 L. Ed. 2d 790 (1972).

It is not necessary for an officer to warn every person he talks to about a crime of his constitutional rights nor is it necessary that a person being questioned sign a waiver waiving the presence of counsel, until such time as it becomes apparent that the person being interrogated is likely to be charged with a crime; after such time the officer must promptly warn the person of his rights so that such person will not be required to give information that may incriminate him. Smith v. State, 229 So. 2d 551 (Miss. 1969).

An accused may waive his constitutional immunity from giving testimony against himself, and does so when he takes the stand and testifies on the merits of the case. Autry v. State, 230 Miss. 421, 92 So. 2d 856 (1957).

57. Due process — In general.

Petitioner was allowed to proceed with a motion for access to his experts for the purpose of evaluation, testing, and any other purpose reasonably believed by counsel to be necessary for the full litigation of his post-conviction claims. As a matter of due process, prisoners sentenced to death should be granted access to their experts so long as the access complied with corrections rules and regulations and so long as those rules and regulations did not violate their due process rights. Grayson v. State, 118 So. 3d 118 (Miss. 2013).

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

Identification of defendant was not impermissibly suggestive because the men in the photographs were all African-American males, had the same build, and possessed the same facial features in accordance with the store clerk's description of the armed robber. The fact that defendant was the only individual wearing a coat was a minor difference and did not rise to the level of impermissible suggestion. Jones v. State, 993 So. 2d 386 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

Defendant's convictions for three counts of manslaughter for his actions in 1964 were appropriate in part because his due process rights were not violated; he claimed that he suffered actual prejudice due to deceased witnesses and deteriorated memories but he failed to show how he was prejudiced because all six of his witnesses testified live at his 2005 trial and he did not suggest any witness he was unable to call on his behalf as a result of the 41-year delay. Killen v. State, 958 So. 2d 172 (Miss. 2007).

State Supreme Court rejected defendant's claim that he was deprived of his right to a fair trial because some jurors saw him shackled, as the issue was not raised by defendant on his direct appeal. Doss v. State, 882 So. 2d 176 (Miss. 2004), writ of certiorari denied by 544 U.S. 1062, 125 S. Ct. 2513, 161 L. Ed. 2d 1113, 2005 U.S. LEXIS 4399, 73 U.S.L.W. 3693 (2005).

Although the court was not without the authority to decide the merits of an inmate's application pursuant to Miss. Code Ann. § 99-39-27(7), the court found that due process required the court to allow the inmate's motion to be filed in the trial court for the consideration of mental retardation evidence as a defense to the death penalty as cruel and unusual punishment under U.S. Const. amend. VIII. Chase v. State, 873 So. 2d 1013 (Miss. 2004), remanded by 112 So. 3d 421, 2013 Miss. LEXIS 5 (Miss. 2013).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder where the sexual molestation was integrally related to her murder such that one could not coherently present the facts of her demise without reference to it, and it described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

In a prosecution of defendant for the unlawful sale of cocaine, defendant's argument that he was denied due process because the jury selection process was not adequately reflected in the record failed; the supplemented record clearly indicated that a prospective juror, as well as several other potential jurors, was struck for cause. Martin v. State, 832 So. 2d 611 (Miss. Ct. App. 2002).

Because the testimony given by a witness was cumulative, any error in the admission of that evidence did not rise to the level of a due process violation. Beckwith v. Anderson, 89 F. Supp. 2d 788 (S.D. Miss. 2000).

A bill which created a sewer district and an ordinance that established a gray-water collection system and that regulated the use of public and private sewers and drains were not unconstitutional. Croke v. Lowndes County Bd. of Supvrs., 733 So. 2d 837 (Miss. 1999).

The jurisdictional provisions of the Youth Court Act in § 43-21-151 do not violate the rights to due process and equal protection under the United States Constitution and the Mississippi Constitution. Miller v. State, 740 So. 2d 858 (Miss. 1999).

The defendant city's refusal to rezone residential property to light commercial was not a denial of due process, notwithstanding that property across the street had already been commercially developed by various businesses, since the city's decision was "fairly debatable." Burdine v. City of Greenville, 755 So. 2d 1154 (Miss. Ct. App. 1999).

The defendant was not amenable to the exercise of in personam jurisdiction over him by the a county chancery court in a contempt proceeding alleging that he was in default on payment of certain amounts of child support due under an escalation clause contained in the property settlement agreement between the parties; although the parties were married in Mississippi and the plaintiff and the child lived in Mississippi after the parties' divorce, the defendant had never been a resident of Mississippi, had no significant contacts with Mississippi, and the judgment sought to be enforced was a Tennessee decree. McCubbin v. Seay, 749 So. 2d 1127 (Miss. Ct. App. 1999).

Neither the Fifth or Sixth Amendment rights of the defendant were violated when the trial court had him removed from the courtroom during a hearing on a motion for mistrial where the state requested that he be removed because the legal issue to be argued concerned a question that he had been asked on the stand, but to which he had yet to give an answer. Ludgood v. State, 710 So. 2d 1222 (Ct. App. 1998).

Impeachment evidence as well as exculpatory material comes within the scope of the Brady rule; failure to produce does not depend upon the good faith or bad faith of the prosecution, nor upon the specificity of the defense request. Malone v. State, 486 So. 2d 367 (Miss. 1986).

Guarantee of due process does not require that an accused have more than one full opportunity to be heard. Simmons v. State, 197 Miss. 326, 20 So. 2d 64 (1944), cert. denied, 324 U.S. 821, 65 S. Ct. 590, 89 L. Ed. 1391 (1945).

58. —Statutes and court rules, due process.

Retroactive application of § 81-5-105, limiting the personal liability of a former officer of a failed federal savings and loan association to gross negligence, intentional tortious conduct, intentional breach of the duty of loyalty, and corporate waste, did not violate due process as expressed in the federal and state constitutions because a vested property right in the tort action did not arise under Mississippi law until the claim was reduced to judgment; where a plaintiff has no vested right in tort claims, abrogation of those claims by legislative enactment does not constitute a deprivation of property in violation of due process. Resolution Trust Corp. v. Scott, 887 F. Supp. 937 (S.D. Miss. 1995).

Rule providing that case could not be heard or re-heard en banc unless majority of all judges in regular active service, including any who may be recused in particular case, vote that case be heard or re-heard en banc does not deny equal protection and due process. U.S. v. Nixon, 827 F. 2d 1019 (C.A. 5th Miss. 1987).

Mississippi's system for awarding punitive damages is not unconstitutional, and therefore the imposition of punitive damages did not violate a defendant's constitutional right to due process. Ciba-Geigy Corp. v. Murphree, 653 So. 2d 857 (Miss. 1994).

Section 97-3-7(2) is not unconstitutionally vague on the ground that it does not define the term "serious bodily harm," particularly when applied in a case involving brutal injuries; in more ambiguous cases, prosecutors and trial courts should refer to the definition of "serious bodily injury" set out in § 210.0 of the Model Penal Code. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

A mother whose parental rights were terminated under § 93-15-103(3)(e) on the ground that there was a "substantial erosion of the relationship" between her and 2 of her children failed to show that the statute was unconstitutionally vague, since a person of common intelligence should have been aware that the result of a factual situation such as the mother's could well be the termination of one's parental rights. If the statute were more specific, then the cases in which it could be applied could be so drastically reduced as to make it ineffective in protecting the children it was meant to serve. Vance v. Lincoln County Dep't of Pub. Welfare ex rel. Weathers, 582 So. 2d 414 (Miss. 1991).

A statute providing for incorporation of a municipality by the proclamation of the Governor, does not violate due process. Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 62 So. 2d 772 (1953).

59. —Local ordinances, due process.

Requiring a landowner to pay for a sewer connection after he refused a free connection did not violate equal protection. The owner was notified that after a certain period of time, he would be responsible for the connection costs, and he was treated no differently than any other person who refused to allow the district to connect him for free Croke v. Southgate Sewer Dist., 857 So. 2d 774 (Miss. 2003).

A city's noise control ordinance, which prohibited "unnecessary or unusual noises... which either annoys, injures or endangers the comfort, repose, health or safety of others...," violated the due process clauses of the federal and state constitutions because it failed to provide clear notice and sufficiently definite warning of the conduct that was prohibited. A statute is unconstitutionally vague when the standard of conduct it specifies is dependent upon the individualized sensitivity of each complainant, and whether a noise is "unnecessary," "unusual" or "annoying" depends upon the ear of the listener. Nichols v. City of Gulfport, 589 So. 2d 1280 (Miss. 1991).

Any violation of the county's regulations regarding notice of noncompliance with the county's subdivision ordinance did not deprive a developer and lot owners of their due process right with respect to the county's action for declaratory and injunctive relief to bring the lot into compliance with the ordinance since such a procedure was not a prerequisite to the filing and prosecution of the lawsuit. Additionally, the rights of the developer and the lot owners in the premises was reasonable advance notice of the lawsuit and the opportunity to appear and be heard. Johnson v. Hinds County, 524 So. 2d 947 (Miss. 1988).

60. —Administrative proceedings, due process.

The complaint procedure established by the Supreme Court for attorney disciplinary proceedings does not violate due process on the ground that it does not provide for an appeal to any other state court. Asher v. Mississippi Bar, 661 So. 2d 722 (Miss. 1995).

The complaint procedure established by the Supreme Court for attorney disciplinary proceedings does not violate due process on the ground that members of the complaint tribunal are also members of the Mississippi Bar. Asher v. Mississippi Bar, 661 So. 2d 722 (Miss. 1995).

There is no suggestion of partiality or impropriety in the use of an assistant attorney general as a hearing officer in a hearing before the Department of Natural Resources Permit Board; the attorney general's office affords counsel to state agencies and there is no conflict or suggestion of unfairness in this arrangement. Thus, an environmental organization, which objected to a modified air emissions permit and was afforded an administrative hearing before the Natural Resources Permit Board, was not denied due process of law on the ground that the hearing officer who sat with the Board was a special assistant attorney general. Furthermore, the environmental organization waived any objections it might have had where it made no objection before the Board and proceeded through the hearing without objection, and the organization admitted having knowledge of the identity of the hearing officer as an assistant attorney general well before the hearing and in time to object if any legitimate objection existed. United Cement Co. v. Safe Air for The Env't, Inc., 558 So. 2d 840 (Miss. 1990).

61. —Property interests, due process.

Failure of a water management district to give notice of its petition to acquire an easement to the life tenants and remaindermen of a piece of property and failure to join the life tenants, before the entering upon and taking possession of the property, was a denial of due process. The life tenants' and remaindermen's due process rights were violated by the taking of their property without notice and without a pre-deprivation hearing. Webb v. Town Creek Master Water Mgmt. Dist., 903 So. 2d 701 (Miss. 2005), remanded by 93 So. 3d 20, 2012 Miss. LEXIS 355 (Miss. 2012).

In a products liability case arising from use of a prescription drug, the trial court abused its discretion by improperly changing venue to Claiborne County because the record was replete with evidence that defendant drug company had sufficiently proved bias in the community of Claiborne County. Therefore, although the trial court correctly found that it was proper to change venue from Jefferson County, Claiborne County was not a proper venue in which a fair trial could be conducted. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004), modified and rehearing denied by 2004 Miss. LEXIS 1002 (Miss. Aug. 5, 2004).

General guarantees of municipal level fire protection in annexation ordinance did not create protected property rights in homeowner personally. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Homeowner did not have federally protected property interest in fire protection by city; Constitution did not confer affirmative rights to governmental aid. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Property interest in review of his claim was necessary to support homeowner's assertion that his due process rights were violated by city's selective payment of claims to some parties from city's claims fund, but not others. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

The continuance of electrical power is a property interest worthy of due process protections. Thus, the defense of sovereign immunity was not available to a county where a homeowner alleged that he had been damaged when the county and an electrical utility discontinued his electrical power, since sovereign immunity is no defense where a violation of constitutional rights is concerned. Tucker v. Hinds County, 558 So. 2d 869 (Miss. 1990).

A property owner's claim of ownership under color of title by virtue of his adverse possession of the property after he purchased the property at a tax sale but before the redemption period had ended and he had the right of possession, was sufficient to apply the "doctrine of relation" back to the date of the tax sale purchase for the purpose of challenging a subsequent zoning ordinance by asserting a pre-existing nonconforming use. In the balancing of public benefit against private property losses, a landowner's constitutional right under the due process clause prevails. Barrett v. Hinds County, 545 So. 2d 734 (Miss. 1989).

City is not constitutionally required to reimburse hospital for care furnished to suspect wounded by city police, as municipality's constitutional duty to obtain necessary medical care for injured detainee does not include corresponding duty to compensate provider of that care. City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983).

Where a licensing agreement between foster parents and the State of Mississippi, as well as state statutes, made clear the foster parent-child relationship was merely a temporary one, there could have been no expectation or entitlement on the part of the foster parents that a child placed in their home would remain permanently in their home. Therefore, the foster parents had no liberty or property interests which were entitled due process protection under the Fifth or Fourteenth Amendments. Crim v. Harrison, 552 F. Supp. 37 (N.D. Miss. 1982).

Labor is property and to deprive laborer and employer of right to contract peaceably with one another is to violate Fifth and Fourteenth Amendments which provide that no persons shall be deprived of life, liberty, or property without due process of law, and that no state shall deprive any person within its jurisdiction equal protection of law. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

Shareholder of capital stock in an incorporated agricultural association, upon becoming ineligible to hold stock by reason of fact that he is no longer a producer of agricultural products and who is unable to sell or transfer his stock to another eligible producer or organization, is entitled under Code 1942 § 4485 to be paid by the association only the par value of his stock which may be paid by association's certificate of indebtedness payable out of future earnings, and not the amount representing the proportion that his shares bear to the present assets of the association even though such amount may be greater than the par value of the shares, and such does not deprive the shareholder of property without due process of law in violation of the constitution. Avon Gin Co. v. Bond, 198 Miss. 197, 22 So. 2d 362 (1945).

An employee's seniority rights constitute "property" within the Fifth Amendment to the Federal Constitution. Stephenson v. New Orleans & N. E. R. Co., 180 Miss. 147, 177 So. 509 (1937).

Sale of the property of a bankrupt by the trustee, free of liens, on at least 10 days' notice by mail, does not take the property of lien creditors without due process. McRaney v. Riley, 128 Miss. 665, 91 So. 399 (1922), cert. denied 260 U.S. 727, 43 S. Ct. 90, 67 L. Ed. 484 (1922).

Congress may not, as to previously made contracts for attorney's fees for collecting Civil War claims, limit the amount of such fees. Lay v. Lay, 118 Miss. 549, 79 So. 291 (1918), aff'd, 248 U.S. 24, 39 S. Ct. 13, 63 L. Ed. 103 (1918).

62. —State action, due process.

In an action challenging the plaintiff's incarceration for nine months in a Madison County jail as a result of a Hinds County detainer, without hearing or court appearance, the plaintiff failed to establish a violation of his Fifth Amendment rights where he failed to allege that the defendants were acting under authority of the federal government. Jones v. City of Jackson, 203 F.3d 875 (5th Cir. 2000).

A landlord's actions in locking up a tenant's possessions pursuant to § 89-7-51(2) did not violate due process requirements where the landlord failed to use the attachment for rent statutes; since § 89-7-51 did not authorize the landlord to use self-help to seize the tenant's property, there was no state action. Bender v. North Meridian Mobile Home Park, 636 So. 2d 385 (Miss. 1994).

63. —Juveniles, due process.

Minors were entitled to some form of due process prior to being placed in a detention center that placed extensive restrictions on its residents. In re M.I., 519 So. 2d 433 (Miss. 1988).

64. —Driver's licenses, due process.

The statutory law providing for prehearing suspension of a driver's license when the driver refuses to submit to a breathalyzer test is not violative of minimum due process requirements. Lavinghouse v. Mississippi Hwy. Safety Patrol, 620 So. 2d 971 (Miss. 1993).

65. —Employment and job security, due process.

A 16-year veteran police officer, who had vested permanent employment rights under the civil service laws, resigned on his own volition and was not "constructively discharged" where he obtained legal counsel when he became aware that he was the object of an investigation and resigned his job on his attorney's advice. Thus, he could not thereafter pursue an untimely claim that he was denied procedural due process. In order to ensure that a civil service employee preserves his or her procedural due process guarantees, he or she should "stay the course" and remain with the job until relieved from the assignment by an official with statutory authority to fire. While the work environment could become the source of some irritation or embarrassment, such embarrassment will usually afford the civil servant nothing in the way of a procedural due process claim after a voluntary resignation. The instances will be few when a claim of constructive discharge will preserve procedural guarantees that the employee has waived by resigning. The wisdom of "staying the course" is especially crucial in light of state law which deems civil service administrative remedies as the exclusive remedy before relief can be sought in state court. Bulloch v. City of Pascagoula, 574 So. 2d 637 (Miss. 1990).

The termination of employees of a state facility for the mentally retarded after the employees refused to take a polygraph examination regarding injuries received by a resident under their supervision did not violate the employees' federally guaranteed right to due process. Jackson v. Hudspeth Mental Retardation Ctr., 573 So. 2d 750 (Miss. 1990).

A college professor did not have a property interest protected by due process in his grant of tenure. Section 37-101-15 empowers the Board of Trustees of Institutions of Higher Learning to terminate professors' employment contracts at any time for malfeasance, inefficiency or contumacious conduct but does not create a legitimate expectation of continued employment for a non-tenured employee. If a state regulation conditions receipt of a benefit upon a discretionary decision of an administrator, there is no legitimate claim of entitlement to the benefit. Wicks v. Mississippi Valley State Univ., 536 So. 2d 20 (Miss. 1988).

Although a discharged police officer was denied due process in that the dismissal decision was made one day before the time for his response to the charges expired, the dismissed police officer waived this issue by not raising it before the Civil Service Commission prior to his full evidentiary hearing and he was thus precluded from challenging the pretermination procedure on appeal. Little v. City of Jackson, 375 So. 2d 1031 (Miss. 1979), cert. denied, 445 U.S. 933, 100 S. Ct. 1325, 63 L. Ed. 2d 768 (1980).

Statutory pretermination procedures for nonprobationary municipal civil service employees do not contain adequate due process safeguards to be followed when discharging, suspending, or demoting covered municipal employees, whose right of continued employment is a property right. Thus, risk reducing procedures must be accorded such employees, including pretermination written notice of the reasons for termination and an effective opportunity to rebut such reasons, the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision, a written decision on the response of the employee at the earliest practicable date, and, although not required, examination of witnesses, trial or hearing, in the discretion of the responsible official. Little v. City of Jackson, 375 So. 2d 1031 (Miss. 1979), cert. denied, 445 U.S. 933, 100 S. Ct. 1325, 63 L. Ed. 2d 768 (1980).

66. —Professional licensure, due process.

An attorney who was suspended from the practice of law following a felony conviction in the federal courts and who was disbarred 3 years later at the conclusion of his appeal of the federal conviction, was not denied equal protection or due process rights on the ground that he would be required to wait 3 years longer before reinstatement than an attorney who chose not to appeal a conviction. All disbarred attorneys are treated equally; the disparity of time arises when an attorney resists the disbarment pending his or her appellate procedures. Had the attorney accepted the disbarment following his conviction, no delay in entering a final order of disbarment would have resulted, and therefore there was no unequal treatment or denial of due process. Additionally, the attorney's disbarment was not retroactive to the date of his suspension since the attorney's initiative delayed the entry of the final order; retroactivity cannot be applied when the attorney seeks a stay of the final order. Mississippi State Bar v. Nixon, 562 So. 2d 1288 (Miss. 1990), reinstatement granted, 618 So. 2d 1283 (Miss. 1993).

The provision of the State Bar Act which provides for automatic suspension of a member who fails to pay the required dues but gives a suspended member power to reinstate himself by payment of delinquent dues, does not violate any constitutional rights because of failure to provide for a judicial hearing. Mississippi State Bar v. Collins, 214 Miss. 782, 59 So. 2d 351 (1952).

66. —Insurers, due process.

The highway patrol had no authority to deliver a stolen pickup truck, which had an altered vehicle identification number and had been seized from an innocent purchaser pursuant to a valid search warrant, to an insurance company, which had paid the owner the full value of the truck under a theft loss insurance policy and was therefore the lawful owner of the vehicle, absent court approval with no advance notice to the innocent purchaser of its intent to do so and without giving him an opportunity to contest the matter in a court of competent jurisdiction; the appropriate procedure would have been for the highway patrol, once the truck served no further purpose in the criminal investigation or prosecution, to make a motion in the justice court for authority to release it to the insurance company, and to give the innocent purchaser and the insurance company reasonable notice of such application and an opportunity to be heard; however, the circuit court erred in directing return of the pickup truck to the innocent purchaser without making the insurance company a party to the hearing or giving it any notice of the proceeding, as this was a blatant violation of the insurance company's right to due process. Weaver v. State, 597 So. 2d 609 (Miss. 1992).

67. —Schools and school districts, due process.

The procedures surrounding a school principal's termination were not "tainted," and no violation of his due process rights occurred, even though it could have been inferred from a witness' reluctance to make a statement and from her affidavit. Harris v. Canton Separate Pub. Sch. Bd. of Educ., 655 So. 2d 898 (Miss. 1995).

The procedures surrounding a school principal's termination were not "tainted," and no violation of his due process rights occurred, even though it could have been inferred from a witness' reluctance to make a statement and from her affidavit

that she felt compelled to testify or lose her job, since such "evidence" of coercion was insufficient to overcome the "presumption of honesty and integrity" in the school board members who served as adjudicators and conducted the dismissal hearing. Harris v. Canton Separate Pub. Sch. Bd. of Educ., 655 So. 2d 898 (Miss. 1995).

The procedures followed at an administrative hearing before 3 members of the school board on a teacher's 6-month suspension violated the teacher's right to due process where, during a break in the formal proceedings, the 3 school board members told the teacher that they intended to reject suspension in favor of a formal reprimand, the teacher claimed to have relied on this information and rested her case prematurely, and the board ultimately reached a decision to suspend the teacher; although the teacher was afforded an opportunity to be heard, the school board, by its own actions, prevented her from taking full advantage of her right to present evidence in her favor by leading her to believe that there was no need to present additional evidence. Bowman v. Ferrell, 627 So. 2d 335 (Miss. 1993).

Where a suspended teacher's procedural due process rights had been violated at her hearing before the school board, the chancery court erred in ordering the teacher's reinstatement rather than a rehearing as required by § 37-9-113(4). Bowman v. Ferrell, 627 So. 2d 335 (Miss. 1993).

The fact that an attorney for a school's board of trustees participates in a dismissal hearing, advises the board and generally runs the hearing affords the employee no grounds for complaint unless it can be shown that in fact the attorney corrupted or otherwise destroyed the impartiality of the process. Hoffman v. Board of Trustees, E. Miss. Junior College, 567 So. 2d 838 (Miss. 1990).

Only those persons who, out of personal animosity, or personal or financial stake in the decision, are shown of such bias that the presumption of honesty and integrity of school board members is overcome, shall be disqualified from service on a hearing board based on due process considerations. Hoffman v. Board of Trustees, E. Miss. Junior College, 567 So. 2d 838 (Miss. 1990).

There is no legislative enactment providing teachers' aides with a valid claim of entitlement to continued employment. Thus, a teacher's aide's termination deprived her of no property interest, the taking of which would invoke the due process provisions of the constitution. Harrison County Sch. Bd. v. Morreale, 538 So. 2d 1196 (Miss. 1989).

Teacher's constitutional right to due process was not violated by school board despite claim that he was denied fair and impartial hearing because school board had already determined to dismiss him when it informed him of his right to public hearing, and because even though board conducted hearing through hearing officer, the ultimate decision rested with board. First, teacher had made no complaint at time of hearing about possibility of impartiality of school board, and such failure waived point. Second, where board acts both investigatively and adjudicatively, court establishes presumption of honesty and integrity in those serving as adjudicators, and in order to rebut presumption, teacher must show that board members had personal or financial stake in decision, or that there was some personal animosity toward teacher. Finally, showing that board was involved in events preceding termination is not enough, absent showing of either personal animosity, personal stake, or financial stake in decision, to overcome presumption of honesty and integrity of board members. Spradlin v. Board of Trustees, 515 So. 2d 893 (Miss. 1987).

Any deprivation of student's interest in attending school must be attended by at least minimal procedural safeguards, but where suspension is for 10 days or less, due process requires only that student be given oral or written notice of charges against him, basis of accusation, and opportunity to present his side of story. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

Even assuming that hearing before school board met minimal procedural safeguards, facts did not establish that hearing given to student by board comported with more formal procedures necessary for long-term suspensions, where it was unclear from facts developed through pleadings and discovery whether or not isolation at issue involved sufficient educational deprivation to warrant being treated as equivalent of suspension; upon returning to school after 10 days suspension, student was required to remain in detention room, isolated from other students and excluded from regular classes. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

When student admits to conduct giving rise to suspension, need for due process hearing is obviated, since purpose of hearing is to safeguard against punishment of students who are innocent of accusations against them. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

68. — Zoning, due process.

A real estate developer's due process rights were not violated when he was unable to obtain a building permit to construct apartments since he had no property right to construct the apartments. Bryan v. City of Madison, 213 F.3d 267 (5th Cir. 2000), writ of certiorari denied by 531 U.S. 1145, 121 S. Ct. 1081, 148 L. Ed. 2d 957, 2001 U.S. LEXIS 1127, 69 U.S.L.W. 3552 (2001).

Decision of city fathers in drawing and maintaining line past which commercial development would not be allowed was not arbitrary, capricious, or unreasonable, where there was substantial evidence supporting both sides of rezoning application, thus making ultimate decision fairly debatable; same reasoning applied to denial of assertion that zoning restriction amounted to confiscatory taking in violation of due process of law under constitution because that issue is intertwined with review of whether zoning decision is arbitrary, capricious, or unreasonable. Saunders v. City of Jackson, 511 So. 2d 902 (Miss. 1987).

The due process rights, if any, guaranteed to objectors of a rezoning proposal is reasonable advance notice of the substance of the rezoning proposal together with the opportunity to be heard at all critical stages of the process. Thrash v. Mayor & Comm'rs of Jackson, 498 So. 2d 801 (Miss. 1986).

The construction and maintenance of a warehouse for the reception of freight on railroad right-of-way, which had existed as such for more than 50 years prior to the adoption of an ordinance making most of such right-of-way a residential district, held to be a reasonable use of such right-of-way in facilitating the company's principal business and no more objectionable than the operation of trains, and to be authorized by provision of ordinance excepting existing nonconforming uses; and, accordingly, action of city authorities in denying such use of the property was an unreasonable and arbitrary interpretation of the ordinance which tended to deprive the company of its property and use thereof in violation of both Federal and State Constitutions. Jones v. City of Hattiesburg, 207 Miss. 491, 42 So. 2d 717 (1949).

69. — Taxation, due process.

The four criteria that a taxing statute must satisfy to withstand a challenge under the commerce clause and due process clause of the United States Constitution are: (1) the tax must be applied to an activity with a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to services provided by the taxing state; the failure to meet any one prong of the test renders the tax invalid. Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).

The imposition of use and excise taxes pursuant to § 27-67-7 et seq. on a pipeline company's use of natural gas taken from its interstate gas pipeline as fuel for its compressor engines located along the pipeline was permissible under the commerce clause and the due process clause of the United States Constitution since the activity taxed the consumption of natural gas in compressor stations located in Mississippi had a sufficient nexus with the State to justify the tax, the tax was fairly apportioned to assess only local activities and did not discriminate against interstate commerce by subjecting interstate taxpayers to a double taxation where similarly situated intrastate taxpayers would be subject to only single taxation, and the tax was fairly related to the benefits provided by the State to the pipeline company. Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).

An amendatory provision in a sales tax statute (Code 1942 § 10122 as amended) reducing from six years to three years the time within which suit may be brought to recover the tax is not violative of the due process clause. Stone v. McKay Plumbing Co., 200 Miss. 792, 30 So. 2d 91 (1947).

A retroactive provision in a sales tax statute changing the limitation on the right of the taxpayer to sue to recover taxes paid is invalid in so far as it undertakes to compel a court to set aside a prior judgment in taxpayer's favor, since the judgment conferred a vested right which could not be taken away without due process of law. Stone v. McKay Plumbing Co., 200 Miss. 792, 30 So. 2d 91 (1947).

70. — Governmental immunity, due process.

Parole board members receive absolute immunity in suit for damages by parolee alleging revocation procedures violated his right to due process, and official who, because of organization of government in particular state, performs parole board's quasi-judicial duties enjoys same protection. Farrish v. Mississippi State Parole Bd., 836 F. 2d 969 (5th Cir. 1988).

Officers whose activities fell within scope of parole board's protected function were absolutely immune from liability in suit for damages alleging denial of prisoner's due process rights where one, acting as hearing officer, had conducted hearing without critical adverse witness even though defendant requested his presence; other officer had served in prosecutorial role during revocation proceeding. Farrish v. Mississippi State Parole Bd., 836 F. 2d 969 (5th Cir. 1988).

Commissioner of Corrections, whose conduct involved administrative activities which, although they impacted on adjudicatory process, were not integral part of it, merited only qualified immunity where allegation was that procedural due process violation had occurred; this official, who had failed to establish adequate policies or procedures to govern preliminary hearing in such an elementary case, should have known that his conduct violated a clearly established right and was therefore liable for damages. Farrish v. Mississippi State Parole Bd., 836 F. 2d 969 (5th Cir. 1988).

71. — Elections, due process.

Fact that decision of federal court declaring Mississippi poll tax law unconstitutional was handed down on day which was deadline for filing protest petitions against issuance of state aid road bonds, thereby increasing the number of electors in county from 8855 to 13510, and making total number of signatures on petitions insufficient to prevent board of supervisors from issuing bonds without calling election therefor, did not deprive petitioners of their constitutional rights; for the decision of the federal court was a fact beyond the power of the board to alter, but of which they were bound to take cognizance. Ratliff v. Board of Supvrs., 193 So. 2d 137 (Miss. 1966).

72. — Parole and probation generally, due process.

In a challenge to the banishment provision of defendant's sentence pursuant to Miss. Code Ann. § 99-39-5(1)(a), the substitution of some period of formal probationary supervision in place of a like term of banishment did not constitute an increase in the degree or character of defendant's punishment that would invoke constitutional concerns of double jeopardy, U.S. Const. amend. V, and the requirement of supervised probation was essentially rehabilitative in its objectives and not punitive; thus, the change in probation terms was within the circuit court's authority as contained in Miss. Code Ann. § 47-7-35. Weaver v. State, 856 So. 2d 407 (Miss. Ct. App. 2003), writ of certiorari denied by 859 So. 2d 1017, 2003 Miss. LEXIS 515 (Miss. 2003).

The banishment of the defendant from a 100 mile radius of the place that he committed a burglary was not justified where the trial court did not make an on the record finding of the benefits of banishment. Weaver v. State, 764 So. 2d 479 (Miss. Ct. App. 2000).

A prisoner is not denied due process by the denial of parole because the discretion conferred on the parole board affords a prisoner no constitutionally recognized liberty interest. Justus v. Mississippi State Parole Bd., 750 So. 2d 1277 (Miss. Ct. App. 1999).

Parole statutes contain no mandatory language, but instead employ permissive "may" rather than "shall," and thus prisoners have no constitutionally recognized liberty interest in parole. Vice v. State, 679 So. 2d 205 (Miss. 1996).

Neither the due process clause nor Mississippi law gives rise to a protected liberty interest in the form of an expectation of release on probation. There is no liberty interest in release pursuant to the provisions of § 47-7-47, which creates a procedure whereby the courts may place a prisoner on probation, since the language of the statute is permissive rather than mandatory in nature; the statute vests absolute discretion in both the Department of Corrections and the court in determining whether probation should be recommended and granted, and this discretion affords a prisoner no constitutionally recognized liberty interest. Smith v. State, 580 So. 2d 1221 (Miss. 1991).

The Mississippi parole statutes do not create a constitutionally protected liberty interest in the form of an expectation of parole because of the use of the permissive "may" in § 47-7-3, which provides that a prisoner "may be released on parole as hereinafter provided," read in the context of the other provisions of that section and, as well, those of § 47-7-17. Thus, Mississippi law did not vest a convicted and incarcerated felon with a liberty interest in parole entitling him to due process of law incident to his application for parole. Harden v. State, 547 So. 2d 1150 (Miss. 1989).

A term of probation requiring defendant to remain at least 125 miles away from a particular county did not violate his First, Fifth, or Fourteenth Amendment rights, where the record indicated that the trial judge carefully and meticulously explained to defendant his rights, the trial court found that defendant voluntarily and knowingly pled guilty, the Department of Corrections conducted an investigation of defendant prior to sentencing, and defendant accepted the terms of probation, which were neither unreasonable nor arbitrary. Cobb v. State, 437 So. 2d 1218 (Miss. 1983).

73. —Revocation of parole and probation, due process.

A defendant who allegedly violated the terms of his probation by committing the crime of sale of cocaine was denied due process of law by having his probation revoked immediately after a mistrial was declared in his trial on the charge of sale of cocaine where the revocation was based upon the trial which had just resulted in a mistrial, the defendant never agreed that the court could summarily revoke his probation in the event the trial resulted in anything other than a conviction, and he was not given advance notice of a revocation hearing. Grayson v. State, 648 So. 2d 1129 (Miss. 1994).

When failure to pay court-imposed fines becomes a possible basis for a probation revocation, the trial court must follow the procedural mandates of § 99-19-20(2). Berdin v. State, 648 So. 2d 73 (Miss. 1994).

A defendant was deprived of due process by a trial court's failure to conduct an inquiry as to the reason she was delinquent in paying her probation fines before revoking her probation because of her failure to pay those fines. Berdin v. State, 648 So. 2d 73 (Miss. 1994).

A defendant's probation revocation violated her due process rights where there was no record of the defendant receiving notice of a probation violation, and the disparity between the court's statements when probation was revoked, the written and signed order of revocation, and the court's after-the-fact explanation at the defendant's post-conviction relief hearing demonstrated a lack of actual notice. Berdin v. State, 648 So. 2d 73 (Miss. 1994).

A trial court properly denied a parolee's petition for writ of habeas corpus, in which the parolee claimed that he was not afforded a timely parole revocation hearing, where the admitted evidence showed that the parolee had violated the conditions of his parole by 2 Tennessee felony convictions and failure to waive extradition back to Mississippi; these were reasonable grounds for revoking his parole, and therefore all procedural due process guarantees were met. Godsey v. Houston, 584 So. 2d 389 (Miss. 1991).

A probationer was not denied due process due to the lack of a preliminary hearing in his probation revocation proceedings, even though a hearing expressly designated as "preliminary" was not held, where 3 hearings were held in the circuit courts and the first and second hearings were, for all practical purposes, equivalent to a preliminary hearing. Additionally, the probationer was not wrongfully denied the opportunity to call his own witnesses where he made a last-minute request during the third hearing to call witnesses who allegedly would have testified in his behalf, the court concluded that the witnesses would have offered no new evidence, the probationer had already admitted that he committed probation violations, and at most the witnesses would have testified in regard to the probationer's character and would have had no effect on the outcome of the case. Riely v. State, 562 So. 2d 1206 (Miss. 1990).

The probation-revocation procedure delineated in § 47-7-37 is constitutional; the statute includes the minimum due process requirements applicable to parole and probation revocation procedures set forth in Morrissey v Brewer (1972, US) 33 L Ed 2d 27, 92 S Ct 2593 and Gagnon v Scarpelli (1973, US) 36 L Ed 2d 656, 93 S Ct 1756. Riely v. State, 562 So. 2d 1206 (Miss. 1990).

74. —Treatment of incarcerated persons, due process.

In a capital murder case, the inmate asserted that he had been subjected to cruel and inhuman treatment in violation of his Fifth, Eighth, and Fourteenth Amendment rights because he had been kept in maximum confinement on Mississippi's death row under conditions that included lock-down and isolation for at least 23 hours of the day and because he had been subjected to numerous execution dates during those 19-20 years; however, there was no law in the United States or Mississippi that supported the inmate's claim and, thus, there were no grounds for postconviction relief on that issue. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Involuntary treatment of the criminally accused with antipsychotic medication is permissible only where medically appropriate and, considering less intrusive alternatives, essential for safeguarding a compelling state interest. In re Turner, 635 So. 2d 894 (Miss. 1994).

Although prisoners do not enjoy an absolute constitutional right to unrestricted visitation, and their visitation privileges are subject to the discretion of prison officials, restrictions on an inmate's visitation privileges should not be imposed arbitrarily or discriminatorily. Puckett v. Stuckey, 633 So. 2d 978 (Miss. 1993).

The unexplained failure to award an inmate meritorious earned time did not amount to a violation of his federal and state constitutional rights to due process and equal protection, since an inmate's earning of "time" is a matter of grace or privilege under § 47-5-142, which provides that "meritorious earned time may be awarded." Since correctional officials are vested with discretionary power to award time under certain conditions, inmates are not entitled to it. Ross v. State, 584 So. 2d 777 (Miss. 1991).

A prisoner did not have a protected liberty interest in being transferred from a county correctional facility to a state prison, absent a state law or regulation or prison policy or procedure conditioning such a transfer on proof of misbehavior or some other event. McFadden v. State, 580 So. 2d 1210 (Miss. 1991).

A prison inmate does not have a protected liberty interest in a particular job assignment under the due process clause. However, a liberty interest may be created by state law or prison regulation. McFadden v. State, 580 So. 2d 1210 (Miss. 1991).

Inmates who are placed in administrative segregation have no constitutional basis for demanding the same privileges as those inmates in the general prison population since prison officials have the discretion to determine whether and when to provide prisoners with privileges such as showers, exercise, visitation, and access to personal property. Thus, the 5 hours a week of exercise plus nightly showers of 15 minutes which were provided to an inmate confined to administrative segregation did not constitute cruel and unusual punishment. Additionally, the procedures provided when the inmate was placed in administrative segregation satisfied the due process clause where the inmate received notice of detention and a hearing on the matter. Terrell v. State, 573 So. 2d 730 (Miss. 1990).

The actions of corrections officials in designating a prisoner eligible for earned time, due to an administrative or clerical error, and then in withdrawing that designation, did not amount to a forfeiture of earned time without due process since no earned time was accumulated by the prisoner. Doctor v. State, 522 So. 2d 229 (Miss. 1988).

75. —Jurisdiction, due process.

For court's exercise of personal jurisdiction to comport with due process, defendant must have certain minimum contacts with forum, such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Cappaert v. Walker, Bordelon, Hamlin, Theriot & Hardy, 680 So. 2d 831 (Miss. 1996).

Although the chancellor initially granted the mother's motion to terminate the father's parental rights, the Hinds County Chancery Court did not have proper subject matter jurisdiction to do so because the Scott County Chancery Court entered the initial order of child custody; when presented with information regarding the jurisdictional problem, the chancellor immediately corrected the defect by setting aside his previous orders and instructing that any further proceedings regarding the case be brought before the Scott County Chancery Court, pursuant to Miss. Code Ann. § 93-5-23. C.M. v. R.D.H., 947 So. 2d 1023 (Miss. Ct. App. 2007).

For court's exercise of personal jurisdiction to comport with due process, defendant's contacts with forum must be such that he should reasonably anticipate being haled into court there. Cappaert v. Walker, Bordelon, Hamlin, Theriot & Hardy, 680 So. 2d 831 (Miss. 1996).

Joint venturer's contacts with Louisiana, as state where radio station was purchased pursuant to joint venture agreement and where funds which joint venturer advanced were used in operating station, were sufficient to permit Louisiana courts to exercise personal jurisdiction in action brought by law firm which provided legal services to another member of venture to hold joint venturer liable on debt; lawsuit arose out of joint venturer's contacts with forum, and even assuming that it did not, joint venturer's contacts were systematic and continuous enough, extending over multiyear period when station was in operation, to satisfy due process. Cappaert v. Walker, Bordelon, Hamlin, Theriot & Hardy, 680 So. 2d 831 (Miss. 1996).

76. —Service of process, due process.

Former husband representing himself, was unable to show a violation of the Fifth Amendment or Miss. Code Ann. § 9-5-137 in a divorce action because the evidence demonstrated that he was not charged with a criminal offense and that a summons was properly issued on the civil complaint. Appellant husband erroneously believed a summons should not have been issued as the charge was not criminal but lay in divorce. Richardson v. Richardson, 856 So. 2d 426 (Miss. Ct. App. 2003), writ of certiorari denied by 2003 Miss. LEXIS 638 (Miss. Nov. 6, 2003).

Complete absence of service of process offends due process and cannot be waived. Mansour v. Charmax Indus., Inc., 680 So. 2d 852 (Miss. 1996).

Due process of law requires personal service to support a personal judgment, and, when the proceeding is strictly in personam brought out to determine the personal rights and obligations of the parties, personal service within the state or a voluntary appearance in the case is essential to acquisition of jurisdiction so as to constitute compliance with the constitutional requirement of due process. American Cas. Co. v. Kincade, 219 Miss. 653, 69 So. 2d 820 (1954).

77. — Notice and hearing, due process.

Defendant's due process rights were not violated by a contempt conviction because a trial court gave defendant notice and conducted a hearing where she was allowed to present evidence, even though not required for direct contempt. In re Hampton, 919 So. 2d 949 (Miss. 2006), writ of certiorari denied by 547 U.S. 1131, 126 S. Ct. 2042, 164 L. Ed. 2d 784, 2006 U.S. LEXIS 3868, 74 U.S.L.W. 3639 (2006).

Denial of the inmate's petition for writ of habeas corpus was affirmed as (1) Miss. Code Ann. § 47-7-17 did not create a constitutionally protected liberty interest in parole, (2) the inmate waived his right to argue that he was prejudiced by the Parole Board's failure to publish notice of his parole hearing as it was not raised below, and (3) the inmate did not argue in his petition that he had ever been denied the opportunity to call witnesses or that the Parole Board refused to listen to their testimony. Way v. Miller, 919 So. 2d 1036 (Miss. Ct. App. 2005).

The defendant was not denied the right to have compulsory process for obtaining witnesses in his favor, notwithstanding his contention that the state, by trying him at a time when charges were still pending against his other co-defendants, ensured that these potentially helpful defendants would be unavailable to the defense because, as a matter of self-preservation, they could be expected to invoke their Fifth Amendment right against self-incrimination and refuse to testify. Bell v. State, 733 So. 2d 372 (Miss. Ct. App. 1999).

There was no violation of due process caused by the time that elapsed between the alleged events that formed the basis for the criminal charge against the defendant for gratification of lust by touching or rubbing a child under the age of fourteen years and the time he was brought to trial where (1) the only claim of prejudice advanced at the hearing to dismiss was that the defendant could not locate his former wife, whom he believed would testify favorably to him, and (2) there was no evidence indicating that the state purposely delayed bringing formal charges against the defendant and, to the contrary, the evidence indicated that, once responsible officials became aware of the alleged events related by the child, the matter was pursued with all reasonable diligence. Haire v. State, 749 So. 2d 1130 (Miss. Ct. App. 1999).

The appellant was afforded a full, complete hearing at which he was given the opportunity to call witnesses and to be heard by the lower court during the divorce proceedings on the issues relating to the equitable division of marital assets that he later presented on appeal; accordingly, he was not denied due process of law, as required by both the U.S. Constitution and the Mississippi Constitution on those issues, for he was given an opportunity to be heard on the same issues he sought to modify a few months after the final decree was entered. Childers v. Childers, 717 So. 2d 1279 (Miss. 1998).

Due process requirements of clause in natural gas utility's Army Corps of Engineers permit to lay natural gas pipelines across river, requiring notice and hearing before government could require utility to remove or alter its pipeline, did not apply to permit exculpation clause stating that government would not be liable for damage or injury to structure authorized and, thus, exculpation clause was enforceable without need for notice and hearing, in utility's action against government, alleging negligence by Corps in designing and constructing dikes and revetment in projects to minimize scouring of river bank, causing utility's pipelines to burst; clauses were independent of each other and both could be given meaning without reference to each other. Columbia Gulf Transmission Co. v. United States, 966 F. Supp. 1453 (S.D. Miss. 1997).

A contemnor was denied due process of law where the show cause hearing for the contempt charges was conducted by the same judge who presided over the divorce proceedings and the related motion for recusal from which the alleged contempt originated, the contemnor was charged with a course of conduct that was committed, for the most part, outside the presence of the court, his conduct associated with the divorce proceedings involved the judge personally, and the judge chose to set a show cause hearing at a date subsequent to the alleged contemptuous conduct. Purvis v. Purvis, 657 So. 2d 794 (Miss. 1994), on rehearing (Miss. Apr. 27, 1995).

A county board of supervisors could not bar a chancery clerk, who had temporarily vacated his positions as clerk of the board of supervisors and county auditor, from performing his duties in those positions based upon a claim that the chancery clerk had failed to perform his duties, without affording him a hearing so as to comply with due process requirements. Barlow v. Weathersby, 597 So. 2d 1288 (Miss. 1992).

A chancellor's refusal to grant a motion to set aside judgment pursuant to MRCP 60(b)(6) was an abuse of discretion where the record was devoid of any notice to the defendant as to the date of the trial; notice, whether of the time and place of a hearing, the contents of a complaint, or of the specific nature of a criminal charge, is the essence of due process. Johnson v. Weston Lumber & Bldg. Supply Co., 566 So. 2d 466 (Miss. 1990), but see Koerner v. Crittenden, 635 So. 2d 833 (Miss. 1994).

A circuit judge erred in deciding not to subject a creditor to liability for injurious violation of a debtor's constitutional right to due process when the creditor seized the debtor's mobile home and furnishings in compliance with § 11-37-101 simply because the creditor acted pursuant to a presumptively valid (albeit unconstitutional) statute. An evidentiary hearing should have been held, and the creditor's claim of good faith reliance on a presumptively valid statute should have been considered in light of not only the sincerity in its belief that it was acting properly, but the reasonableness of its actions under the circumstances. A fact finder conceivably could have concluded that the creditor's "surprise" seizure of the debtor's mobile home and its contents was, under the circumstances, unreasonable and compensable, where the record indicated no explanation for the necessity of an immediate seizure. Underwood v. Foremost Fin. Servs. Corp., 563 So. 2d 1387 (Miss. 1990).

In an action against a husband for contempt for failing to abide by the terms of a divorce decree, the husband was deprived of due process where, after the husband was held in contempt, the chancellor did not allow him to present evidence in support of his motion for a new trial in order to prove that he had abided by the terms of the divorce decree, and the chancellor then dispensed with the husband's motion for a new trial by denying it without hearing the additional evidence. Weeks v. Weeks, 556 So. 2d 348 (Miss. 1990).

Accused was not denied due process by the trial court's refusal to grant a preliminary evidentiary hearing on his motion to suppress identification where there was no showing of illegality in either the photographic identification of the defendant or in the several lineup identifications. Howard v. State, 319 So. 2d 219 (Miss. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

78. —Discovery, due process.

Defense counsel was given every opportunity to listen to the tapes and view the transcripts, as all evidence was made available to defense counsel, and no evidence was intentionally withheld by the State; additionally, when applying the four-part test to determine if Brady violations occurred in the inmate's case with respect to two witnesses, the trial court finding on that issue was supported by the record. Therefore, all exculpatory issues raised by the inmate regarding those two witnesses were without merit, and there was no violation of defendant's due process rights. Manning v. State, 929 So. 2d 885 (Miss. 2006).

In his petition for post-conviction relief, the inmate demonstrated (1) that the shoe-print report, indicating the likely size of the shoe, which did not match the inmate's shoe size, existed and was known to the prosecution at the time of the trial; (2) that despite seeking discovery of all exculpatory evidence, the report was not disclosed to the defense; and (3) that there was a reasonable probability that the outcome of the murder trial would have been different had evidence that a shoe-print not matching the inmate's shoe size was found at the scene of the crime been presented; therefore, the inmate should be allowed to proceed in the trial court on the issue that his constitutional rights were violated by the State's suppression of exculpatory information concerning the shoe print. Additionally, the inmate was allowed to seek post-conviction relief on the question of whether the State had knowingly suppressed additional exculpatory evidence, including (1) notes taken on the door-to-door canvas conducted following the murders; (2) statements of other neighbors implicating another suspect; and (3) other impeachment evidence. Manning v. State, 884 So. 2d 717 (Miss. 2004).

In a contract dispute over the installation of a swimming pool, a trial court violated a contractor's procedural due process rights in basing its judgment on testimony that was neither taken under oath nor subject to cross-examination where the contractor consulted with a concrete finisher, and relied on the finisher's unsworn opinion. Pulliam v. Chandler, 872 So. 2d 752 (Miss. Ct. App. 2004).

The defendant's Fifth Amendment due process and fair trial rights were not infringed by a number of discovery violations which concerned five witnesses who either testified at his 1994 trial or were prohibited from testifying by the trial court. Beckwith v. Anderson, 89 F. Supp. 2d 788 (S.D. Miss. 2000).

The failure of the state to provide the last known address and telephone number of a witness was not a violation of defendant's due process right or right to a fair trial; failure to provide the location of the witness to the defense did not undermine the confidence in the outcome of trial and, therefore, the defendant was not entitled to a mistrial on this basis. Beckwith v. Anderson, 89 F. Supp. 2d 788 (S.D. Miss. 2000).

Government did not violate *Brady* in drug conspiracy case when it failed to produce defendant's financial records and car titles, which the government seized while executing a search warrant, absent showing that such records were not available to defendant through his own diligence. United States v. Dixon, 132 F.3d 192 (5th Cir. 1997), cert. denied, 522 U.S. 1061, 118 S. Ct. 721, 139 L. Ed. 2d 661, 523 U.S. 1096, 118 S. Ct. 1581, 140 L. Ed. 2d 796 (1998).

A litigant is not shut off from all remedies for discovery merely because the rules of civil procedure do not apply to administrative proceedings or because the rules of the administrative agency do not promote it. In appropriate cases, a "pure bill for discovery" will lie and statutory remedies may be available to the end that due process be afforded. State Oil & Gas Bd. v. McGowan, 542 So. 2d 244 (Miss. 1989).

There is no discovery violation as to an officer's notes, taken in the presence of witnesses and destroyed in good faith. Thus, the destruction of original handwritten notes of a defendant's statement, which were transcribed into a typed statement, and admission of the typed statement into evidence, did not deprive the defendant of his rights to a fair and impartial trial and adequate defense as provided by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Woodward v. State, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

79. —Compulsory process, due process.

There can be no per se prohibition against a child witness testifying in a divorce case between the child's parents. The right of every litigant to compulsory process for witnesses and to have them testify under oath in court is so well grounded that any per se exclusion simply because he or she is a child of the divorcing parents risks offending the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Mississippi Constitution Art 3, § 14. Before excluding the testimony of a child witness of tender years in a divorce proceeding, the chancellor, at a minimum, should follow the procedure required by Crownover v Crownover (1975) 33 Ill App 3d 327, 337 NE2d 56. Although no parent can be precluded from having a child of the marriage testify in a divorce proceeding simply because of that fact, parents in a divorce proceeding should, if at all possible, refrain from calling children of their marriage as witnesses, and counsel should advise their clients against doing so except in the most exigent cases. Jethrow v. Jethrow, 571 So. 2d 270 (Miss. 1990).

80. — Rights of indigent defendant, due process.

DNA testing of the knife used in an assault would have been of little assistance to defendant and therefore was not necessary to preserve defendant's due process guarantees as both the victim and the eyewitness testified that defendant attacked the victim, and if the blood on the knife was found to be defendant's blood, it would have added little support to his theory of self-defense; thus, defendant was not denied a fair trial nor was his request for expert assistance necessary to preserve his due process guarantees. Grubbs v. State, 956 So. 2d 932 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 313 (Miss. 2007).

In a prosecution for capital murder committed during the commission of a rape, the trial court's failure to provide funds to the defendant to retain an independent pathologist constituted reversible error where the opinion of the State's pathologist that the victim was raped was the only evidence offered to prove this critical aspect of the State's case. In re Turner, 635 So. 2d 894 (Miss. 1994).

While the due process clause requires that an indigent defendant should at times be allowed an expert in the interest of fundamental fairness, a court is not required to appoint an expert upon demand. Some of the factors to be considered in determining if the defendant was denied a fair trial when the court did not appoint a requested expert include the degree of access the defendant had to the State's experts and whether those experts were available for vigorous cross-examination. Another consideration is the lack of prejudice or incompetence on the part of the State's experts. Fisher v. City of Eupora, 587 So. 2d 878 (Miss. 1991).

Neither due process nor equal protection rights are violated by requiring a prisoner to demonstrate some specific need before requiring the State or county to furnish the prisoner with free copies of trial records in post-conviction relief proceedings. The State is not required to subsidize a "fishing expedition" for grounds upon which to attack a conviction and sentence, merely because the prisoner is indigent. Fleming v. State, 553 So. 2d 505 (Miss. 1989), but see De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992).

In absence of anything in the record that suggests that a defendant charged with uttering a forgery was prejudiced to the point of warranting a new trial by the failure to furnish him with a handwriting expert, the trial court did not err in refusing defendant's request for the expert. Burt v. State, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

81. — Right to counsel, due process.

The prosecution's cross-examination and closing argument references to the defendant's exercise of his constitutional right to counsel did not rise to such a level as to constitute plain error; therefore, the defendant was procedurally barred from raising the issue on appeal. Riddley v. State, — So. 2d —, 1999 Miss. App. LEXIS 541 (Miss. Ct. App. Aug. 24, 1999), affirmed by 777 So. 2d 31, 2000 Miss. LEXIS 167 (Miss. 2000).

Effective right of counsel encompasses the right to representation by attorney who does not owe conflicting duties to other defendants, and undivided loyalty of defense counsel is essential to the due process guarantee of the Fifth Amendment. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

There was no actual conflict arising from fact that defense counsel had previously represented government rebuttal witness in unrelated prosecutions, where subject of cross-examination was witness' prior deals with state to provide testimony in exchange for plea agreements. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Prejudice is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected his lawyer's performance. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Defense counsel's representation was not adversely affected by fact that he had previously represented government rebuttal witness in unrelated prosecutions, where counsel was not "suddenly curtailed" in his cross-examination when subject of prior deals with prosecutors arose but, rather, proceeded onward to question witness in detail about his motivation for prior testimony in another case as well as his motivation for testifying against defendant in the present case. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Where no actual conflict of interest is present, defendant must demonstrate prejudice and show reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Defendant was not prejudiced by any adverse performance of defense counsel due to fact that he had previously represented government rebuttal witness in unrelated prosecutions; even assuming that counsel conclusively established that witness's sole motivation in testifying was to receive a reduced sentence pursuant to agreement with the State, there remained the vast amount of evidence presented during state's case in chief. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Undivided loyalty of defense counsel is essential to due process. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

In proceedings to determine custody of 2 children who had been adjudicated neglected and placed in foster care, the children were denied their due process right of representation where they were without the services of an attorney or guardian ad litem for approximately 3 years during the course of the custody proceedings. Copiah County Dep't of Human Servs. v. Linda D., 658 So. 2d 1378 (Miss. 1995).

In a prosecution for conspiracy to distribute cocaine, a defendant's constitutional right to the effective assistance of counsel was violated due to an irreparable conflict of interest where the attorney who represented the defendant had also been counsel for the State's main witness in the trial against the witness for the same offense. Littlejohn v. State, 593 So. 2d 20 (Miss. 1992).

82. —Judicial impartiality, due process.

Federal district court correctly denied state death row inmate's habeas corpus petition; comments by a deputy sheriff called as a venireman, stating that he could not be fair because he had seen crime scene photos in the course of his job, did not taint the resentencing jury or deprive petitioner of due process because the deputy was excused as a juror and because there was no indication that the rest of the venire heard his comments. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Defendant's right to a fair trial was not violated when a trial judge rephrased a question posed by the prosecution for purposes of clarity because the act did not show bias or a deliberate attempt to influence the jury; therefore, there was no reason to grant a motion for a new trial. Quinn v. State, 873 So. 2d 1033 (Miss. Ct. App. 2003), writ of certiorari denied by 873 So. 2d 1032, 2004 Miss. LEXIS 597 (Miss. 2004).

A judge who had served as the prosecutor at the time of the defendant's indictment should have disqualified himself; the very functions involved in the performance of the positions of judge and prosecutor are contradictory and no person can be considered to be impartial while that person is also acting as a partisan. Since the judge failed to disqualify himself, the defendant was deprived of due process, which includes a fair and impartial trial. Jenkins v. State, 570 So. 2d 1191 (Miss. 1990).

83. —Jury selection, due process.

Inmate's trial attorneys were not ineffective because (1) although some of the State's race-neutral reasons for striking jurors were a close call, the trial court allowed the challenges to stand, and the inmate did not show that a different outcome would have resulted had the Batson objections been sustained; (2) his counsel filed numerous pre-trial motions, cross-examined nine out of eleven prosecution witnesses, ultimately did not call a defense witness because he would have corroborated the State's witnesses, met with the inmate on numerous occasions and even discussed a plea offer from the State that the inmate rejected; (3) the inmate's accusation that trial counsel had failed to properly investigate was merely an unfounded allegation because the inmate supplied little or nothing of what an effective attorney performing a proper investigation would or should have found by way of mitigating testimony; and (4) trial counsel did not err in failing to raise the issue of the inmate's competency because the inmate presented no evidence that he was currently incompetent or incompetent at the time of his trial. Knox v. State, 901 So. 2d 1257 (Miss. 2005), writ of certiorari denied by 546 U.S. 1063, 126 S. Ct. 797, 163 L. Ed. 2d 630, 2005 U.S. LEXIS 9080, 74 U.S.L.W. 3335 (2005).

Where a defendant is to be identified at trial, and the defendant requests that he or she be seated among other people in the courtroom, the trial judge should exercise broad discretion in determining whether the request should be granted; the factors to be considered by the trial judge include (1) any danger presented to the public by the defendant, (2) the danger of misidentification, (3) the courtroom facilities available, and (4) any other pertinent factors known to the trial judge. Scott v. State, 602 So. 2d 830 (Miss. 1992).

A trial judge did not abuse his discretion in denying a defendant's request to be seated among the general public when an in-court identification of the defendant was made where the trial judge thoroughly conducted voir dire examination of the witness before allowing his identification, and the defendant had previously been convicted for escape from an Arkansas prison. Scott v. State, 602 So. 2d 830 (Miss. 1992).

It is a matter of fundamental fairness and due process that the defendant is entitled to be apprised of communications between the court and the jury during deliberations. The defendant is also entitled to be represented by counsel during this very important procedure. Edlin v. State, 523 So. 2d 42 (Miss. 1988).

Defendant was barred from asserting claim of state's abuse of its peremptory challenges to exclude all blacks from defendant's jury, which allegedly deprived him of his right to representative jury and to due process of law, where record failed to reflect that defendant had made contemporaneous objection to prosecuting attorney's use of peremptory challenges. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Jury selection was properly conducted and jurors were not excluded on basis of race where black jurors were excluded for following race-neutral reasons: (1) 22-year-old laborer with eleventh-grade education was stricken because his youth, marital status, and educational level appeared to prosecutor to indicate instability; (2) 49-year-old minister/bus driver was stricken because he was preacher; (3) 35-year-old housewife was removed because she did not reveal her brother's conviction for armed robbery; (4) 38-year-old cafeteria hostess was challenged because of her concerns about sequestration due to having to care for invalid mother; and (5) 25-year-old was stricken from panel because he wore hat into courtroom and his general demeanor suggested to prosecutor that he was unstable, unconcerned, and had no respect for proceedings. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Under Batson v Kentucky (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712, defendant raising claim must show (1) he is member of "cognizable racial group;" (2) prosecutor has exercised peremptory challenges toward elimination of veniremen of his race; and (3) facts and circumstances infer that prosecutor used his peremptory challenges for purpose of striking minorities. These components constitute prima facie showing of discrimination necessary to compel state to come forward with neutral explanation for challenging black jurors. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Prosecutors are not limited in use of any legitimate informational source available as to jurors, nor does prosecutor have to question juror in open court about such information before using it as racially neutral ground to make peremptory strike, as long as source of information and practice itself are not racially discriminatory. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Claim that court erred in permitting state to systematically exclude black veniremen by peremptory challenge, where no objection was raised either during trial or on motion for new trial, was waived and counsel's excuse for waiving claim at trial, that under prior law he felt he would be unsuccessful on point, was insufficient. Jones v. State, 517 So. 2d 1295 (Miss. 1987), vacated 108 S. Ct. 2891, 487 U.S. 1230, 101 L.Ed.2d 925, on remand 602 So. 2d 1170.

Failure of defense counsel to timely object to state's peremptory challenges bars later attempts to advance that claim on appeal; objection is timely only where made prior to impaneling of jury. Thomas v. State, 517 So. 2d 1285 (Miss. 1987).

A conviction in a murder prosecution would be reversed where the trial court permitted the jury to be led to believe that a coconspirator who testified against defendant would be prosecuted, even though the court and the prosecution knew that he had been granted immunity. King v. State, 363 So. 2d 269 (Miss. 1978).

The defendant was denied the right to a full and complete cross-examination when the witness, whether rightfully or not, successfully invoked the privilege against self-incrimination, and the defendant's motion for the court to instruct the jury to disregard the witness' testimony should have been sustained, and failure of the court to do so was error. Frackman v. Deposit Guar. Nat'l Bank, 296 So. 2d 695 (Miss. 1974).

Where evidence disclosed that jury after twenty-three hours of deliberation stood 11 to 1 for verdict of guilty of murder when bailiff stated to jury that judge told him he had until next convening of court to wait until they reached verdict and that as far as he was concerned they could stay there until they rotted and that shortly thereafter the jury returned a verdict of guilty, such conduct constituted a coercive inference on the jury prejudicial to defendant, regardless of whether the judge actually made such statements. McCoy v. State, 207 Miss. 272, 42 So. 2d 195 (1949).

84. Trial conduct, due process.

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Appellant was not denied due process where a trial court had sentenced him as a habitual offender without submitting the issue of his status as a habitual offender to the jury, because it was clear from federal case law that a jury was not required to pass upon an enhanced penalty due to prior convictions and the appellant's sentence was within the limits of Miss. Code Ann. § 99-19-83, as construed by Mississippi law. McNickles v. State, 979 So. 2d 693 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 979 So. 2d 691, 2008 Miss. LEXIS 176 (Miss. 2008).

Federal district court correctly denied state death row inmate's habeas corpus petition; although the prosecutor improperly invoked the position of his office by telling the jury that the case was a "rare" one in which he felt he must seek the death penalty, a state court correctly found that no prejudice resulted. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Appellate court found no merit to defendant's claim that he did not receive a fair trial on the ground that the State failed to provide him with a copy of the original police report where the only alteration made to the police report was the addition of the word "recovered" written next to the entry regarding the victim's credit card. The trial court allowed defendant additional time to restructure his cross-examination of the officer who wrote the report. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Victim's in-court identification of defendant did not deny him a fair trial where the victim did not identify defendant as the man who robbed him, he simply observed that defendant's build was similar to that of the taller man; this observation did not rise to the level of an identification. Powell v. State, 878 So. 2d 144 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 962 (Miss. 2004).

Defendants were not denied a fair trial when the prosecution was allowed to put on evidence of a prior inconsistent statement; defense counsel questioned the detective about the content of the witness's statements, and defendants could not complain that they had not received a fair trial for the reason that the prosecution had been allowed to question the detective about the content of the witness's statement. Powell v. State, 878 So. 2d 144 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 962 (Miss. 2004).

85. Presence of accused at trial.

Where defendant and his attorney were asked to return in the afternoon for trial and defendant did not return, the trial court did not err in trying defendant in absentia under Miss. Code Ann. § 99-17-9; the jury was properly instructed not to make any assumptions regarding defendant's absence when considering his guilt or innocence. Being tried in absentia does not violate the United States Constitution. Ali v. State, — So. 2d —, 2004 Miss. App. LEXIS 1118 (Miss. Ct. App. Dec. 7, 2004), substituted opinion at, opinion withdrawn by 928 So. 2d 237, 2006 Miss. App. LEXIS 336 (Miss. Ct. App. 2006).

86. —Accomplices and co-defendants, due process.

The State's plea bargain with a codefendant which was conditional upon his testimony at the defendant's trial did not violate due process where there was no indication that the codefendant's plea reduction was made conditional upon "false or specific testimony or a specific result," and the defendant's attorney cross-examined the codefendant extensively on the plea bargain; the practice of the State's withholding its end of a plea bargain until a codefendant has testified is permissible and does not result in tainted and inadmissible testimony, but rather the existence of a plea bargain is to be considered by the trier of fact in determining the credibility of the codefendant's testimony. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Upon a prima facie showing of the existence of an advance plea agreement between the state and a codefendant who was state's principal witness, whereby in exchange for testifying for the state the codefendant would receive a lenient sentence for armed robbery, a defendant, who had been convicted for the same robbery as accessory before the fact, may be entitled to post-conviction relief where the agreement had not been disclosed prior to his trial, although the defense had made a general discovery request for exculpatory material, and the existence of any such agreement had been denied by the codefendant while testifying at the defendant's trial. Case would be remanded to circuit court for evidentiary hearing. Malone v. State, 486 So. 2d 367 (Miss. 1986).

A defendant is entitled to know of any advance plea agreement between the state and a codefendant who is to testify against him, and a general discovery request is adequate to impose upon the prosecution the duty of disclosure. Malone v. State, 486 So. 2d 367 (Miss. 1986).

Where parents were charged with capital murder of their child, the trial court did not abuse its discretion in denying the defendants' motion for severance, even though each defendant had a right to call the co-defendant as a witness and even though each co-defendant had a right to invoke the Fifth Amendment. Cardwell v. State, 461 So. 2d 754 (Miss. 1984).

Non-disclosure of the prosecutor's plea agreement with a codefendant under circumstances where the terms of that agreement might reasonably touch upon the codefendant's credibility or otherwise undermine confidence in the outcome of the trial may vitiate a criminal conviction and require a new trial. Such rule emanates from Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), later proceeding, 2 Md. App. 146, 233 A.2d 378 (1967), habeas corpus proceeding, 314 F. Supp. 799 (D. Md. 1970), aff'd, 443 F.2d 1307 (4th Cir. Md. 1971), not followed, United States v. Oxman, 740 F.2d 1298, 16 Fed. R. Evid. Serv. 505 (3d Cir. Pa. 1984), disagreed, United States v. Borello, 766 F.2d 46, 18 Fed. R. Evid. Serv. 569 (2d Cir. N.Y. 1985), on remand, 624 F. Supp. 150 (E.D.N.Y. 1985), vacated, 473 U.S. 922, 105 S. Ct. 3550, 87 L. Ed. 2d 673 (1985), on remand, 774 F.2d 1224 (3d Cir. Pa. 1985), cert. denied, 475 U.S. 1046, 106 S. Ct. 1263, 89 L. Ed. 2d 572 (1986).

87. —Informants, due process.

Law enforcement officers' use of defendant's wife as confidential informant did not violate defendant's right to due process, where neither wife nor officer with whom she spoke testified at trial. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

88. —Mental examination, due process.

Experts who rendered diagnosis of "no mental disorder" for low intelligence quotient for capital murder defendant, after being appointed to perform mental examination of him to determine his competency to stand trial, afforded defendant constitutionally adequate evaluation and furnished constitutionally adequate report. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Defendant was not competent to stand trial due to finding that he was unable to assist in his defense, where defendant's intelligence quotient was 48 to 52, findings of psychologist concluded that defendant did not possess mental capacity to assist in preparation of defense, and district attorney's motion to pass case to files contained affidavit asking that defendant be committed to mental institution; state's only effort at rebutting evidence of incompetency was effort to prove that defendant had answered questions rationally at his arraignment. Gammage v. State, 510 So. 2d 802 (Miss. 1987).

89. —Identification of defendant, due process.

Appellate court overruled defendant's argument that the on-the-scene identification violated his due process rights and prevented him from receiving a fair trial, because the pre-trial identification was sufficiently reliable. The victim had the opportunity to view defendant two or three times before the armed robbery occurred, the victim testified that he was indeed paying attention before, during and after the robbery, the record indicated that the victim gave a detailed description of defendant that was largely accurate, and the victim was, insofar as the record revealed, unequivocal in his ability to identify defendant on four separate occasions. Johnson v. State, 884 So. 2d 787 (Miss. Ct. App. 2004), writ of certiorari denied by 883 So. 2d 1180, 2004 Miss. LEXIS 1302 (Miss. 2004).

Chance encounter with the victim at the police station did not amount to an unnecessarily suggestive, single person show-up identification such as to violate due process; the victim's description given to police was sufficiently accurate for them to identify defendant as a suspect based on nothing but information obtained from her, and only the briefest of time transpired between the victim's encounter in the parking lot and her subsequent unanticipated encounter with defendant at the police station, at which time she identified him of her own volition, apparently without any prompting or inquiry from any investigating officer. Garner v. State, 856 So. 2d 729 (Miss. Ct. App. 2003).

When a reasonably intelligent eyewitness has had a good opportunity to view the features of the perpetrator of a crime, the method the police use in having the witness identify the defendant recedes in importance in inverse ratio to the intelligence of the witness and opportunity to view the perpetrator. Thus, a rape defendant's argument that the victim's in-court identification resulted from an impermissibly suggestive photographic identification of the defendant, or from seeing him at the preliminary hearing, was without merit where the victim was a sensible child who had ample opportunity to view the rapist in the daylight, she gave a description of the defendant to a police officer, the accuracy of which was undisputed, and she identified the defendant's photograph without hesitation no more than 1 ½ hours after the crime. Powell v. State, 566 So. 2d 1228 (Miss. 1990).

A robbery victim's in-court identification of the defendant was not tainted by her extensive observation of the defendant at a pre-trial parole revocation hearing where the victim testified at the suppression hearing concerning her ample opportunity to observe the defendant at the time of the robbery. Saucier v. State, 562 So. 2d 1238 (Miss. 1990).

A pretrial voice identification of a burglary defendant was impermissibly suggestive and, therefore, denied the defendant due process of law where the witness heard only one voice after he was shown his stolen items by the police and was told by the police that the man whose voice he was hearing had those items on his person. Estes v. State, 533 So. 2d 437 (Miss. 1988).

Although a photographic display, in which the defendant was the only one pictured with bare arms prominently displaying his tattoo, was suggestive, an in-court identification by the witness who identified the defendant from the photographs was not precluded where the witness had ample opportunity to observe the assailant during the crime, where she described accurate details based on that observation, she immediately identified the defendant on viewing the display, and where the display was conducted only 6 days after the crime. Nicholson v. State, 523 So. 2d 68 (Miss. 1988).

In a forgery prosecution, a witness' reviewing of a photograph of the forgery suspect taken by a store security system at the time that the suspect cashed the forged check did not impermissibly taint the witness' in-court identification of the defendant so as to render it inadmissible. Such photographs may properly be used to refresh the recollection of an eyewitness since they show the person who actually committed the crime as opposed to some possible suspect in the police files. George v. State, 521 So. 2d 1287 (Miss. 1988).

A photographic display identification procedure was not suggestive where the defendant's photograph was on the top of a stack given to the witness, where the witness identified the top photograph as that of the defendant, and where he refused to look at any other pictures. Wash v. State, 521 So. 2d 890 (Miss. 1988), overruled on other grounds, Wharton v. State, 734 So. 2d 985 (Miss. 1998).

In a prosecution for burglary, the trial court did not err by permitting the victim to identify defendant in court after he had identified defendant in a highly suggestive station house line-up, where the witness had had an opportunity to view defendant at the time of the crime and to notice his facial features, where the witness had displayed a strong level of certainty regarding both identifications, and where the time between the burglary and the line-up was not more than several hours; defendant's due process rights were not violated. Stewart v. State, 377 So. 2d 1067 (Miss. 1979).

90. —Polygraph tests, due process.

The prosecution's failure to disclose the inadmissible results of a polygraph test given to a key witness did not violate the rule of Brady v. Maryland, 373 U.S. 83 (1963) or the due process clause of the

federal constitution. Wood v. Bartholomew, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995), rehearing denied, 516 U.S. 1018, 116 S. Ct. 583, 133 L. Ed. 2d 505, on remand, 96 F.3d 1451.

91. —Habitual offenders, due process.

A defendant was properly sentenced as a habitual offender pursuant to § 99-19-81, even though the habitual offender language of the indictment failed to state the dates of his prior convictions, where all of the information contained in the indictment, and specifically the cause number, afforded the defendant access to the date of judgment. Therefore, the information pertaining to the dates of the judgments was substantially set forth in the indictment and sufficient information was afforded the defendant to inform him of the specific prior convictions upon which the State relied for enhanced punishment to comply with due process. Benson v. State, 551 So. 2d 188 (Miss. 1989).

92. —Delay, due process.

A 26 year delay between the defendant's second mistrial in 1964 and subsequent entry of a nolle prosequi in 1969 and his reindictment in 1990 did not violate his due process right to a speedy trial as the state did not intentionally delay the reindictment and there was no prejudice. Beckwith v. Anderson, 89 F. Supp. 2d 788 (S.D. Miss. 2000).

In a capital murder prosecution involving an underlying felony of rape, the defendant's due process rights were not violated by a delay in providing the defendant with a "sexual assault kit" which collected samples of the victim's body fluids, even though the defendant did not receive the samples until almost one year after the State's expert conducted his testing, which allegedly resulted in the "degradation" of the samples so that the defendant was unable to perform accurate tests, where the State fully complied with a court order to preserve half the samples, and any delay in receiving the samples was due to the defendant's failure to "simply go and get the samples" from the State's expert and the defendant's mistaken belief that the expert had used up all the samples. Holland v. State, 587 So. 2d 848 (Miss. 1991).

There was no merit in argument that defendant's due process rights had been violated by unexcused and unreasonable delay in charging him with crime where there was no proof government even knew of alleged embezzlement before receiver of trust went to district attorney's office, which occurred after death of trust beneficiary, much less that government deliberately delayed indictment in order to gain advantage over defendant. Hooker v. State, 516 So. 2d 1349 (Miss. 1987).

93. —Burden of proof, due process.

To establish due process violation under *Brady*, defendant must show that: (1) evidence was suppressed; (2) suppressed evidence was favorable to defense; and (3) suppressed evidence was material either to guilt or to punishment. United States v. Dixon, 132 F.3d 192 (5th Cir. 1997), cert. denied, 522 U.S. 1061, 118 S. Ct. 721, 139 L. Ed. 2d 661, 523 U.S. 1096, 118 S. Ct. 1581, 140 L. Ed. 2d 796 (1998).

Without a showing of prejudice, defendant cannot make out claim of due process violation. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

Federal due process interests in property arise only from an independent source, such as state law statutory guarantees; if plaintiff fails to show property interest through independent source, due process considerations are not implicated. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

The capital murder statute (§ 99-19-101) does not unconstitutionally shift the burden of proof during the sentencing phase by requiring a defendant to come forward with proof of mitigating circumstances or automatically have the death penalty imposed, since the statute does not require the jury to impose death when aggravating circumstances are shown and mitigating circumstances are not; proof of aggravating circumstances may still be found insufficient by the jury to require death and the state still carries the burden of showing not only aggravating circumstances, but that the circumstances are sufficient to warrant death. Furthermore, the statute is not unconstitutional for failing to provide guidelines for appellate review, since a comparison with other cases where the death penalty was upheld is constitutionally adequate and comparison with cases of life imprisonment is not required; the use of the "especially heinous, atrocious, or cruel" aggravating circumstances is not vague, overbroad or violative of the Fifth Amendment, and the statute does not unconstitutionally allow unlimited evidence at the sentencing stage, since evidence is limited to the aggravating circumstances listed in the statute. Coleman v. State, 378 So. 2d 640 (Miss. 1979).

94. —Instructions, due process.

Trial court did not deny due process rights of capital murder defendant by giving instruction that jury had first to acquit defendant on greater charge of capital murder before going on to consider whether defendant had committed lesser crime of murder. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

95. —Review, due process.

It is not violation of due process to have appellate court perform reweighing or harmless error analysis when invalid aggravating circumstance is found to exist in capital case. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A post-conviction relief petitioner was not entitled to de novo review on appeal from a ruling that he was competent to be executed where the trial judge stated that he relied on § 99-19-57(2)(b) and Ford v Wainwright (1985, US) 91 L Ed 2d 335, 106 S Ct 2595 in determining the petitioner's competency, and that the petitioner failed to prove by a preponderance of the evidence that he was not competent to be executed; the petitioner was afforded due process and the trial judge's ruling could only be reversed if it were against the overwhelming weight of the evidence or an abuse of discretion. Billiot v. State, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

96. Parole or probation proceedings.

Because the inmate failed the urine test four months short of completing the one-year in the Intensive Supervision Program (ISP), there was no denial of due process or equal protection by the denial of an evidentiary hearing, and there was no double jeopardy issue because the Mississippi Department of Corrections (MDOC) simply changed the inmate's status as a prisoner by revoking the inmate from ISP, and placing the inmate in an MDOC facility to serve the remainder of the inmate's sentence. McBride v. Sparkman, 860 So. 2d 1237 (Miss. Ct. App. 2003).

97. Taking for public use.

In a dispute surrounding the enactment of a district ordinance regulating the disposal of wastewater, residents, who owned septic systems, alleged that the enactment of the ordinance amounted to an unconstitutional taking. A genuine issue of material fact existed; therefore, the chancellor erred in granting summary judgment on this issue, and the record was insufficiently developed to afford appellate review. Green v. Cleary Water, Sewer & Fire Dist., 910 So. 2d 1022 (Miss. 2005), writ of certiorari denied by 547 U.S. 1098, 126 S. Ct. 1883, 164 L. Ed. 2d 568, 2006 U.S. LEXIS 3287, 74 U.S.L.W. 3598 (2006).

Requiring a landowner to connect to the sewer system was not a taking. Croke v. Southgate Sewer Dist., 857 So. 2d 774 (Miss. 2003).

City sign regulations which barred the placement of an exterior sign on a "single office building" did not constitute an unjust taking of the plaintiff's right to erect a sign without appropriate compensation. American Federated Gen. Agency, Inc. v. City of Ridgeland, 72 F. Supp. 2d 695 (S.D. Miss. 1999).

The residents of a neighborhood did not suffer an unconstitutional taking of property rights and diminution of property values as a result of the removal of a "no thru truck" restriction on a road through the neighborhood. Mathis v. City of Greenville, 724 So. 2d 1109 (Ct. App. 1998).

Neither natural gas utility's arguments on its Fifth Amendment taking and procedural due process claims, on its claim that exculpation clause in its Army Corps of Engineers permit to lay pipelines across river was unenforceable, or on its claim that Flood Control Act governmental immunity provision should not apply, nor federal government's arguments in government's motion for Rule 11 sanctions against utility, were frivolous so as to subject either party to Rule 11 sanctions and attorney fees, in utility's action against government, alleging negligence by Corps in designing and constructing dikes and revetment, causing pipelines crossing river to burst. Columbia Gulf Transmission Co. v. United States, 966 F. Supp. 1453 (S.D. Miss. 1997).

Statute of limitations for Mississippi landowner's claims asserting due process taking violations, equal protection violations, and discrimination on account of race was Mississippi's 3-year residual statute of limitations. Taylor v. County of Copiah, 937 F. Supp. 573 (S.D. Miss. 1994), aff'd, 51 F.3d 1042 (5th Cir. 1995).

Landowner's claim that county maintenance activities along roads within his property damaged property, did not give rise to constitutional taking claim. Taylor v. County of Copiah, 937 F. Supp. 573 (S.D. Miss. 1994), aff'd, 51 F.3d 1042 (5th Cir. 1995).

A restrictive covenant is an interest in real property for which due compensation must be paid upon a taking by the exercise of eminent domain powers. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284 (Miss. 1994).

Homeowners who suffered additional damages allegedly attributable to a highway construction project a few years after the homeowners were compensated for the taking of their property by the condemning authority in an eminent domain action could not recover for the additional damages, even if those damages were not reasonably foreseeable at the time of the original eminent domain trial. King v. Mississippi State Hwy. Comm'n, 609 So. 2d 1251 (Miss. 1992).

An actual taking or physical invasion of property is not the only basis for compensation. Damage to adjacent private property caused by public use is also compensable. Property is damaged when it is made less valuable. Personal inconvenience, discomfort, or interference with use is not compensable unless it results in the depreciation of value. Even then, compensation is not definite, but these factors are evidence of conditions which adversely affect the value of land. Persons owning property abutting streets have a right to reasonable access to their property from the street, and altering that access may damage the property. Where alteration of access, including light, air and view, diminishes the value of the property, the owner is entitled to compensation; such compensation is commonly termed consequential damages. Gilich v. Mississippi State Hwy. Comm'n, 574 So. 2d 8 (Miss. 1990).

The alteration of access to property requires compensation only where, and to the extent that, alteration of access diminishes the value of the property. Matters such as parking and increased difficulty in maneuvering automobiles may likewise be considered to the extent of their adverse effect on property value. Additionally, loss of frontage that "moves" buildings and facilities closer to a roadway may adversely affect value and require compensation. However, compensation for such losses is due only to the extent that the damage is caused by governmental action as distinguished from landowner improvements. Thus, such losses are legally illusory where there has been no taking, but only a reclaiming of a right-of-way that the landowner has theretofore enjoyed and where the landowner has boxed himself or herself in by the manner in which he or she has constructed or purchased the improvements on the property. So long as, after the governmental action at issue, there remains access which would be reasonable if the property had been reasonably improved, no compensation is due. City of Gulfport v. Anderson, 554 So. 2d 873 (Miss. 1989).

Compensation is required for a change of grade in a roadway which adversely affects the value of adjacent property, such as where a change in grade casts increased quantities of water upon the landowner's property. City of Gulfport v. Anderson, 554 So. 2d 873 (Miss. 1989).

The 2 lakes artificially created by dredging for fill materials used in construction of Interstate Highway I-10 are not part of the State's tidelands public trust, and to strip these artificial tidelands from their record titleholders would constitute a taking within the Fifth and Fourteenth

Amendments to the United States Constitution and within Mississippi Constitution Article 3, § 17, which taking would require just compensation from the State. Cinque Bambini Partnership v. State, 491 So. 2d 508 (Miss. 1986), certiorari granted 107 S.Ct. 1284, 479 U.S. 1084, 94 L.E.2d 142, dismissal denied, 481 U.S. 1003, 107 S. Ct. 1623, 95 L. Ed. 2d 197 (1987), aff'd, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988), reh'g denied, 486 U.S. 1018, 108 S. Ct. 1760, 100 L. Ed. 2d 221 (1988).

Due compensation requirements of the United States and Mississippi constitutions did not prohibit taxing a landowner with appeal costs and damages pursuant to Code 1972, §§ 11-3-23 [repealed] and 11-27-29 where he appealed from a judgment in a special court of eminent domain and was not successful in having the award increased. Antley v. Mississippi State Hwy. Comm'n, 318 So. 2d 847 (Miss. 1975).

Tobacco tax held not to violate constitutional provision prohibiting taking property for public use without compensation. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

The provision against taking private property without just compensation is a limitation upon the Federal Government alone, and does not apply to the states. Martin v. Dix, 52 Miss. 53, 24 Am. R. 661 (1876).

98. Sentence and punishment — In general.

Defendant's post-conviction motion was properly dismissed because while defendant retained the ability to challenge the legality of the incarceration, despite entering into an agreed sentencing order whereby defendant agreed not to file an appeal or a motion for post-conviction collateral relief, nothing in the record showed that defendant was illegally confined. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

In a capital murder case where defendant was indicted separately for each of four murders, submission of the "great risk of death to many persons" aggravator did not violate defendant's Fifth Amendment rights, as evidence regarding the other three killings was relevant in the case at bar during sentencing. Flowers v. State, 842 So. 2d 531 (Miss. 2003), remanded by 2006 Miss. LEXIS 356 (Miss. June 29, 2006).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Federal district court correctly denied state death row inmate's habeas corpus petition; pretrial publicity was not pervasive enough to prejudice the resentencing jury because resentencing occurred years after the initial guilt and sentencing phases and merited only passing news coverage, even though media coverage of the trial itself was substantial. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Cited in: Barnes v. State, 920 So. 2d 1019 (Miss. Ct. App. 2005), writ of certiorari dismissed by 920 So. 2d 1008, 2005 Miss. LEXIS 602 (Miss. 2005), writ of certiorari dismissed by 921 So. 2d 344, 2005 Miss. LEXIS 761 (Miss. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 79 (Miss. 2006).

ATTORNEY GENERAL OPINIONS

Revocation of probation or parole because a person has been charged with another crime, whether or not he is subsequently convicted of the charged offense, does not constitute double jeopardy. Smith, Apr. 6, 2001, A.G. Op. #01-0175.

RESEARCH REFERENCES

ALR. Privilege against self-incrimination as applicable to testimony that one has been compelled to give in another jurisdiction. 154 A.L.R. 994.

Damage to private property caused by negligence of governmental agents as "taking," "damage," or "use" for public purposes, in constitutional sense. 2 A.L.R.2d 607.

Restrictive covenants, conditions, or agreements, in respect of real property discriminating against persons on account of race, color, or religion. 3 A.L.R.2d 466.

Due process of law; provision forbidding making membership in labor organization a condition to employment. 6 A.L.R.2d 492.

Validity of statutory classifications based on population—jury selection statutes. 97 A.L.R.3d 434.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial. 98 A.L.R.3d 997.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury. 3 A.L.R.4th 374.

Applicability of double jeopardy to juvenile court proceedings. 5 A.L.R.4th 234.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts—modern view. 6 A.L.R.4th 802.

Mental subnormality of accused as affecting voluntariness or admissibility of confession. 8 A.L.R.4th 16.

Assemblage or plottage as factor affecting value in eminent domain proceedings. 8 A.L.R.4th 1202.

Concern for possible victim (rescue doctrine) as justifying violation of Miranda requirements. 9 A.L.R.4th 595.

Sex discrimination in treatment of jail or prison inmates. 12 A.L.R.4th 1219.

Retrial on greater offense following reversal of plea-based conviction of lesser offense. 14 A.L.R.4th 970.

Right of jailed or imprisoned parent to visit from minor child. 15 A.L.R.4th 1234.

Extent and determination of attorney's right or privilege against self-incrimination in disbarment or other disciplinary proceedings—post-Spevack cases. 30 A.L.R.4th 243.

Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system. 35 A.L.R.4th 1263.

Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of a mistrial—state cases. 40 A.L.R.4th 741.

Admissibility, in criminal case, of physical evidence obtained without consent by surgical removal from person's body. 41 A.L.R.4th 60.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecutions. 41 A.L.R.4th 1189.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking. 44 A.L.R.4th 366.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information. 44 A.L.R.4th 401.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel. 59 A.L.R.4th 308.

Double jeopardy: various acts of weapons violations as separate or continuing offense. 80 A.L.R.4th 631.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process. 93 A.L.R.5th 527.

Failure of state prosecutor to disclose fingerprint evidence as violating due process. 94 A.L.R.5th 393.

Failure of state prosecutor to disclose exculpatory ballistic evidence as violating due process. 95 A.L.R.5th 611.

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41 Am Jur Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

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71 Am. Jur. Proof of Facts 3d, Eminent Domain: Proof of Lack of Reasonable Necessity for Taking of Property, p. 97.

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Double jeopardy clause held to prohibit state from sentencing defendant to death after life sentence he had initially received was set aside on appeal. 81 L. Ed. 2d 164.

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Double jeopardy clause held to bar state recovery conviction following prior state conviction for capital murder committed during robbery. 82 L. Ed. 2d 801.

Retrial of defendant held not barred by double jeopardy clause even through jury acquitted him of one count but was unable to agree as to other counts. 83 L. Ed. 2d 242.

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AMENDMENT VI

JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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1. In general.

Although the state failed to identify the nurse who drew defendant's blood, and defendant was consequently unable to cross-examine her, his Sixth Amendment right to confront witnesses was not violated. The Sixth Amendment does not require that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person or as part of the prosecution's case; rather, gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility. Deeds v. State, 27 So. 3d 1135 (Miss. 2009), writ of certiorari denied by 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S.

LEXIS 5807, 79 U.S.L.W. 3196 (U.S. 2010).

Defendant's conviction for murder was appropriate because he was specifically instructed on his right to testify in his own defense and the trial judge was careful to inform defendant that the decision was for defendant alone to decide; the record did not demonstrate that defendant was refused an opportunity to present a defense, and the record and arguments demonstrated that defendant's counsel was satisfied that defendant received what he asked of the trial judge. McCain v. State, 971 So. 2d 608 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 700 (Miss. 2007), writ of certiorari denied by 553 U.S. 1056, 128 S. Ct. 2478, 171 L. Ed. 2d 772, 2008 U.S. LEXIS 4228, 76 U.S.L.W. 3620 (2008).

Where defendant failed to show that the under-representation of a racial group on his jury was based on a systematic exclusion in selection of the jury venire, defendant was not denied a jury that was a fair cross-section of the community. Pratt v. State, 870 So. 2d 1241 (Miss. Ct. App. 2004).

Defendant's right to a fair trial was not denied where the prosecutor's statements, while rambling and tending to bring in extraneous considerations, largely were focused on the need to consider that drugs were dangerous and possession should be a crime; the evidence offered to support conviction was of a person signing for delivery of marijuana, without any evidence that he was otherwise involved in the drug trade; the challenged arguments were not in the "send a message" category and the statements did not interfere with the fairness of the trial. Shanks v. State, 951 So. 2d 575 (Miss. Ct. App. 2006).

In defendant's capital murder case, while the prosecutor's comments to the jury regarding defendant's having the protection of the constitution, but the victim not having it, were condemned, they did not constitute reversible error where the argument was not likely to have influenced the jury. The evidence of defendant's callous indifference to human life was overwhelming, and the jury's sentence was well supported by the record. Goodin v. State, 856 So. 2d 267 (Miss. 2003), writ of certiorari denied by 541 U.S. 947, 124 S. Ct. 1681, 158 L. Ed. 2d 375, 2004 U.S. LEXIS 2196, 72 U.S.L.W. 3598 (2004).

2. Construction and application.

Court rejected defendant's claim that certain trial court rulings denied defendant a fundamentally fair trial ensured by U.S. Const. Amend. VI; because defendant's asserted individual errors were without merit, defendant's claim of cumulative effect was also without merit. Sheffield v. State, 844 So. 2d 519 (Miss. Ct. App. 2003).

Isolated reference to what perpetrators told an investigator about defendant's connection to a burglary was insufficient to rise to the level of a Confrontation Clause issue, especially because one of the perpetrators testified against defendant in the trial for the offense of accessory after the fact to burglary. Martin v. State, 834 So. 2d 727 (Miss. Ct. App. 2003).

No right ranks higher than right of accused to fair trial. United States v. Nix, 976 F. Supp. 41 (1997).

In earlier decisions the view has been expressed that the Sixth Amendment to the Federal Constitution respecting rights of persons accused of crime has no application to State action, is not a limitation on powers of States, and is confined alone to Federal action. Caldwell v State, 176 M 80, 167 So 779; Skinner v State, 198 M 505, 23 So 2d 501. And that this amendment applies only to trials in Federal Courts and does not require giving to accused in criminal prosecution for burglary in state court assistance of counsel for his defense. Odom v. State, 205 Miss. 572, 37 So. 2d 300 (1948), cert. denied, 336 U.S. 932, 69 S. Ct. 747, 93 L. Ed. 1092 (1949).

3. General considerations.

Trial court did not err in denying defendant's motion to suppress his pre-trial confession to police because the State presented sufficient evidence to show that defendant's statements were voluntarily made without threats, coercion, or an offer of reward. The State introduced a police officer's testimony that stated that no threats were made and a videotape of the confession; also defendant signed a Miranda warning form and four forms waiving his rights to counsel and to remain silent. Manix v. State, 895 So. 2d 167 (Miss. 2005).

Defendant's claims of ineffective assistance of counsel in all phases of his capital murder trial were rejected because the evidence showed defendant's confession was not coerced, that police did not make promises to induce his confession and that defendant was read his Miranda rights before making his voluntary confession. Also defendant failed to show that his counsel's failure to investigate a critical prosecution witness resulted in prejudice where there was sufficient other evidence of defendant's guilt, or that he was not properly advised regarding a plea bargain offer. Hodges v. State, 912 So. 2d 730 (Miss. 2005), writ of certiorari denied by 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670, 74 U.S.L.W. 3322 (2005), remanded by 2006 Miss. LEXIS 214 (Miss. Apr. 20, 2006).

The presence of security personnel at trial did not deny defendant a fair trial — a witness frightened by the presence of many armed guards did not admit to having testified differently because of the presence of the guards. Russell v. State, 849 So. 2d 95 (Miss. 2003).

4. Information of accusation.

Defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in a robbery. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Dismissal of an indictment charging defendant with being a felon in possession of a weapon and reversal of the conviction thereunder were required because the indictment failed to specify which, if any, of the four types of prohibited knives defendant was alleged to have possessed in violation of defendant's federal and state constitutional rights. Thomas v. State, 126 So. 3d 877 (Miss. 2013).

Indictment charging a person with money laundering under Miss. Code Ann. § 97-23-101(1)(b)(ii)(1) was required to specify the "unlawful activity" from which the illegal proceeds were alleged to have derived, and violation of this requirement may be cured only where the prosecution demonstrated that it otherwise provided timely notice to defendant of the alleged illegal activity, and that the notice clearly and sufficiently provided defendant a fair opportunity to prepare a defense to the charges; the omission of the "specified unlawful activity" in defendant's indictment was harmless error which did not render the trial fundamentally unfair. Tran v. State, 962 So. 2d 1237 (Miss. 2007), writ of certiorari denied by 553 U.S. 1054, 128 S. Ct. 2472, 171 L. Ed. 2d 769, 2008 U.S. LEXIS 4212, 76 U.S.L.W. 3619 (2008).

Because defendant's indictment failed to charge the essential elements of armed robbery, the circuit court lacked subject matter jurisdiction over the offense of armed robbery, but the indictment properly charged defendant with the crime of simple robbery; however, defendant's guilty plea was involuntary because he was not informed of the true nature and consequences of the charge. Garner v. State, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. Neal v. State, 936 So. 2d 463 (Miss. Ct. App. 2006).

Indictment for murder includes all lower grades of felonious homicide, including manslaughter, and failure of state to elect between murder and manslaughter does not leave defendant ignorant of charge in violation of Sixth Amendment of United States Constitution and § 26 of Mississippi Constitution. Kelly v. State, 463 So. 2d 1070 (Miss. 1985).

The right of an accused to be informed of nature and cause of the accusation against him is a fundamental right under the Sixth Amendment. Lambert v. State, 462 So. 2d 308 (Miss. 1984).

5. Venue.

Defendant's convictions for attempting a burglary, arson, and a murder, were proper where venue was proper in the county where defendant attempted to burn the structure; venue was proper pursuant to U.S. Const. Art. III, § 2 cl. 3, U.S. Const. Amend. VI, and Miss. Const. Art. 3, § 26 because there was nothing conceptually outrageous or bizarre in bringing charges in the county for an attempt to burn a building in that county. Holbrook v. State, 877 So. 2d 525 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 865 (Miss. 2004), writ of certiorari denied by 543 U.S. 1166, 125 S. Ct. 1340, 161 L. Ed. 2d 141, 2005 U.S. LEXIS 1746, 73 U.S.L.W. 3496 (2005).

Transfer of venue for jury selection purposes based on racial demographics did not violate defendant's rights to impartial jury or equal protection in prosecution for murder of black leader of civil rights organization, where transferee county had same or similar racial composition as county where defendant was indicted. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Defendant has both federal and state constitutional right to be tried in county where offense was committed. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

6. Public trial.

Court did not violate defendants' rights to a public trial where defendants escaped from the maximum security unit at Parchman, and both defendants were dangerous, violent, and habitual offenders. As a result of their past criminal convictions, their previous escapes, and the evidence of their willingness to do anything to remain free, the trial court was correct to find a clear and present overriding public interest in safety for the public that justified its consideration of whether to conduct the trial inside the penitentiary. Harper v. State, 887 So. 2d 817 (Miss. Ct. App. 2004).

For purposes of determining whether to unseal defendants' previously-sealed motions to dismiss indictment and to sever attached exhibits in prosecution for conspiracy to commit murder, in light of qualified First Amendment right of public and press to openness of courtroom and court files, defendants' rights to fair trial would be impaired if motions and exhibits were unsealed prior to trial; unsealing of motion to dismiss indictment and motion's exhibits, which contained names and addresses of potential prosecution witnesses, would compromise witnesses' safety and well-being, partial redaction would not prevent ascertainment of names and addresses, allegations in motion to sever could prejudice jury and might constitute inadmissible evidence, and voir dire to determine possible juror bias would not be workable solution. United States v. Nix, 976 F. Supp. 41 (1997).

Four-step process applies in court's determination of whether to close criminal court proceeding or to seal court file despite qualified First Amendment right of public and press to openness of courtroom and court files: party seeking to close proceeding or seal file must advance overriding interest that is likely to be prejudiced; closure must be no broader than necessary to protect interest of accused's right to fair trial; court must consider reasonable alternatives to closing proceeding; and court must make findings adequate to support any closure or sealing. United States v. Nix, 976 F. Supp. 41 (1997).

District court would allow previously-sealed motions of defendants to dismiss indictment and to sever and attached exhibits to remain sealed, but only as long as necessary to protect rights of defendants to fair trial in prosecution for conspiracy to commit murder, in light of qualified First Amendment right of public and press to openness of courtroom and court files; motion to dismiss and its exhibits would be unsealed as soon as prosecution witnesses to which motion and exhibits referred testified, and motion to sever and its exhibits would be unsealed as soon as jury was impaneled and qualified and first prosecution witness had begun to testify. United States v. Nix, 976 F. Supp. 41 (1997).

Criminal processes should be open to public scrutiny, and exceptions can be made only for good cause; however, right to public trial belongs to accused, and no one else. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

Defendant was not denied his right to a public trial by the trial court's order excluding a spectator who resembled defendant from the courtroom, where the spectator possibly was defendant's brother and the purpose of the exclusionary order was to preclude confusing state's witnesses in making an in-court identification of defendant who was seated with other spectators. Isaacks v. State, 350 So. 2d 1340 (Miss. 1977).

7. Presence of defendant.

Defendant's argument on appeal was that there was no personal in-court identification of him as one of the men who participated in the robbery. However, the judge had recessed court for lunch and defendant failed to return to court on his bond, and upon a motion by the State, trial proceeded in his absence; because defendant chose not to return for his trial, he could not complain that he was not personally identified in court, since this was a consequence of his own voluntary act. McCoy v. State, 881 So. 2d 312 (Miss. Ct. App. 2004).

The defendant was not constitutionally entitled to be present while the trial judge qualified the pool of prospective jurors since his presence in the courtroom would not have had a reasonably substantial relation to his opportunity to defend himself. Leffingwell v. State, 747 So. 2d 879 (Miss. Ct. App. 1999).

Neither the Fifth or Sixth Amendment rights of the defendant were violated when the trial court had him removed from the courtroom at the states request during a hearing on a motion for mistrial where the legal issue to be argued concerned a question that had been asked on the stand, but to which he had yet to give an answer. Ludgood v. State, 710 So. 2d 1222 (Ct. App. 1998).

The trial court in a capital murder prosecution did not err in permitting 3 off-the-record bench conferences and a jury instruction conference to be conducted when the defendant was not present where the defendant was represented by counsel at every critical stage of the proceedings, and he was not prejudiced by his absences at the conferences. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Although the trial judge did not verbally warn a defendant that he would be removed from the courtroom for disruptive conduct, the defendant received adequate warning that he would be removed for continued disruptive conduct where he was removed after an initial outburst, he was allowed to cool down, and no proceedings were had in his absence. These occurrences amounted to a warning since the defendant was not unaware that his disruptive conduct was the reason for his first removal and that continued disruption would result in a second removal. Bostic v. State, 531 So. 2d 1210 (Miss. 1988).

8. Bias and prejudice, generally.

In a capital murder case, the prosecution's use of biblical imagery and references to the victim's old age and frailty was fair comment and did not constitute prosecutorial misconduct. Dycus v. State, 875 So. 2d 140 (Miss. 2004), vacated by, remanded by 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212, 73 U.S.L.W. 3528 (2005).

Even if the record clearly showed that a petitioner was in shackles in front of the jury in the sentencing phase of a capital murder trial, there was no merit to the petitioner's arguments that his Sixth and Fourteenth Amendment rights were violated; the petitioner had already been convicted twice and had already received a death sentence for the murder of one victim, and as a juvenile, he had a history of escaping from authority. Wilcher v. State, 863 So. 2d 719 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder where the sexual molestation was integrally related to her murder such that one could not coherently present the facts of her demise without reference to it, and it described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

In capital cases, although there is no error which, standing alone, requires reversal, aggregate effect of various errors may create such an atmosphere of bias, passion, and prejudice that they effectively deny defendant a fundamentally fair trial. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

9. Publicity, generally.

Party seeking closure of courtroom or court file could overcome First Amendment presumption of openness to press and public of court file and defendants' motions to dismiss indictment and to sever in prosecution for conspiracy, but only if party seeking closure would show, first, that there was substantial probability that defendants' right to fair trial would be prejudiced by publicity that closure would prevent and, second, that reasonable alternatives to closure could not adequately protect defendants' fair trial rights. United States v. Nix, 976 F. Supp. 41 (1997).

Incriminating statements which defendant made to journalist did not violate defendant's Sixth Amendment right to counsel absent a showing that journalist acted on behalf of state in obtaining interview. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Newspaper publisher who interviewed defendant in prison at defendant's request was working as private citizen, so that his questioning of defendant did not implicate Sixth Amendment rights, even though interview could not have taken place without cooperation of prison authorities. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Statements made to private individuals do not implicate Sixth Amendment right to counsel. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

An accused's right to a fair trial and the press and public's right of access to criminal proceedings must be balanced when determining whether access to legal proceedings should be restricted. The press and public are entitled to notice and a hearing before a closure order is entered, and any submission in a trial court for closure, either by a party or by the court's own motion, and be it a letter, written motion, or oral motion, either in chambers or open court, must be docketed, as notice to the press and public, in the court clerk's office for at least 24 hours before any hearing on such submission, with the usual notice to all parties. The requirement should not be taken to mean that a greater notice period may not be afforded where feasible. Preferably, the submission should be a written motion if time and circumstances allow. A hearing must be held in which the press is allowed to intervene on behalf of the public and present argument, if any, against closure. The movant must be required to advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceedings, and it must make findings adequate to support the closure. In considering the less restrictive alternatives to closure, the court must articulate the alternatives considered and why they were rejected. The court must then make written findings of fact and conclusions of law specific enough that a reviewing court can determine whether the closure order was properly entered. A transcript of the closure hearing should be made public and if a petition for extraordinary relief concerning a closure order is filed in the Supreme Court, it should be accompanied by the transcript, the court's findings of fact and conclusions of law, and the evidence adduced at the hearing upon which the judge based the findings and conclusions. These requirements cannot be avoided by an agreement between the defendant and the State that proceedings and files should be closed. Gannett River States Pub. Co. v. Hand, 571 So. 2d 941 (Miss. 1990).

Incriminating statement elicited from capital murder defendant by deputy sheriff in violation of Fifth and Sixth Amendment rights to counsel is inadmissible in sentencing phase of prosecution. Mhoon v. State, 464 So. 2d 77 (Miss. 1985).

10. Plea bargain.

With regard to defendant's claim that his attorney had breached a plea agreement made with the prosecution for a five-year sentence for the crime of conspiracy to manufacture methamphetamine, the court found that the negotiated agreement was not withdrawn because of the attorney's actions or inactions but because of defendant's felony history and his use of family members in his criminal activities. Sweat v. State, 910 So. 2d 12 (Miss. Ct. App. 2004), affirmed in part and reversed in part by 912 So. 2d 458, 2005 Miss. LEXIS 661 (Miss. 2005).

Defendant's petition to enter a guilty plea and the transcript reflected that he was aware that he would be pleading guilty to the amended charge of attempted possession of precursor chemicals, and that his attorney had gone over both the petition to enter a guilty plea and the amended charge with him. Thus, his assertion that his plea was unintelligent and involuntary was rejected, as was his argument that counsel was ineffective in failing to explain that an "attempted possession" conviction did not carry a lesser sentence. Even if that had been true, defendant received a favorable plea agreement (all but five years suspended), he had admitted guilt and that he understood the nature of the offense, and he failed to show the outcome of a jury trial would have been different. Green v. State, 880 So. 2d 377 (Miss. Ct. App. 2004).

Defendant's conviction for the sale of cocaine and his enhanced 40 year sentence were both proper where defendant failed to establish the ineffective assistance of his counsel especially because counsel negotiated a plea that defendant refused and the attorney was successful in having the trial court dismiss the portion of the indictment that dealt with the sale being within 1,500 feet of a public park. Easter v. State, 878 So. 2d 10 (Miss. 2004).

Criminal defendant's acceptance of prosecutor's proposed plea bargain does not create constitutional right to have bargain specifically enforced. Mabry v. Johnson, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984), on remand 752 F.2d 313.

It is impermissible for a trial judge to enhance a sentence because the defendant refused a plea bargain and put the state and court to the trouble of trial by jury. Pearson v. State, 428 So. 2d 1361 (Miss. 1983).

11. Mental examination and treatment.

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

Experts who rendered diagnosis of "no mental disorder" for low intelligence quotient for capital murder defendant, after being appointed to perform mental examination of him to determine his competency to stand trial, afforded defendant constitutionally adequate evaluation and furnished constitutionally adequate report. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Involuntary treatment of the criminally accused with antipsychotic medication is permissible only where medically appropriate and, considering less intrusive alternatives, essential for safeguarding a compelling state interest. In re Turner, 635 So. 2d 894 (Miss. 1994).

A murder defendant was not denied a fair trial by the denial of his motion for a court-appointed psychologist, in spite of the defendant's argument that he was thereby prevented from properly presenting his theory of defense related to his state of mind when he was assaulted by the victim, where the State offered no expert testimony regarding the defendant's state of mind, the defendant did not testify as to his state of mind, and the record did not "even hint at a defense of this nature." Green v. State, 631 So. 2d 167 (Miss. 1994).

A defendant was not improperly denied the assistance of an independent privately employed psychiatrist in violation of his Sixth, Eighth and Fourteenth Amendment rights where the defendant requested and received a psychiatric examination and evaluation to determine his mental condition, resulting in the unanimous determination of 5 medical professionals that the defendant was sane at the time of the charged offense and was competent to aid in his defense. Lanier v. State, 533 So. 2d 473 (Miss. 1988).

Neither the United States Constitution nor the Mississippi Constitution requires that the nation or state furnish an indigent defendant with the assistance of a psychiatrist to examine the defendant and advise with his court appointed counsel in the preparation of his defense. Phillips v. State, 197 So. 2d 241 (Miss. 1967), cert. denied, 389 U.S. 1050, 88 S. Ct. 791, 19 L. Ed. 2d 844 (1968).

12. Guilty plea, generally.

Dismissal of the inmate's motion for post-conviction relief was proper because there were no Sixth Amendment jury issues since he pled guilty and never asserted his right to a jury trial. Smith v. State, 933 So. 2d 1008 (Miss. Ct. App. 2006).

Defendants' constitutional rights under U.S. Const. Amend. VI, Miss. Const. Art. 3, § 26 were not violated when the trial court admitted their confessions at trial because the statements given by one defendant did not implicate the others, and defendants did not move for severance. Harris v. State, — So. 2d —, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Defendant's entry of a plea of guilty acted as a waiver of any speedy trial claim, whether based on statutory or constitutional grounds. Davidson v. State, 850 So. 2d 158 (Miss. Ct. App. 2003), remanded by 2003 Miss. App. LEXIS 724 (Miss. Ct. App. June 3, 2003).

Trial court's failure to advise defendant of maximum and minimum sentences when defendant pled guilty did not implicate fundamental constitutional right sufficient to except post-conviction case from procedural bar created by defendant's failure to file petition within 3 years of guilty plea. Bevill v. State, 669 So. 2d 14 (Miss. 1996).

A defendant's claim that he blindly entered a plea of guilty because his attorney told him that his mother advised him to do so was not sufficient to render his plea involuntary. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A plea is voluntary if not induced by fear, violence, deception or improper inducements. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A trial court's failure to inform a defendant of the mandatory minimum sentence for the crime charged did not render the defendant's guilty plea involuntary where no misrepresentation as to the mandatory minimum sentence was made to the defendant, he did not expect to receive the mandatory minimum sentence, he did not claim that there was a misrepresentation of the sentence which he was to receive, he was fully apprised and understood the consequences of the sentence the State intended to recommend, and he did not allege that the failure to be informed of the minimum sentence induced him to enter his guilty plea. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

The constitutional standard for voluntariness of a guilty plea does not mention knowledge of the mandatory minimum sentence as an essential element; instead, it merely states that the accused should understand the effects of a guilty plea. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A plea of guilty constitutes a waiver of some of the most basic rights of free Americans, those secured by the Fifth, Sixth and Fourteenth Amendments to the

Constitution of the United States, as well as those comparable rights secured by Mississippi Const, Art 3, §§ 14 and 26. Sanders v. State, 440 So. 2d 278 (Miss. 1983).

13. Argument of counsel.

Trial court did not unconstitutionally limit closing argument at guilt phase of capital murder case by denying defendant full 5 minutes of additional time requested after original 60 minutes had expired; 60-minute period had been requested by defendant's counsel, and after 5 minute extension request was refused counsel was allowed to place remaining 4 minutes into record, and case was not so complex as to require more time. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A trial court's limitation of closing argument to 15 minutes in the sentencing phase of a capital murder prosecution did not violate the defendant's constitutional right to a fair trial where the defendant made no proffer as to what he would have argued had he been given additional time, and he raised no objection to the time limit at the time of trial. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, Weatherspoon v. State, 732 So. 2d 158 (Miss. 1999).

14. Instructions.

Because the jury was instructed on all the elements of capital murder, defendant was not deprived of the constitutional rights to a fair trial and to a jury determination of every element of the crime charged when defendant was convicted under the one continuous transaction doctrine of capital murder with the underlying felony of robbery. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

It was improper to convict defendant of using her mother's money without her consent in violation of the Mississippi Vulnerable Adults Act of 1986, Miss. Code Ann. § 43-47-19 because although the indictment sufficiently informed defendant of the crime and the conduct the grand jury believed constituted the crime, the trial court erroneously issued a jury instruction that materially conflicted with the indictment's language; the wording of the indictment suggested that the grand jury believed defendant's use of the money was improper only if the money was used without the mother's consent, but at trial, the State produced no evidence that defendant had used her mother's money without her consent, and several witnesses testified that she, in fact, had obtained her mother's consent. Decker v. State, — So. 3d —, 2011 Miss. LEXIS 296 (Miss. June 16, 2011), opinion withdrawn by 2011 Miss. LEXIS 324 (Miss. June 30, 2011).

15. Instructions curative of error.

Defendant's convictions for kidnapping and sexual battery were proper where his argument that counsel was ineffective because the jury was improperly instructed on the issue of whether or not the sexual act was consensual was without merit because a prerequisite to finding defendant guilty of sexual battery was to determine that the sexual act between him and the victim was without the victim's consent. As the jury determined that defendant was indeed guilty of sexual battery, inherently the jury had to determine that the sexual act took place without the victim's consent. Winding v. State, 908 So. 2d 163 (Miss. Ct. App. 2005).

Mistrial was not required in capital murder case after victim's grandmother "became emotional" when asked to look at pictures identifying victim during guilt phase; defendant had not made contemporary objection, thus precluding court from giving curative instruction which jury would have presumably followed, and as incident occurred after defendant had been officially found guilty he could not be heard to complain about an emotional state which he had brought on through his own actions. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

16. Verdict.

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

17. Sentence and punishment, generally.

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Petitioner's argument that the capital sentencing statute, Miss. Code Ann. § 99-19-101, did not permit waiver of a jury for sentencing purposes was without merit because although § 99-19-101 provided for sentencing only by a jury in capital cases, § 99-19-101 specifically provided that a jury could be waived by a defendant in writing. Also, the record showed that petitioner's waiver was knowingly and intelligently made because she was advised as to the sentencing options available to a jury, or a judge sitting without a jury, after her capital murder conviction, and she signed a waiver stating that she understood that she could be sentenced in the discretion of the trial judge to death, life imprisonment without eligibility for parole, or life imprisonment as provided in § 99-19-101(1). Byrom v. State, 927 So. 2d 709 (Miss. 2006), writ of certiorari denied by 549 U.S. 1056, 127 S. Ct. 662, 166 L. Ed. 2d 520, 2006 U.S. LEXIS 9076, 75 U.S.L.W. 3283 (2006).

Mississippi's capital sentencing scheme complies with the Sixth Amendment requirement that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, because under Miss. Code Ann. § 99-19-101 it is the jury that determines the presence of aggravating circumstances necessary for the imposition of the death sentence. Berry v. State, 882 So. 2d 157 (Miss. 2004), writ of certiorari denied by 544 U.S. 950, 125 S. Ct. 1694, 161 L. Ed. 2d 528, 2005 U.S. LEXIS 2822, 73 U.S.L.W. 3569 (2005).

The defendant's 25 year sentence fell within the guidelines of § 97-3-79, was not excessive, and did not violate his Sixth and Fourteenth amendment rights, notwithstanding the defendant's assertion that he was merely an accessory after the fact, where the trial judge found no reason to suspend any of the sentence the defendant had a previous conviction of burglary of an occupied dwelling. Lawson v. State, 748 So. 2d 96 (Miss. 1999).

Trial court is prohibited from imposing heavier sentence upon defendant because he has exercised his constitutional right to trial by jury than sentence offered defendant in plea bargaining process. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Imposition by trial court of heavier sentence than that which was offered in plea bargaining process is not abuse of discretion and violates no right of defendant where lenient sentence is proposed in pretrial plea bargain negotiations, where after rejecting same defendant is found guilty by jury, where before imposition of sentence trial judge is presented with evidence of aggravating circumstances relevant to sentencing not known to him at time of original plea bargain negotiations, where in fact trial judge imposes heavier sentence than was proposed at time of plea bargain and in fact bases imposition of heavier sentence upon information of aggravating circumstances of which he has been newly made aware, and where heavier sentence has not been imposed upon accused in whole or in part as penalty for his exercise of his constitutional right to trial by jury. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Sentence of life imprisonment for crime of capital rape was appropriate for defendant convicted of raping 6-year-old child, despite fact that defendant had been offered 5-year sentence during plea negotiations prior to trial; court was not involved in plea negotiations, did not impose heavier sentence merely because defendant exercised his constitutional right to jury trial, and merely followed statutory sentencing dictates. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A trial court's failure to inform a defendant, who pled guilty to possession of cocaine with intent to distribute, that a $1,000.00 fine was the minimum penalty for the crime was harmless error where the record contained the defendant's written waiver of indictment, his petition to enter a plea of guilty, and a 12-page transcript of the circuit judge's interrogation of the defendant before accepting the plea. Eley v. State, 631 So. 2d 787 (Miss. 1994).

18. Speedy trial — In general.

Defendant's right to a speedy trial was not violated, as approximately 197 days elapsed between defendant's arrest and trial, a number well below the statutory limit of 270 days, and the greatest part of the "delay" between the commission of the felony and trial was directly and solely the consequence of defendant's flight; therefore, defendant's counsel was not ineffective for failing to file a motion to dismiss on speedy trial grounds. Jackson v. State, 864 So. 2d 1047 (Miss. Ct. App. 2004).

In an escape case, defendant was not denied his constitutional or statutory right to a speedy trial, because 899 of the 991 days that elapsed between the escape and the trial were attributable to defendant, and defendant suffered no prejudice as a result of the delay. Jenkins v. State, 881 So. 2d 870 (Miss. Ct. App. 2003), affirmed in part and reversed in part by, remanded by 888 So. 2d 1171, 2004 Miss. LEXIS 1268 (Miss. 2004).

Defendant's speedy trial claim failed; though 410 days elapsed before he was again brought to trial after the conviction was reversed, most of the delay was chargeable to him, since he had obtained three continuances, and he failed to show prejudice from the delay chargeable to the State. Robinson v. State, 858 So. 2d 887 (Miss. Ct. App. 2003).

The Sixth Amendment speedy trial right applies only to time periods when a person is either under indictment or under arrest; therefore, such right did not apply to a more than 20 year period from the entry of a nolle prosequi on an indictment for murder until the subsequent reindictment of the defendant. Beckwith v. Anderson, 89 F. Supp. 2d 788 (S.D. Miss. 2000).

An 838 day delay between arrest and trial was sufficient to trigger the Barker balancing test and require an examination of the other factors. DeLoach v. State, 722 So. 2d 512 (Miss. 1998).

While defendant may have some responsibility to assert speedy trial claim, primary burden is on courts and prosecutors to assure that they bring cases to trial. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

Defendant's right to speedy trial is guaranteed by Sixth and Fourteenth Amendments to the United States Constitution as well as by Article 3, section 26 of the Mississippi Constitution. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Prosecution may not circumvent accused's demand for speedy trial by seeking new indictment for same offense and then proceeding upon new indictment. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Bad motive on part of prosecution significantly affects balancing test in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S.

994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

State bears burden of bringing accused to trial in speedy fashion. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

19. —Administrative proceedings, speedy trial.

Since attorney disciplinary proceedings are not criminal in nature, the complaint tribunal erred in applying the factors set forth. Mississippi Bar v. An Att'y, 636 So. 2d 371 (Miss. 1994).

20. —Statutory right to speedy trial.

Constitutional right to speedy trial exists separately from the statutory right. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

Although long delays between the time of arrest and arraignment have the potential to violate the defendant's constitutional right to a speedy trial even if the 270 day mandate of § 99-17-1 has been met, the State's compliance with § 99-17-1 would be viewed as significant when determining whether the defendant's constitutional right to a speedy trial had been violated. Spencer v. State, 592 So. 2d 1382 (Miss. 1991).

A defendant's statutory right to a speedy trial was not violated, even though 338 days elapsed between the defendant's original arraignment and the first day of his trial, where the defendant was granted a 63-day continuance during that time, and the case was continued for 37 days due to a congested docket. Additionally, the defendant's constitutional right to a speedy trial was not violated, even though 456 days elapsed between the time the defendant was arrested and the first day of his trial, where a significant part of the delay was attributable to the defendant, the balance of the delay was attributable to mere negligence and court congestion, and the defendant failed to assert his right to a speedy trial until the day the trial was scheduled. Adams v. State, 583 So. 2d 165 (Miss. 1991).

A defendant's statutory right to a speedy trial under § 99-17-1 was not violated, even though his trial occurred 460 days after his arrest, where the trial occurred only one day after his arraignment. Additionally, the defendant's constitutional right to a speedy trial was not violated where the defendant moved for 2 continuances during the period between the indictment and the trial which resulted in 181 days of time lost, much of the remaining delay could be attributed to 5 changes in the defendant's attorney, the delay was for good cause to allow his counsel sufficient time to prepare for trial, there were no deliberate attempts by the State to cause a delay to hamper the defendant's ability to prepare a defense, and there was no showing of prejudice to the defendant. Wiley v. State, 582 So. 2d 1008 (Miss. 1991).

For constitutional purposes, the right to a speedy trial attaches and time begins to run with arrest. The statutory right to a speedy trial set forth in § 99-17-1 attaches with arraignment; calculation of statutory time requires exclusion of the date of arraignment and inclusion of the date of trial and weekends, unless the last day of the 270-day period falls on Sunday. Any delays in prosecution attributable to a defendant under either the constitutional or statutory scheme tolls the running of time. Any continuances for "good cause" will toll the running of time unless "the record is silent regarding the reason for delay," in which case "the clock ticks against the State because the State bears the risk of non-persuasion on the good cause issue." The statutory 270-day rule is satisfied once the defendant is brought to trial, even if that trial results in a mistrial. Handley v. State, 574 So. 2d 671 (Miss. 1990).

Compliance with § 99-17-1 does not necessarily mean that a defendant's constitutional right to a speedy trial has been respected. Smith v. State, 550 So. 2d 406 (Miss. 1989).

A defendant's right to a speedy trial was not violated since the § 99-17-1 270-day period was tolled from the time of the first continuance which was granted on the defendant's motion, until the date of the end of the second continuance in which the defense counsel actively participated. Arnett v. State, 532 So. 2d 1003 (Miss. 1988).

Section 99-17-1 requires only that indictments be tried within 270 days of arraignment, and, where the first trial results in a mistrial, the statute is not applicable to require that the retrial take place within 270 days of the first trial. Kinzey v. State, 498 So. 2d 814 (Miss. 1986).

Delay of almost 10 months in bringing parolee arrested on burglary charges to trial following parolee's demand for speedy trial does not deny parolee speedy trial rights under § 99-17-1 where only 47 days elapse from arraignment to trial but does violate constitutional speedy trial right where delay has been caused by state and parolee, whose parole has been revoked as result of arrest, is prejudiced by being ineligible for parole and disqualified from participating in rehabilitation programs because of detainer filed in connection with burglary arrest, and by being unable to properly locate witnesses to substantiate defense that someone else stole car and performed burglary. Bailey v. State, 463 So. 2d 1059 (Miss. 1985).

21. — Time right accrues, speedy trial.

The time period over which the defendant's Sixth Amendment protection extended was the period from his second mistrial in 1964 through the entry of the nolle prosequi in 1969, a period of almost five years, rather than from his second mistrial in 1964 through his reindictment in 1990, a period of over 26 years. Beckwith v. Anderson, 89 F. Supp. 2d 788 (S.D. Miss. 2000).

An unserved arrest warrant, issued because a statutorily empowered magistrate determines that probable cause for the arrest exists, does not formally initiate criminal proceedings or create other effects on a person's liberty interests; therefore, the period of delay in a defendant's trial is not measured from the issuance of an arrest warrant. Stokes v. State, 758 So. 2d 452 (Miss. Ct. App. 2000).

An increase in restrictions of incarceration is not the equivalent of an "arrest" for speedy trial rules; therefore, the period of delay in a defendant's trial is not measured from the occurrence of such an event. Stokes v. State, 758 So. 2d 452 (Miss. Ct. App. 2000).

The defendant's constitutional right to a speedy trial did not attach when he was taken into custody for violating his appeal bond, but at the later date on which he was indicted for possession of a deadly weapon as a convicted felon. Coleman v. State, 725 So. 2d 154 (Miss. 1998).

Defendant's speedy trial rights under Sixth Amendment attach when he is arrested, and such rights continue until defendant is convicted, acquitted or formal entry is made on record of his case that he is no longer under indictment. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Defendant's constitutional right to speedy trial attaches at time of arrest. Simmons v. State, 678 So. 2d 683 (Miss. 1996); Skaggs v. State, 676 So. 2d 897 (Miss. 1996); Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Constitutional right to speedy trial attaches when person is effectively accused of a crime. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Constitutional right to speedy trial attaches at time of accused's arrest, indictment, or information. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In determining whether defendant's claim of constitutional speedy trial violation is justified, date of defendant's arrest is date right to speedy trial attaches. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

The constitutional right to a speedy trial attaches when a person has been accused. Smith v. State, 550 So. 2d 406 (Miss. 1989).

The speedy trial clock begins to tick from the moment the defendant is effectively accused of the offense. In cases not involving a detainer lodged against a defendant already incarcerated, this means the time of indictment. Fisher v. State, 532 So. 2d 992 (Miss. 1988), grant of habeas corpus rev'd, 997 F.2d 1095 (5th Cir. 1993).

The right to a speedy trial applies only after a person has been accused and, under some circumstances, one becomes an "accused" when arrested. Lightsey v. State, 493 So. 2d 375 (Miss. 1986).

Speedy trial right is inapplicable to time during which defendants are neither under indictment nor subject to restraint, and inapplicable to delays occasioned by interlocutory appeals. United States v. Loud Hawk, 474 U.S. 302, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986), rehearing denied, 106 S. Ct. 1289, 475 U.S. 1061, 89 L. Ed. 2d 596, on remand 784 F.2d 1407.

A 28-day delay in taking a defendant before a magistrate for a preliminary hearing did not deprive him of his right to a speedy trial under § 26 of the Mississippi Constitution or the Sixth Amendment of the Federal Constitution, and such a delay without prejudice is not sufficient to require a reversal of his conviction. McLelland v. State, 204 So. 2d 158 (Miss. 1967).

Although assuming, but not deciding, that an unexplained three-and-one-half day delay in affording a defendant to preliminary hearing to be undue delay, there is no authority to the effect that such delay entitled the defendant to an outright discharge on the charge of armed robbery. Dunning v. State, 251 Miss. 766, 171 So. 2d 315 (1965), cert. denied, 386 U.S. 993, 87 S. Ct. 1310, 18 L. Ed. 2d 339 (1967).

22. —Tests, speedy trial.

Defendant's right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 was not violated because the prejudice was minimal since the fading memories of potential, unnamed witnesses did not impair defense. Ben v. State, 95 So. 3d 1236 (Miss. Aug. 23, 2012), writ of certiorari denied by 133 S. Ct. 1723, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2589, 81 U.S.L.W. 3555 (U.S. 2013).

In a statutory rape case, defendant's Sixth Amendment right to a speedy trial was not violated under the totality of the circumstances after four factors were analyzed, despite the fact that the length of the delay and the reason for the delay weighed in favor of defendant; the assertion of the right and the prejudice factors weighed in favor of the State. Price v. State, 898 So. 2d 641 (Miss. 2005).

Defendant was not deprived of his constitutional right to a speedy trial as (1) although the delay was presumptively prejudicial, (2) the 182 days granted for continuances were for good cause including the judge's illness and plea negotiations, (3) defendant never asserted a right to a speedy trial by filing a motion, and (4) there were no assertions of prejudice. Mayo v. State, 886 So. 2d 734 (Miss. Ct. App. 2004), writ of certiorari denied by 887 So. 2d 183, 2004 Miss. LEXIS 1383 (Miss. 2004).

Defendant failed to establish that the constitutional right to a speedy trial was violated, as though the length of time was presumptively prejudicial, most of the delays were attributed to defendant or his counsel, defendant failed to show that he had failed to demand his right to a speedy trial until shortly before the trial began, and he was not prejudiced by the delay as emotional stress caused by the delay did not constitute prejudice. Wesley v. State, 872 So. 2d 763 (Miss. Ct. App. 2004).

Under balancing test to determine whether defendant's constitutional right to speedy trial has been violated, no one factor alone is dispositive, and the factors must be considered individually, assessed both objectively and dispassionately, then weighed and balanced together. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

Under case law, four factors must be considered before one can determine if right to speedy trial has been denied: length of delay; reason for delay; defendant's assertion of his right to speedy trial; and prejudice resulting to defendant. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

Factors to be examined in determining whether constitutional right to speedy trial has been violated include length of delay, reason for delay, assertion of right to speedy trial, and prejudice to defendant from the delay; no single factor is dispositive. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Factors to be considered in determining whether defendant's right to speedy trial was violated are length of delay, reason for delay, defendant's assertion of right to speedy trial, and prejudice to defendant resulting from delay. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379

(1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Analysis of whether defendant was deprived of right to speedy trial must turn on facts of particular case, quality of evidence available on each factor, and, in absence of evidence, identification of party with risk of non-persuasion; no sole factor is dispositive. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Once constitutional right to speedy trial has attached, the Supreme Court, in determining whether right has been denied, must examine length of delay, reason for delay, defendant's assertion of right to speedy trial, and prejudice resulting to defendant from delay, in light of all circumstances, including conduct of prosecution and accused. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Court must balance four factors in determining whether defendant's claim of constitutional speedy trial violation is justified: length of delay, reason for delay; whether defendant has timely asserted right to speedy trial and whether defendant has been prejudiced by delay. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether defendant's claim of constitutional speedy trial violation is justified, no single factor is dispositive, but court must consider totality of circumstances, including any additional relevant circumstances beyond 4 enumerated factors, in making that determination. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

For purpose of constitutional speedy trial analysis, as period of delay between defendant's arrest and trial increases, importance of delay factor also increases. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

For purpose of constitutional speedy trial analysis, where delay between arrest and trial is not long enough to be considered presumptively prejudicial, court does not need to examine remaining factors used to determine whether constitutional speedy trial violation has occurred. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Balance is struck in favor of rejecting defendant's speedy trial claim if delay is neither intentional nor egregiously protracted, and where there is complete absence of actual prejudice. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

The balancing test used in criminal proceedings for determining whether the right to a speedy trial has been violated is not applicable in an attorney disciplinary action; although attorney disciplinary proceedings are quasi-criminal in nature, they are not governed by the same rules that are utilized in criminal proceedings. Barrett v. Mississippi Bar, 648 So. 2d 1154 (Miss. 1995).

In a constitutional speedy trial analysis, prejudice to the defendant may take several forms: (1) delay may prejudice the outcome of the defendant's case; (2) prejudice may take the form of harm to the defendant's personal interests, such as the debilitating effect of delay on the defendant's financial, societal, and emotional circumstances; and (3) lengthy pretrial incarceration may be unnecessarily oppressive and may pose societal disadvantages, though a defendant's assertion of prejudice attributable solely to incarceration, with no other harm, typically is not sufficient to warrant reversal. Ross v. State, 605 So. 2d 17 (Miss. 1992).

When the constitutional right to a speedy trial attaches, the court, in order to determine whether the defendant's right has been denied, will examine 4 factors: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice resulting to defendant because of the delay. All 4 factors must be considered together, and no individual factor may completely dispose of the issue. Lightsey v. State, 493 So. 2d 375 (Miss. 1986).

23. —Tolling of time, speedy trial.

Over four years expired between defendant's arrest and trial for murder, but defendant was out on bond after the first year, made no demand for a speedy trial, failed to show any prejudice to the defense, or that the State intentionally delayed the investigation in its search for critical eyewitnesses and other evidence. Defendant's right to a speedy trial was not violated under the Sixth and Fourteenth Amendments to the United States Constitution, or Miss. Const. art. III, § 26.

Moore v. State, 837 So. 2d 794 (Miss. Ct. App. 2003).

Trial court did not err in denying petitioner's motion for post-conviction relief where he failed to prove his assertions that he was denied his right to a speedy trial and that he received ineffective assistance from counsel; there was no evidence in the record of the starting date of petitioner's incarceration, but the record showed that 89 days elapsed between indictment and trial which the appellate court found was quite reasonable. Hill v. State, 827 So. 2d 743 (Miss. Ct. App. 2002).

Under speedy trial analysis, any delays which are attributable to accused toll the running of the clock; however, time of delay is assessed against state if state fails to show good cause for such delay. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Constitutional speedy trial clock is tolled for period of time attributable to delay caused by defendant; period of delay attributable to defendant is subtracted from total days of delay. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Any defendant-prompted delay, regardless of merit, tolls the constitutional speedy trial clock; the speedy trial remedy is meant to address the harm visited on the defendant because of the State's delay in bringing the defendant to trial. Ross v. State, 605 So. 2d 17 (Miss. 1992).

24. —Complexity of case, speedy trial.

A defendant's constitutional right to a speedy trial was not violated, even though the length of the delay was 281 days and was therefore presumptively prejudicial, where the case involved 9 counts of burglary and one count of conspiracy and was therefore a "complex, serious" case rather than an "ordinary street crime," the delay appeared to be reasonable and not unduly lengthy, and the defendant failed to substantiate his claim of prejudice resulting from the delay. Jackson v. State, 614 So. 2d 965 (Miss. 1993).

25. — Delay attributable to defendant, speedy trial.

Defendant was not denied his Sixth Amendment right to a speedy trial because not a single Barker factor weighed in defendant's favor, and one, reason for the delay, weighed heavily against him; although the delay in bringing defendant to trial was more than three times the presumptively prejudicial eight-month mark, of the 833 total days between indictment and trial, 701 days were attributable to defendant. Hardison v. State, 94 So. 3d 1092 (Miss. 2012).

Defendant was not denied his Sixth Amendment right to a speedy trial because not a single Barker factor weighed in defendant's favor, and one, reason for the delay, weighed heavily against him; although the delay in bringing defendant to trial was more than three times the presumptively prejudicial eight-month mark, of the 833 total days between indictment and trial, 701 days were attributable to defendant. Hardison v. State, 94 So. 3d 1092 (Miss. 2012).

By pleading guilty, an inmate had waived his constitutional right to a speedy trial. Moreover, delays which were attributable to a defendant did not count toward the 270-day requirement under Miss. Code Ann. § 99-17-1, and Miss. Code Ann. § 99-1-5 provided that prosecution for an offense was not barred when process could not be served; here, the reason for any delay in sentencing was that there was a significant period of time in which the trial court was unable to serve the inmate with his indictment. Edmondson v. State, 17 So. 3d 591 (Miss. Ct. App. 2009).

Defendant's constitutional right to a speedy trial was not violated where the state established good cause for the trial delay; any delay that defendant suffered was caused by defendant's criminal actions in Indiana, being incarcerated in another state, and the extradition process. Hall v. State, 984 So. 2d 278 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 288 (Miss. 2008).

Where defendant was tried 538 days after arraignment, and 264 days of the delay could be attributed against the State, there was no statutory violation under the guidelines set forth in Miss. Code Ann. § 99-17-1. Further, the delay could be attributed to continuances requested upon the motion of defendant's attorneys, substitution of counsel, plea negotiations, ongoing discovery, and potentially the trial date being lost due to a crowded docket, and applying the balancing test to the four factors listed in Barker, and the conduct of the State and defendant, defendant's constitutional right to a speedy trial was not denied. Summers v. State, 914 So. 2d 245 (Miss. Ct. App. 2005).

Defendant was arrested on July 5, 2000, indicted one year later, and his trial commenced on April 2, 2002; because defendant was released on bond shortly after his indictment there was no oppressive pretrial detention after he was indicted. Further, at least part of the delay to trial, following his indictment, was attributable to the two continuances granted at defendant's request; thus, there was no merit to defendant's denial of a speedy trial claim as to the period of time following his indictment. Young v. State, 891 So. 2d 813 (Miss. 2005).

Although the time between defendant's arrest and his trial for attempted kidnapping was substantial, a portion of the delay was excluded from the "270 day rule" provided in Miss. Code Ann. § 99-17-1 as being attributable to defendant and he failed to show how his case was prejudiced by the delay in that he did not show that his pretrial incarceration was oppressive, that he suffered anxiety, or that his defense was impaired. Therefore defendant's right to a speedy trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Miss. Const. art. 3, § 26 was not violated. Hersick v. State, 904 So. 2d 116 (Miss. 2004).

Defendant was released on bond shortly after his indictment; there was no oppressive pretrial detention after he was indicted; additionally, at least part of the delay prior to trial, following defendant's indictment, was attributable to the two continuances granted at defendant's request. Therefore, there was no merit to defendant's denial of a speedy trial claim as to the period of time following his indictment. Young v. State, — So. 2d —, 2004 Miss. LEXIS 588 (Miss. May 27, 2004), opinion withdrawn by, substituted opinion at 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

Defendant was not deprived of her right to a speedy trial where she was brought to trial 19 months after she was arrested as most of the delay created in the case going to trial was of defendant's own volition, she did not assert her right to speedy trial until three weeks before the trial, and under the totality of the circumstances she was not denied her right to a speedy trial. Black v. State, 823 So. 2d 543 (Miss. Ct. App. 2002).

The defendant's right to a speedy trial was not violated where (1) when tolling the clock for several continuances, the defense attorney substitutions, the psychiatric evaluation, and the defendant's skipping bond, only 265 days, at most, could be charged against the state, (2) although the defendant was incarcerated for a substantial period of the delay, his incarceration was caused by his skipping bond and unrelated offenses, and (3) there was no impairment of the defense. Elder v. State, 750 So. 2d 540 (Miss. Ct. App. 1999).

Where the delay in the case totaled more than 25 months, but 23 months of the delay was caused by the defendant leaving the state before he could be arrested and his subsequent incarceration in another state on an unrelated matter, the defendant was not denied his right to a speedy trial. Johnson v. State, 756 So. 2d 4 (Miss. Ct. App. 1999).

The defendant's right to a speedy trial was not violated where (1) the length of time between the defendant's arrest and the trial was approximately 13 months, but he was indicted by the first grand jury convened following his arrest and his trial was set for the next term of court, (2) the only continuances were caused by a joint motion for additional time to get medical evidence, by the defendant's efforts to have his court appointed attorney dismissed, and by his bar complaint filed against his attorney, (3) the defendant's actions between filing a pro se motion for a speedy trial and the time of trial caused the delay and the record did not show that he brought it to the attention of the trial court, and (4) there was no discernible prejudice other than time spent in jail for which the defendant was given credit on his eventual prison sentence. Taylor v.

State, 744 So. 2d 306 (Miss. Ct. App. 1999).

The defendant was not denied his right to speedy trial under the statute where delays were caused by his requests for continuances, his motions, and his submission to a mental evaluation pursuant to court order. Snow v. State, 735 So. 2d 1094 (Miss. Ct. App. 1999).

The defendant failed to establish a violation of his right to a speedy trial where (1) the defendant was granted a total of four continuances and, in each of his first three motions for continuances, he expressly waived speedy trial rights, (2) a mistrial was declared when the venire panel was exhausted before a jury was selected, (3) the defendant made no effort to assert his rights prior to trial, and (4) the defendant did not allege any prejudice. Watts v. State, 733 So. 2d 214 (Miss. 1999).

The defendant was not entitled to dismissal for violation of his right to a speedy trial where (1) 296 days of the 640 days between arrest and trial were due to actions of the defendant and 209 days were due to docket congestion, (2) the defendant did not raise the issue of his right to a speedy trial until 458 days after his arrest, and (3) the defendant failed to show any prejudice other than the length of his pretrial incarceration. Bingham v. State, 755 So. 2d 426 (Miss. Ct. App. 1999).

The defendant's right to a speedy trial was not violated where (1) the state offered valid reasons for all of the delays from the defendant's arrest in October of 1994 until his trial in February of 1997, (2) most of the delays were either for neutral reasons or at the request of the defense, (3) the defendant did not show any actual trial prejudice and relied entirely on the "presumed" prejudice resulting from pre-trial incarceration, and (4) the defendant did not make a demand for a speedy trial until September of 1996 when he filed his motion to dismiss, which motion was made after he agreed to continuances, moved for his own continuance, and moved for a severance from his codefendant. Horton v. State, 726 So. 2d 238 (Ct. App. 1998).

A 419 day delay between arraignment and trial was not a violation of the defendant's constitutional right to speedy trial where (1) 199 days were attributable to motions for continuances and substitutions of counsel by the defendant, (2) 97 days were attributable to an overcrowded court docket, (3) the defendant failed to assert his right to speedy trial until the day of trial, and (4) the defendant failed to show prejudice. Black v. State, 724 So. 2d 996 (Ct. App. 1998).

The defendant was not denied his constitutional right to a speedy trial, notwithstanding a delay of about 1051 days from his arrest to the commencement of trial, where (1) much of the delay was attributable to the defendant, (2) the delays attributable to the state were necessary for pre-trial business such as the appointment of counsel, a preliminary hearing, the indictment and arraignment, the hearing of several defense motions, the appointment of additional counsel, the granting of a defense expert, the hearing of more motions, a rule on expert fees, and the hearing of a suppression motion, (3) the defendant did not request a speedy trial and only moved for dismissal for the denial of a speedy trial, and (4) there was no prejudice shown by the defendant. Brewer v. State, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

The defendant could not complain of a delay in trial caused by his acquiescence in and initiation of much of the plea bargaining that caused the delay. DeLoach v. State, 722 So. 2d 512 (Miss. 1998).

Delay in bringing defendant to trial in capital murder prosecution weighed heavily against defendant in constitutional speedy trial analysis where most delay was due to defendant and where State made no deliberate attempts that could be considered as oppressive conduct to harm defense. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) Kolberg v. State, 704 So. 2d 1307 (Miss. 1997).

Defendant's constitutional right to speedy trial was not violated, although 21-month delay between arrest and trial was presumptively prejudicial, where significant portion of delay was due to defendant's request for psychological evaluation, defendant did not bring motion to dismiss on speedy trial grounds for over a year, and defendant did not demonstrate any prejudice. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

Delay caused by actions of defendant, such as continuance, tolls running of speedy trial period for that length of time, and is subtracted from total amount of delay. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A defendant's constitutional right to a speedy trial was not violated, even though the length of the delay was 636 days, where the bulk of the delay was caused by the defendant's frequent changes of counsel and his reneging on a plea agreement, the multitude of pretrial motions filed on the defendant's behalf further contributed to the delay, the defendant made no assertion of his right other than a motion to dismiss the charges after the fact, and the defendant could not show tangible prejudice but relied only on the anxiety caused by incarceration and pending charges. Wagner v. State, 624 So. 2d 60 (Miss. 1993).

A defendant was not denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article 3, § 26 of the Mississippi Constitution, even though approximately 11 months transpired between the defendant's arrest and the commencement of his trial, where the State twice offered to try the case after each of the defendant's 2 motions for speedy trial and the defendant twice declined, and the defendant made no showing of actual prejudice. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

26. — Delay attributable to state, speedy trial.

Defendant's right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 was not violated because the bulk of the delay was due to the state crime lab's forensic and DNA testing, which was critical to the case. Ben v. State, 95 So. 3d 1236 (Miss. Aug. 23, 2012), writ of certiorari denied by 133 S. Ct. 1723, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2589, 81 U.S.L.W. 3555 (U.S. 2013).

Aggravated assault conviction and sentence were affirmed where counsel was not ineffective because the defendant provided no evidence that proved he suffered harm as a result of his attorney not objecting to the State's leading questions or that had his attorney objected to the State's leading questions the outcome would have been different and trial counsel's failure to object to leading questions by the State could have been a trial strategy. Bullard v. State, 923 So. 2d 1043 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 160 (Miss. 2006).

Defendant's constitutional and statutory rights to a speedy trial on drug charges were not violated. The 742-day delay between indictment and trial was presumptively prejudicial, but defendant failed to actively pursue his right to a speedy trial, and he was not actually prejudiced. Alexander v. State, 875 So. 2d 261 (Miss. Ct. App. 2004).

Delay of 30 years between the original indictment and the trial did not violate defendants' speedy trial rights where the trial court granted a nolle prosequi the same year as the original indictment, and defendants were re-indicted and tried 30 years later. Caston v. State, 823 So. 2d 473 (Miss. 2002).

Although the cause for the delay in going to trial was well beyond the presumptively prejudicial eight-month period, the cause for delay after the arrest and prior to the indictment was with the investigating agencies, including the Federal Bureau of Investigation and the majority of delay thereafter was caused by the multiplicity of motions filed by each of the defendants; thus, the State's contributions to the delay were legitimate and there was no violation of the constitutional right to a speedy trial. Collins v. State, 817 So. 2d 644 (Miss. Ct. App. 2002).

The defendant's right to a speedy trial was not violated, notwithstanding a 474 day delay between his arrest and trial, where the reason for the lengthy delay was that the defendant was reindicted; defendant did not demonstrate any prejudice to himself or his defense by the delay, and he did not assert his right to a speedy trial until two days before trial. Jamison v. State, 741 So. 2d 359 (Miss. Ct. App. 1999).

The defendant was not denied his right to a speedy trial where (1) the trial was delayed for good cause the state obtained a continuance so it could attempt to locate a material witness, (2) the defendant did not file a motion for a speedy trial until a few days before the trial was set to start, and (3) there was no prejudice other than the fact that the defendant remained incarcerated during this time while waiting to be brought to trial. Holiday v. State, 739 So. 2d 394 (Miss. Ct. App. 1999).

The defendant was not entitled to reversal of his conviction for murder on the basis of a violation of his right to a speedy trial where (1) the delay was for good cause, as it was requested by the state so that it could locate a material witness, (2) the defendant waited until the Friday before the trial was set to start on a Monday morning and then filed his motion for a speedy trial, and (3) the defendant suffered no prejudice other than continued incarceration during the time while waiting to be brought to trial. Holiday v. State, 1999 Miss. App. LEXIS 15 (Miss. Ct. App. Jan. 26, 1999), opinion withdrawn by, substituted opinion at 739 So. 2d 394, 1999 Miss. App. LEXIS 176 (Miss. Ct. App. 1999).

The defendant failed to establish a violation of his right to a speedy trial where (1) the defendant was granted a total of four continuances and, in each of his first three motions for continuances, he expressly waived speedy trial rights, (2) a mistrial was declared when the venire panel was exhausted before a jury was selected, (3) the defendant made no effort to assert his rights prior to trial, and (4) the defendant did not allege any prejudice. Watts v. State, 733 So. 2d 214 (Miss. 1999).

The trial court did not improperly dismiss the speedy trial claim where the reasons for the delay were valid, the assertion of the right only occurred near the time of the trial, and there was no showing of actual prejudice. Hogan v. State, 730 So. 2d 94 (Miss. Ct. App. 1998).

Any delay as result of action by state, without good cause, causes time to be counted against state in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Delay of murder trial at request of state until after defendant's aggravated assault trial would be charged to state in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A defendant was not denied his right to a speedy trial, even though 266 days elapsed from the time of his arrest to the time of his first trial which ended in a mistrial, 305 days elapsed from his arrest to his second trial which resulted in a conviction, the delay was attributable to the State, and the defendant filed a motion for a speedy trial 15 days after indictment, where he did not file a motion to dismiss for lack of a speedy trial until the day before the second trial, and he failed to show any actual prejudice. Rhymes v. State, 638 So. 2d 1270 (Miss. 1994).

A defendant's constitutional right to a speedy trial was violated, even though the defendant made several motions for continuances and did not make a demand for a speedy trial, where there was a delay of approximately 3 ½ years between the date the grand jury returned the indictment and the date of the trial, the State procrastinated in requesting blood, fingerprint and hair samples, the State failed to take appropriate measures to get the defendant moved to Mississippi for trial, the State failed to provide discovery, and there were 8 continuances for which the record stated no reason or justification. Vickery v. State, 535 So. 2d 1371 (Miss. 1988).

A conviction of false pretense in the selling of an automobile known to be stolen, would be reversed and the defendant discharged from confinement, where he had been continually available for prosecution, although in federal custody part of the time, where all the time his identity was known as well as the facts of the crime, but his prosecution did not take place until two years after issuance of the warrant for his arrest on the charge, and after records were no longer available, one of his witnesses was dead and another had left the state, the facts constituting a denial of his constitutional right to a speedy trial. Bell v. State, 220 So. 2d 287 (Miss. 1969).

27. — Delay unattributable to defendant or state, speedy trial.

Defendant was not denied his right to a speedy trial where a total of 810 days elapsed from the date of defendant's arrest to the date on which the trial began, because defendant requested continuances prior to moving for a speedy trial, the State was granted continuances for DNA analyses and to find a key witness, after DNA tests were ordered, there were several motions filed by defendant and the State, and thus good cause was shown related to matters beyond the control of the State. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

Constitutional right to a speedy trial was not denied, although a rape trial commenced more than two years after defendant's arrest, because there was good cause for the delay and no showing of actual prejudice. Watson v. State, 848 So. 2d 203 (Miss. Ct. App. 2003), affirmed by 2003 Miss. App. LEXIS 623 (Miss. Ct. App. June 17, 2003).

A capital murder defendant was not denied his constitutional right to a speedy trial, even though 434 days elapsed between his arrest and the trial, and the defendant asserted his right to a speedy trial at his initial appearance and by pretrial motions, where some of the delay was due to the defense counsels' conflicts, the judge to whom the case had been assigned for 7 months was murdered, there was a complete "turn-over" in the district attorney's office, there was no showing that the State made a willful effort to delay the trial or that it was negligent in doing so, and the delay did not cause any prejudice to the defense. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A defendant was not denied his constitutional right to a speedy trial, even though 449 days elapsed between his arrest and the date of the hearing adjudicating his motion to dismiss the charges, and there was a 6 ½ month delay between arrest and indictment which was attributed to the crime lab and court congestion, where a 5-month delay was attributable to the defendant and his change of counsel, 8 months of the delay occurred during a period in which there was no demand for a speedy trial and in which the defendant was held on other unrelated charges, and the defendant's testimony did not mention the existence of prejudice. State v. Magnusen, 646 So. 2d 1275 (Miss. 1994).

A defendant was not denied his right to a speedy trial, even though there was a 23-month delay from the date of arrest to the date of trial and a portion of the delay was attributable to official neglect with respect to completion and delivery of a lab report, where the defendant was indicted within 15 months of his arrest, and he failed to show any actual prejudice as a result of the delay. Perry v. State, 637 So. 2d 871 (Miss. 1994).

A lapse of five years between a defendant's indictment and trial did not deny him a speedy trial where the facts established that he had defaulted on his bail bond, that officials had made every reasonable effort to locate him and bring him back to the county for trial, that the defendant did not make any request between time of indictment and time of trial for a speedy trial, and that when he was finally apprehended he was granted a speedy trial. McCrory v. State, 223 So. 2d 625 (Miss. 1969).

28. —Shared attribution for delay, speedy trial.

Applying the Barker test, the appellate court held that although more than eight months passed from the date of defendant's arrest to the date of trial, the trial judge was correct in his determination that there was no speedy trial right violation as the reason for delay showed sufficient good cause, based on a delay in DNA testing and an overcrowded docket; defendant asserted his right to a speedy trial late in the process; and there was no actual prejudice. Felder v. State, 831 So. 2d 562 (Miss. Ct. App. 2002).

A defendant was not denied his constitutional right to a speedy trial, even though 475 days elapsed between his arrest and his trial, where extradition of the defendant caused 9 days of the delay, a substantial portion of the delay (119 days) was due to a continuance granted to the defendant on the date the case was originally set for trial, approximately 12 months of the delay was not attributable to either the defendant or his attorney, the defendant did not assert his right to a speedy trial until after he had been granted the continuance on the date originally scheduled for trial, and the defendant's claim that he was prejudiced by the delay because he lost touch with certain alibi witnesses was diminished by the facts that minimum effort was made by the defendant or his investigator to locate or contact witnesses who had moved, the lost witnesses would have been available to testify on the date originally set for trial, and no mention of this matter was made in the defendant's motion for a new trial filed a week after the verdict was rendered. Noe v. State, 616 So. 2d 298 (Miss. 1993).

A defendant was denied his constitutional right to a speedy trial where 2 ½ years elapsed between the time of the defendant's arrest and his trial, the defendant caused 11 months of the delay while the State caused one year and 9 months of the delay without good cause, the defendant asserted his right to a speedy trial one year prior to his trial, and the defendant was prejudiced as a result of the delay in bringing him to trial as the only witness alleged to have connected the defendant to the crime died before the defendant was brought to trial and another witness admitted that her memory was not as good at the time of trial as it had been previously. Jenkins v. State, 607 So. 2d 1137 (Miss. 1992).

A defendant's constitutional and statutory rights to a speedy trial were not violated, even though the delay between the defendant's arrest and trial was 378 days and the delay between arraignment and trial was 370 days, where only one of the delays—a continuance requested by the State solely for its prosecutorial tactical advantage—was attributable to the State, and, after calculating the delays caused by the defendant, he came to trial 164 days after his arrest and 156 days after his waiver of arraignment. Ross v. State, 605 So. 2d 17 (Miss. 1992).

A defendant was not deprived of his constitutional right to a speedy trial, even though he was tried 603 days after his arrest, where only the 162-day delay from the arrest to the indictment was chargeable against the State, the defendant did not assert his right to a speedy trial until 35 days prior to trial, and he failed to show prejudice as a result of the delay. Handley v. State, 574 So. 2d 671 (Miss. 1990).

29. —Indictment and information, speedy trial.

Defendant was arrested on July 5, 2000, indicted one year later, and his trial commenced on April 2, 2002. For purposes of the pre-indictment delay of 366 days, there was nothing in the record or in defendant's brief to indicate (1) that defendant made any effort to request an attorney, seek bail, or demand a speedy trial prior to June 2001; (2) that the State delayed bringing defendant to trial for any prejudicial or improper reason; or (3) any prejudice to defendant by the delay; thus, defendant's right to a speedy trial was not violated by the pre-indictment delay. Young v. State, 891 So. 2d 813 (Miss. 2005).

Delay in trial caused when state reindicted defendant twice in good faith weighed less heavily against state in speedy trial analysis than if state had acted in bad faith. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A defendant's right to a speedy trial was not violated, even though the defendant was tried for capital murder more than 270 days after his original arraignment on an indictment for murder less than capital, where the defendant was reindicted for capital murder and was tried well within the 270-day rule from the time of the arraignment on the capital murder charge. Galloway v. State, 574 So. 2d 1 (Miss. 1990).

A simple delay between the date of an offense and the date of the indictment is not per se reversible error, particularly when the reason for the delay is for the purpose of concealing the identity of an undercover agent for a reasonable period of time so that he or she may continue to work effectively as an agent. Thus, a defendant was not denied his right to a speedy trial where a 10-month delay from the time of the criminal act to the charge and arrest was caused by the State's pursuance of a continuing undercover operation. Dedeaux v. State, 519 So. 2d 886 (Miss. 1988).

Twenty-one month delay in bringing defendant to trial following arrest violates defendant's right to speedy trial where there is one year delay in indicting defendant for offense of house burglary, defendant files motion to dismiss indictment, state obtains order remanding charge for purpose of reindicting defendant as habitual offender, and state obtains new indictment against defendant 19 months after arrest. Burgess v. State, 473 So. 2d 432 (Miss. 1985).

In a prosecution for the sale of marijuana, defendant's right to a speedy trial as regards delay of prosecution could have accrued no earlier than the date of the return of the indictment where pre-indictment and pre-trial delays were justifiable to conceal the identity of an undercover agent for a reasonable period of time so that he may continue to work effectively as such agent and the date of the indictment was within the two-year time frame set forth in Code 1972, § 99-1-5 during which prosecutions may be commenced. Page v. State, 295 So. 2d 279 (Miss. 1974).

The claim of an accused that he had been denied a speedy trial would not be denied on the ground that the accused had not requested a trial between the date of his indictment and his trial, where the accused was given no notice of the indictment until he was notified to appear for trial, and hence there was no reason for him to request a speedy trial. Bell v. State, 220 So. 2d 287 (Miss. 1969).

30. —Change of counsel, speedy trial.

Delays caused by 2 changes in defense counsel would not be charged against state in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, delay between arrest and trial caused by withdrawal of defendant's attorney which entails allowing new attorney reasonable time to become familiar with case and prepare for trial cannot be weighed against state because it is beyond state's control. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, delay due to changes in defendant's attorneys and defendant's reneging on plea agreement weigh against defendant. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

31. —Plea negotiations, speedy trial.

Plea negotiations that lasted 360 days would not be counted against state in speedy trial analysis; defendant participated or at least acquiesced in negotiations and received some benefit from them. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

For speedy trial analysis, delays from attempts to negotiate plea agreement were not attributable to accused, since there was no evidence in record as to whether defendant acquiesced to these plea negotiations. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, delays caused by plea negotiations are for good cause and have effect of tolling speedy trial clock, although such negotiations should be substantiated by documentation. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

32. — Crowded docket, speedy trial.

Defendant's conviction was affirmed because while it was clear that defendant was not tried within 270 days as required under Miss. Code Ann. § 99-17-1, it was also clear that the reason for the delay was the congested trial docket. Moreover, defendant showed no prejudice to his ability to mount a defense as a result of the delay. Johnson v. State, 69 So. 3d 10 (Miss. Ct. App. 2010), affirmed by 68 So. 3d 1239, 2011 Miss. LEXIS 335 (Miss. 2011).

The defendant was not denied his constitutional right to a speedy trial where the delay of the trial was caused by a congested docket and, although the defendant raised his motion to dismiss two months prior to the actual scheduled date for the trial, he suffered no prejudice. Biggers v. State, 741 So. 2d 1003 (Miss. Ct. App. 1999).

The defendant was not entitled to dismissal for violation of his right to a speedy trial where (1) 296 days of the 640 days between arrest and trial were due to actions of the defendant and 209 days were due to docket congestion, (2) the defendant did not raise the issue of his right to a speedy trial until 458 days after his arrest, and (3) the defendant failed to show any prejudice other than the length of his pretrial incarceration. Bingham v. State, 755 So. 2d 426 (Miss. Ct. App. 1999).

The defendant waived his right to a speedy trial when he pleaded guilty to manslaughter. Rowe v. State, 735 So. 2d 399 (Miss. 1999).

A 419 day delay between arraignment and trial was not a violation of the defendant's constitutional right to speedy trial where (1) 199 days were attributable to motions for continuances and substitutions of counsel by the defendant, (2) 97 days were attributable to an overcrowded court docket, (3) the defendant failed to assert his right to speedy trial until the day of trial, and (4) the defendant failed to show prejudice. Black v. State, 724 So. 2d 996 (Ct. App. 1998).

Delays due to crowded court docket do not weigh as heavily against state, for speedy trial purposes, as do deliberate or purposeful delays. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

A defendant was not denied his constitutional right to a speedy trial, even though 574 days elapsed from the date of his arrest to the date of trial and he properly asserted his right to a speedy trial, where the delay was caused by an overcrowded trial docket and the county's system of assigning each case to a particular judge as that case proceeded up to and through the trial process, and the defendant demonstrated no actual prejudice. McGhee v. State, 657 So. 2d 799 (Miss. 1995).

A defendant was not denied his constitutional right to a speedy trial, even though the length of the delay between the defendant's arrest and his trial was 334 days and the defendant asserted his right to a speedy trial in a timely manner, where most of the delay was attributable to ordinary lag from crowded dockets and court terms, and the defendant did not even attempt to show any particular prejudice resulting from the delay but merely maintained that he had increased anxiety due to the delay. Hurns v. State, 616 So. 2d 313 (Miss. 1993).

A defendant's right to a speedy trial was violated where 301 days elapsed between the day of arraignment and the day of the trial, and the case was continued twice by court order stating that "all cases not otherwise disposed of are hereby ordered continued to the next regular term of court." Although docket congestion is "good cause" for delay in certain circumstances, the State never sought a continuance for this or any other reason, but instead relied on the "mass continuances" routinely made at the end of each court term. Yarber v. State, 573 So. 2d 727 (Miss. 1990).

Where crime with which defendant was charged was committed in April 1971, defendant was indicted by the grand jury in September 1971, defendant was returned to Mississippi in August 1972 following his extradition for an out-of-state trial, and in September 1972, the court offered to try the defendant or pointed out that if he demanded a special venire the case would have to be continued, because the term of court was about to expire, and it could not be extended due to a conflicting term in the same court district, and the case was then set for trial at the next term of court in March 1973, the defendant was not denied a speedy trial. Craig v. State, 284 So. 2d 57 (Miss. 1973).

33. —Incompetency of defendant, speedy trial.

Defendant was not denied right to a speedy trial where, although almost 7 years elapsed between his indictment on charges of murder and aggravated assault and his arraignment, substantially all of the delay was due to defendant's confinement in a state mental institution pursuant to court order, issued shortly after the indictment, finding defendant insane and not competent to stand trial, and trial was set in less than 6 weeks after the court was notified by institution's staff of defendant's competence to stand trial. Smith v. State, 489 So. 2d 1389 (Miss. 1986).

34. —Continuances, speedy trial.

Continuances requested by defendant, including continuance to allow defense counsel additional time for discovery after defendant changed attorneys in immediate days before trial for no compelling reason, would be charged to defendant in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A defendant's constitutional right to a speedy trial was not violated where the defendant was tried 230 days after his arrest, the delay was due to the State's reasonable and legitimate motion for a continuance predicated on the unavailability of a material witness, the defendant's assertion of his right to a speedy trial was made 173 days prior to trial in conjunction with his objection to the State's request for a continuance, and there was no actual prejudice to the defendant in his defense. Box v. State, 610 So. 2d 1148 (Miss. 1992).

A defendant's constitutional right to a speedy trial was not violated, even though 536 days elapsed between the defendant's arrest and his trial and no reason for the delay appeared in the record, where 126 days were attributable to a continuance requested by the defendant, the defendant's first and only assertion of his right to a speedy trial came only one day prior to trial, and the defendant experienced no prejudice as a result of the delay. Spencer v. State, 592 So. 2d 1382 (Miss. 1991).

In determining whether a defendant has been denied his or her right to a speedy trial, a continuance granted to the defendant is counted differently from a continuance granted to the State. Any delay as a result of action by the State without "good cause" causes the time to be counted against the State. A delay caused by the actions of the defendant, such as a continuance, tolls the running of the time period for that length of time, and this time is subtracted from the total amount of the delay. Wiley v. State, 582 So. 2d 1008 (Miss. 1991).

Defendant who was tried 15 months after his indictment for forgery was not denied his right to a speedy trial where he had never asserted that right prior to his trial, several continuances were at his request, and, though defendant claimed he asked for one continuance on the basis of the district attorney's agreement not to prosecute the forgery case if defendant was convicted on other pending charges, there was no proof of such agreement, it would not in any case have been binding on the trial judge's setting of the docket, and defendant showed no prejudice resulting from the delay. Harrington v. State, 336 So. 2d 721 (Miss. 1976).

35. — Guilty plea, speedy trial.

Although defendant argued that he was deprived of his right to a speedy trial, a valid guilty plea operated as a waiver of all non-jurisdictional defects or rights incidental to trial and this included a defendant's right to a speedy trial. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

Inmate's petition for post-conviction was denied because he waived the right to challenge on the basis of speedy trial or a defect in the indictment under Miss. Const. Art. VI, § 169 when he entered a guilty plea. Burch v. State, 929 So. 2d 394 (Miss. Ct. App. 2006).

A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial, including the right to a speedy trial, whether of constitutional or statutory origin. Anderson v. State, 577 So. 2d 390 (Miss. 1991).

A delay of four years and one month in sentencing a defendant following his guilty plea violated his constitutional right to a speedy trial where the State gave no good reason for the delay and the defendant had fulfilled the "probation-like" conditions of deferral of his sentencing. Trotter v. State, 554 So. 2d 313, 86 A.L.R.4th 327 (Miss. 1989).

Nine hundred and forty-six day delay between arraignment and trial on charges of burglary and being habitual criminal does not violate defendant's speedy trial right where defendant is originally imprisoned pursuant to voluntary plea of guilty to what defendant thinks is lesser included offense, such disposition of case takes place well within time required by § 99-17-1, defendant succeeds in having conviction overturned, and trial is held 76 days after order overturning original conviction. Darby v. State, 476 So. 2d 1192 (Miss. 1985).

36. —Totality of circumstances, speedy trial.

Defendant's constitutional right to a speedy trial was not violated because, although there was a delay of 424 days, the case was complicated and required the use of experts for both sides, and a witness did actually identify defendant from a six-photo line-up a few days after the murder. Galloway v. State, 122 So. 3d 614 (Miss. 2013), writ of certiorari denied by 189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685, 82 U.S.L.W. 3685 (U.S. 2014).

Defendant was not denied his constitutional right to speedy trial, considering totality of circumstances; total delay from date of arrest to date of trial was 409 days and thus was presumptively prejudicial, total period of delay after subtracting delays attributable to defendant was 211 days, defendant claimed violation of his constitutional right to speedy trial 3 days before trial, and defendant made no showing of actual prejudice other than his incarceration. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

37. — Prejudice to defendant, speedy trial.

Defendant's right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 was not violated because the prejudice was minimal since the fading memories of potential, unnamed witnesses did not impair defense. Ben v. State, 95 So. 3d 1236 (Miss. Aug. 23, 2012), writ of certiorari denied by 133 S. Ct. 1723, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2589, 81 U.S.L.W. 3555 (U.S. 2013).

Defendant's convictions for aggravated assault and armed robbery were proper because his right to a speedy trial was not violated since the delay was neither intentional nor egregiously protracted,and there was an absence of actual prejudice to the defense. Johnson v. State, 68 So. 3d 1239 (Miss. June 30, 2011).

Defendant was not denied his right to a speedy trial, even though the 14-month delay between the placement of the detainer and defendant's trial date was presumptively prejudicial, because defendant did not file a motion to dismiss for the lack of a speedy trial until one year after his arrest and there was no evidence to support defendant's claim of lost witnesses or his claim that the delay negatively affected the conditions of his confinement under his previous sentence. Clayton v. State, 946 So. 2d 796 (Miss. Ct. App. 2006), writ of certiorari dismissed by 947 So. 2d 960, 2007 Miss. LEXIS 64 (Miss. 2007).

Defendant's right to a speedy trial was not violated because, while a delay did exist, defendant failed to assert his right to a speedy trial, did not object to any delays, other than filing the day before trial a motion to dismiss for failure to provide a speedy trial, and failed to show that he suffered any actual prejudice due to the delay. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Most significant factor was that defendant failed to demonstrate how his incarceration and the 31-month delay between his arrest and trial caused him any actual prejudice. Thus, per the Barker factors, the appellate court found that there was no violation of defendant's constitutional right to a speedy trial; secondly, defendant waived his right to complain about the denial of his statutory right to a speedy trial since he did not assert that right until well after the statutory deadline had passed, and because his assertions as to a denial of his speedy trial rights would not have resulted in a different outcome to the case, counsel was not ineffective in failing to raise said issues. Guice v. State, 952 So. 2d 187 (Miss. Ct. App. 2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Time elapsing from the date of defendant's arrest to the beginning day of his trial was more than 31 months, and was presumptively prejudicial under the Barker factor. However, he had not asserted his right to a speedy trial and on appeal, he did not assert that his defense suffered any prejudice because of his lengthy incarceration; he did not contend that witnesses were unavailable because of the delay or that evidence had been lost or destroyed or that his defense against the charges was affected in any way by the delay, and because no actual prejudice was shown, his constitutional right to a speedy trial was not violated. Guice v. State, 952 So. 2d 187 (Miss. Ct. App. 2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Trial court carefully and patiently examined the testimony and other evidence and provided defendant with ample opportunity to provide evidence that the delay was not attributable to him or good cause; defendant failed to suggest any evidence, potential witness, or case theory which escaped his reach because of the delay, and there was no basis to hold that the delay in the proceedings impaired defendant's defense of the case. Stark v. State, 911 So. 2d 447 (Miss. 2005).

District court's ruling that the government could not seek the death penalty against a defendant charged with carjacking resulting in death in violation of 18 U.S.C.S. § 2119(3) was vacated where the 16-month delay between the indictment and the government's notice of appeal was not long enough to weigh heavily in favor of presuming prejudice to the defendant, the government's use of two continuances within one year of the indictment to further investigate was permissible, there was no evidence to support the finding that the defendant had refrained from appealing a magistrate's rulings based on the government's death penalty representations, and the defendant had not diligently asserted his speedy trial right and failed to show that he was actually prejudiced by any delay. United States v. Frye, 372 F.3d 729 (5th Cir. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1296, 161 L. Ed. 2d 120, 2005 U.S. LEXIS 1580, 73 U.S.L.W. 3495 (2005).

No violation of defendant's constitutional right to a speedy trial occurred where there was no evidence in the record to suggest that defendant had attempted to obtain a ruling on a motion asserting his right to a speedy trial; there was no prejudice to defendant's defense based on the testimony of the defense witnesses, who were clear in their recollection of what transpired on the night of the crime. Anderson v. State, 874 So. 2d 1000 (Miss. Ct. App. 2004).

Defendant's conviction for aggravated assault was proper where his right to a speedy trial was not violated because the claim was not preserved for appellate review; moreover, the evidence defendant complained he was unable to present was cumulative to evidence he did not present; the court could discern no prejudice under those circumstances and there could be no violation of the right to a speedy trial in the absence of prejudice. Woodson v. State, 845 So. 2d 740 (Miss. Ct. App. 2003).

One defendant alleged that the delay in going to trial could diminish the ability of defense witnesses to recall pertinent dates and times that could weaken a possible alibi defense, while the other defendant alleged that the defendant experienced anxiety, depression, mental anguish, and psychological and mental distress due to the delay and also that defendant was unable to remember certain facts and locate alibi witnesses; however, defendants wholly failed in their efforts to demonstrate any actual prejudice and there was no violation of the constitutional right to a speedy trial. Collins v. State, 817 So. 2d 644 (Miss. Ct. App. 2002).

The defendant was not denied his constitutional right to a speedy trial, notwithstanding a delay of almost two years and 11 months between arrest and trial, and that the state offered no explanation for the delay, because the defendant failed to assert his right to a speedy trial and failed to demonstrate any actual prejudice, or the probability, as opposed to possibility, of actual prejudice. Smith v. State, 812 So. 2d 1045 (Miss. Ct. App. 2001).

An almost five year delay between the defendant's second mistrial in 1964 and the entry of a nolle prosequi in 1969 did not violate the defendant's speedy trial rights as the defendant was not retried after his second mistrial and, therefore, there was no prejudice. Beckwith v. Anderson, 89 F. Supp. 2d 788 (S.D. Miss. 2000).

The complete absence of any evidence of actual prejudice to the defendant arising out of a 14 month delay in bringing the defendant to trial outweighed any other considerations that weighed against the state and, therefore, the trial court did not err when it denied the defendant's motion to dismiss the indictment based on a perceived violation of his right to a speedy trial under the Sixth Amendment. Genry v. State, 767 So. 2d 302 (Miss. Ct. App. 2000).

A five year delay between a mistrial in a murder prosecution and the entry of a nolle prosequi did not violate the defendant's constitutional right to a speedy trial because the defendant was not retried after the mistrial and, therefore, suffered no prejudice. Beckwith v. Anderson, 89 F. Supp. 2d 788 (S.D. Miss. 2000).

The defendant's constitutional right to speedy trial was not violated, notwithstanding that 11 months elapsed from the time of his arrest to his trial and that the state did not show good cause for the delay, where (1) although the defendant was imprisoned for a period of time before trial, most, if not all, of his period of imprisonment stemmed from his parole revocation and conviction on subsequent criminal charges, and (2) he did not assert his right to a speedy trial until nine months after his arrest. Jones v. State, 756 So. 2d 852 (Miss. Ct. App. 2000).

There was no violation of the defendant's constitutional right to a speedy trial, notwithstanding a delay of approximately 400 days from the date of his arrest or indictment to the date of his trial, where the defendant did not seek a dismissal until 20 days prior to going to trial and there was no demonstration of actual memory loss by witnesses which might have caused prejudice. Riggs v. State, 744 So. 2d 365 (Miss. Ct. App. 1999).

The defendant's right to a speedy trial was not violated where (1) when tolling the clock for several continuances, defense attorney substitutions, psychiatric evaluation, and the defendant's skipping bond, only 265 days, at most, could be charged against the state, (2) although the defendant was incarcerated for a substantial period of the delay, his incarceration was caused by his skipping bond and unrelated offenses, and (3) there was no impairment of the defense. Elder v. State, 750 So. 2d 540 (Miss. Ct. App. 1999).

The defendant failed to establish prejudice arising from the delay of his trial, notwithstanding his contentions that (1) he was unable to adequately prepare his case, and (2) since the state did not simultaneously prosecute him on his four outstanding indictments he could not take the witness stand in his defense without the trial jury becoming aware of his previous convictions for similar crimes. Robinson v. State, — So. 2d —, 1999 Miss. App. LEXIS 320 (Miss. Ct. App. June 8, 1999), remanded by 761 So. 2d 209, 2000 Miss. LEXIS 147 (Miss. 2000).

The defendant was not prejudiced by the fact that she suffered a ruptured brain aneurysm during the delay between her arraignment and trial, notwithstanding that she may have suffered loss of memory because of her condition, as the ruptured aneurysm was in no way caused or exacerbated by the state. Swindle v. State, 755 So. 2d 1158 (Miss. Ct. App. 1999).

The absence of a witness did not constitute prejudice where the defendant never proffered anything at trial describing the potential testimony of the witness, other than saying that the defense anticipated him to testify that if the defendant hadn't shot the victim, the victim "would have killed us all," and such statement was cumulative to testimony received from another witness. Swindle v. State, 755 So. 2d 1158 (Miss. Ct. App. 1999).

The defendant was not prejudiced by a delay in his sentencing, which was deferred to give him an opportunity to make restitution, notwithstanding the contention that had sentence been imposed, he would have not committed a subsequent offense for which he was indicted as an habitual criminal. Massengill v. State, 755 So. 2d 492 (Miss. Ct. App. 1999).

The defendant was not entitled to reversal of his conviction for murder on the basis of a violation of his right to a speedy trial where (1) the delay was for good cause, as it was requested by the state so that it could locate a material witness, (2) the defendant waited until the Friday before the trial was set to start on a Monday morning and then filed his motion for a speedy trial, and (3) the defendant suffered no prejudice other than continued incarceration during the time while waiting to be brought to trial. Holiday v. State, 1999 Miss. App. LEXIS 15 (Miss. Ct. App. Jan. 26, 1999), opinion withdrawn by, substituted opinion at 739 So. 2d 394, 1999 Miss. App. LEXIS 176 (Miss. Ct. App. 1999).

The defendant was not entitled to dismissal for violation of his right to a speedy trial where (1) 296 days of the 640 days between arrest and trial were due to actions of the defendant and 209 days were due to docket congestion, (2) the defendant did not raise the issue of his right to a speedy trial until 458 days after his arrest, and (3) the defendant failed to show any prejudice other than the length of his pretrial incarceration. Bingham v. State, 755 So. 2d 426 (Miss. Ct. App. 1999).

The defendant failed to show that he was prejudiced by a 38 month delay, notwithstanding his assertion that he had grown significantly during that time and that his defense of duress was harmed by his change in appearance, as he was no longer smaller than his codefendant; the fact that his appearance changed and that he looked less sympathetic was one of the inexorable realities of the end of adolescence, and pictures and verbal descriptions used at his trial established his earlier appearance. Biggs v. State, 741 So. 2d 318 (Miss. Ct. App. 1999).

The defendant failed to show prejudice caused by a 12 month delay where the record was devoid of any testimony from the defendant himself reflecting anxiety and concern, and there was no evidence that his defense was impaired. Arthur v. State, 735 So. 2d 213 (Miss. 1999).

The delay in the defendant's trial was not presumptively prejudicial where (1) at the time the first capias was executed, the defendant was incarcerated elsewhere pending prosecution for murder, and (2) after the defendant entered a plea agreement in that matter, he was expeditiously arraigned on the crime at issue and trial occurred within eight months of such arraignment. Davis v. State, 750 So. 2d 552 (Miss. Ct. App. 1999).

The defendant was not entitled to the reversal of his conviction, notwithstanding a 501 day delay from his arrest to his trial since the only prejudice asserted was that the memory of the arresting officers had diminished but the record did not support such assertion where the primary arresting officer and the remaining officers testified regarding many details of the events surrounding the issuance of the search warrant and the subsequent search. Bryant v. State, 746 So. 2d 853 (Miss. Ct. App. 1998).

The trial court did not improperly dismiss the speedy trial claim where the reasons for the delay were valid, the assertion of the right only occurred near the time of the trial, and there was no showing of actual prejudice. Hogan v. State, 730 So. 2d 94 (Miss. Ct. App. 1998).

Five-year period between mistrial on defendant's murder charge and entry of nolle prosequi of indictment, which was followed more than twenty years later by reindictment and conviction, did not violate defendant's right to speedy trial, though length of such period was presumptively prejudicial to defendant; defendant never asserted his speedy trial rights, defendant acquiesced in delay caused by state agency's assistance to his defense without prosecution's knowledge, and defense was not prejudiced, as all material evidence from prior proceedings was preserved. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Defendant's right to speedy trial was not violated by 554-day delay between arrest and trial, even though delay was due to crowded docket and weighed against state, where defendant suffered no prejudice as a result of the delay and defendant was out on bond pending trial. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Delay may prejudice defendant, for speedy trial purposes, in two ways; delay may actually impair defendant's ability to defend himself, and defendant may suffer because of restraints to his liberty. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Incarceration before trial is not alone enough prejudice to warrant reversal of conviction on ground that defendant was denied speedy trial. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In speedy trial analysis, defendant was not prejudiced by his inability to talk with potential alibi witnesses, due to his incarceration prior to trial; record mentioned names of no potential alibi witnesses who had suffered memory loss or who could not be found, and defense counsel could have traced leads at defendant's direction. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

For speedy trial analysis, prejudice to accused encompasses both actual prejudice in defending case and prejudice from inordinate delay. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Accused may suffer prejudice due to delay, a factor in speedy trial analysis, in form of oppressive pretrial incarceration, anxiety and concern, and impairment of defenses. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Without evidence of absent witness' departure date or expected testimony, accused could not show prejudice from delay in commencement of trial, a factor in speedy trial analysis; moreover, even if accused could have shown prejudice due to absent witness, he would have been barred from doing so, as he raised prejudice from absent witness for first time on appeal. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, defendant may be prejudiced by fact that he has been detained before trial, that he has suffered anxiety as result of delay, or that his defense has been impaired by delay. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, defendant suffers no prejudice from detention when he is out on bail. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, where incarceration is only ground raised by defendant as basis for prejudice, reversal generally will not be required. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether defendant has been prejudiced by delay between arrest and trial such that violation of his constitutional right to speedy trial is implicated, impairment of defendant's defense may occur as result of witnesses dying or disappearing or of loss of memory on part of witnesses. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether defendant has been prejudiced by delay between arrest and trial such that violation of his constitutional right to speedy trial is implicated, anxiety on part of defendant is presumed from mere fact of delay even where defendant does not complain that he has suffered anxiety. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

An aggravated assault defendant was not denied his constitutional right to a speedy trial, even though there was a delay of more than 25 months between the date of his arrest and his trial and the State blamed part of the delay on an overcrowded docket which weighed against the State, where the defendant requested a continuance of an earlier trial date, the victim had to undergo several surgical treatments and it was several months before he was physically able to proceed with the case, the defendant did not raise the speedy trial issue until more than one and ½ years after his arrest, and the defendant failed to show any material prejudice as a result of the delay. Stogner v. State, 627 So. 2d 815 (Miss. 1993).

A defendant was not denied his statutory or constitutional rights to a speedy trial, even though he was arrested on February 13, 1989, arraigned May 5, 1989, and his trial began March 5,1990, where the defendant filed 15 motions before he was brought to trial which substantially contributed to the delay, the record supported the State's position that it could not try the case until the issues of change of venue and admissibility of forensic DNA analysis had been resolved, and the defendant did not contend that the delay either diminished his defense or strengthened the State's evidence, but stated only that he suffered "a great deal of anxiety." Polk v. State, 612 So. 2d 381 (Miss. 1992).

Defendants did not suffer a deprivation of the right to a speedy trial, even though there was a 414-day delay between the date the defendants were arrested and the date of their trial, where a substantial part of the reason for the delay was that the defendants took no steps to secure counsel, and the delay did not operate to their substantial prejudice since there was no evidence of prejudice at trial and the defendants' arrest resulted in their parole revocation and immediate incarceration to complete prior sentences, so that the defendants' lives were not "put on hold" solely as a result of the delay. Jaco v. State, 574 So. 2d 625 (Miss. 1990).

Defendant was not denied her constitutional right to speedy trial, although delay was lengthy, where there were numerous reasons for delay, including defendant's efforts to fight extradition and congested court dockets; further, defendant did not assert right to speedy trial until little over one month before trial and had failed to show any prejudice other than her continuous incarceration. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

Defendant was not denied constitutional right to speedy trial despite asserting that right, when he was tried approximately 33 months after his indictment, where defendant was incarcerated in New York state prison which would not let defendant be moved to Mississippi for trial, and district attorney fulfilled his duty to make diligent, good-faith effort to have defendant returned to Mississippi for trial; defendant also made no allegation in either trial court or on appeal that he lost witnesses or was otherwise prejudiced in trial of his case. Hughey v. State, 512 So. 2d 4 (Miss. 1987).

38. —Presumptive prejudice, speedy trial.

Delay of 15 months before defendant's trial was presumptively prejudicial and the State did not offer a valid explanation for the delay; however, defendant's right to a speedy trial was not denied because, while there was some delay, it was offset by (1) defendant's failure to assert his right to a speedy trial; and (2) his failure to demonstrate any actual prejudice that witnesses were unavailable to testify as a result of the delay. Jackson v. State, 910 So. 2d 658 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

From the date of arrest to the date of defendant's trial, approximately 22 months elapsed, and that presumptive prejudice required the appellate court to consider other Barker factors relating to defendant's right to a speedy trial. Other reasons for the delay were: (1) plea negotiations; (2) change of counsel; (3) the fact the State had to await results from the crime lab after plea negotiations failed; and (4) a preferred trial setting in another case. However, when considered as a whole, the reasons for delay favored neither party, defendant was not prejudiced by his pre-trial incarceration, his alleged demands for speedy trial had generally been in the form of motions to dismiss, and his rights under the Sixth Amendment and Miss. Const. art. III, § 26 were not violated. Grant v. State, 913 So. 2d 316 (Miss. Ct. App. 2005).

Delay of almost 26 months between indictment and trial warranted presumption of prejudice, thereby triggering inquiry into other constitutional speedy trial factors. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) Kolberg v. State, 704 So. 2d 1307 (Miss. 1997).

Presumptive prejudice, requiring further inquiry into remaining factors for determining whether speedy trial violation has occurred, arises where there has been delay of eight months or more before trial. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

In speedy trial analysis, delay of 8 months is presumed prejudicial. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In determining whether constitutional right to speedy trial has been denied, delay is triggering mechanism and must be presumptively prejudicial or analysis is halted. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Delay of 280 days from time defendant's constitutional right to speedy trial attached to time trial began was presumptively prejudicial for purposes of speedy trial analysis. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Although accused was presumptively prejudiced by 280-day delay before trial, he was not denied right to speedy trial, since he failed to ask for speedy trial until trial, he moved for continuance before trial, and he failed to show prejudice from the delay. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

For purpose of constitutional speedy trial analysis, delay which is presumptively prejudicial to defendant will not require reversal in and of itself but will require that remaining factors in determining whether claim of constitutional violation is justified be examined closely. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Delay of 409 days between arrest of defendant on charge of capital rape and commencement of trial was presumptively prejudicial, and triggered examination of remaining factors to determine whether violation of defendant's constitutional right to speedy trial had occurred. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A 6-month delay between a mistrial and a retrial was not "presumptively prejudicial," and therefore the defendant's constitutional right to a speedy trial was not violated by the delay. Handley v. State, 574 So. 2d 671 (Miss. 1990).

A trial within approximately 90 days of the attachment of a speedy trial right does not amount to a presumptively prejudicial delay. Livingston v. State, 525 So. 2d 1300 (Miss. 1988).

39. — Timely assertion of right, speedy trial.

Defendant's right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 was not violated because despite the anxiety and hardship that defendant could have endured, he waited until two weeks before his initial trial date to assert his right to a speedy trial; although defendant's motion included a request for a speedy trial, the context and timing of the motion showed that he was actually seeking dismissal, not a trial. Ben v. State, 95 So. 3d 1236 (Miss. Aug. 23, 2012), writ of certiorari denied by 133 S. Ct. 1723, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2589, 81 U.S.L.W. 3555 (U.S. 2013).

There was no violation of the defendant's constitutional right to a speedy trial, notwithstanding a delay of approximately 400 days from the date of his arrest or indictment to the date of his trial, where the defendant did not seek a dismissal until 20 days prior to going to trial and there was no demonstration of actual memory loss by witnesses which might have caused prejudice. Riggs v. State, 744 So. 2d 365 (Miss. Ct. App. 1999).

The defendant's right to a speedy trial was not violated, notwithstanding a 474 day delay between his arrest and trial where the reason for the lengthy delay was that the defendant was reindicted, he did not demonstrate any prejudice to himself or his defense by the delay, and he did not assert his right to a speedy trial until two days before trial. Jamison v. State, 741 So. 2d 359 (Miss. Ct. App. 1999).

The defendant failed to properly assert his right to a speedy trial where he made no demand for a speedy trial before the selection of the jury. Henderson v. State, 732 So. 2d 211 (Miss. 1999).

The trial court did not improperly dismiss the speedy trial claim where the reasons for the delay were valid, the assertion of the right only occurred near the time of the trial, and there was no showing of actual prejudice. Hogan v. State, 730 So. 2d 94 (Miss. Ct. App. 1998).

The defendant's right to a speedy trial was not violated where (1) the state offered valid reasons for all of the delays from the defendant's arrest in October of 1994 until his trial in February of 1997, (2) most of the delays were either for neutral reasons or at the request of the defense, (3) the defendant did not show any actual trial prejudice and relied entirely on the "presumed" prejudice resulting from pre-trial incarceration, and (4) the defendant did not make a demand for a speedy trial until September of 1996 when he filed his motion to dismiss, which motion was made after he agreed to continuances, moved for his own continuance, and moved for a severance from his codefendant. Horton v. State, 726 So. 2d 238 (Ct. App. 1998).

Defendant's initial assertion of his right to speedy trial in his motion to dismiss for failure to transcribe some proceedings while defendant was represented by his original trial counsel was not equivalent of demand for speedy trial and, thus, dilatory assertion of right to speedy trial weighed against him in constitutional analysis. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) Kolberg v. State, 704 So. 2d 1307 (Miss. 1997).

In speedy trial analysis, defendant's failure to bring denial of speedy trial issue up until trial, as well as defendant's motion for continuance, which could be considered as contrary to any concerns about speedy trial, weighed in favor of state. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Late filing by defendant asserting his right to speedy trial is not fatal to defendant's claim of violation of constitutional right to speedy trial. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Filing of motion to dismiss for denial of defendant's right to speedy trial 3 days prior to trial date was not fatal to defendant's claim, but weighed less heavily than an earlier assertion of his right would have done in analysis of whether his constitutional right to speedy trial was violated. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

40. —Manner of asserting right, speedy trial.

Defendant's embezzlement conviction was proper where his speedy trial rights were not violated because, by falsely agreeing to repay the owner, defendant avoided pursuing an indictment against him, and thus, the delay until August 2001 was a neutral factor Further, defendant did not diligently pursue a speedy trial. Crimm v. State, 888 So. 2d 1178 (Miss. Ct. App. 2004).

Assertion of constitutional right to speedy trial need not be in writing. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

41. — Failure to assert rights, speedy trial.

Defendant's claims for speedy trial violations neither established a plain-error basis to justify further appellate review, nor evidenced a miscarriage of justice; regarding delay, the record reflected that defendant assented to the entry of nine separate "Agreed Orders of Continuance" and filed numerous pre-trial motions, and defendant did not suffer prejudice due to a change in a witness's testimony. Dora v. State, 986 So. 2d 917 (Miss. 2008), writ of certiorari denied by 555 U.S. 1142, 129 S. Ct. 1009, 173 L. Ed. 2d 302, 2009 U.S. LEXIS 780, 77 U.S.L.W. 3429 (2009).

Defendant's right to a speedy trial did not automatically warrant reversal of defendant's conviction for an alleged violation of the right; rather, a balancing test was conducted, and moreover, defendant's demand for a dismissal of the charge based on an alleged violation of the right to a speedy trial was not the same as the demand for a speedy trial. Guice v. State, 952 So. 2d 129 (Miss. 2007), writ of certiorari denied by 552 U.S. 1042, 128 S. Ct. 645, 169 L. Ed. 2d 515, 2007 U.S. LEXIS 12594, 75 U.S.L.W. 3274 (2007).

Defendant was not denied his right to a speedy trial where he never asserted the right to a speedy trial, and the record showed that he was trying to avoid a trial, rather than assert his right to a speedy trial. He did not appear at his first scheduled trial and twice fired attorneys shortly before other trial dates were set to occur. Bindon v. State, 926 So. 2d 222 (Miss. Ct. App. 2005).

There was no violation of defendant's constitutional right to a speedy trial because defendant was responsible for much of the extraordinary 37-month lapse of time between his arrest and his trial due to his failure to provide necessary documentation to the hospital for a mental examination, his preparation for trial, and the illness of his counsel. Also defendant failed to assert his right to a speedy trial and to show any real prejudice that outweighed any delay resulting from the trial court's schedule. Jones v. State, 902 So. 2d 593 (Miss. Ct. App. 2004), writ of certiorari denied by 901 So. 2d 1273, 2005 Miss. LEXIS 336 (Miss. 2005).

Defendant failed to raise the issue of denial of a speedy trial in his motion for a new trial; there was no trial court order to review, no findings on the record, no response from the State as to the pre-indictment delay; there was nothing to indicate that the State delayed bringing defendant to trial for any prejudicial or improper reason; and there was nothing in the record to indicate any prejudice to defendant by the delay; thus, there was simply nothing at all for the appellate court to review. Therefore, the pre-indictment speedy trial issue was not properly before the appellate court. Young v. State, — So. 2d —, 2004 Miss. LEXIS 588 (Miss. May 27, 2004), opinion withdrawn by, substituted opinion at 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

While the length of delay was presumptively prejudicial and the State offered no legitimate reason for the delay, defendant failed to demand a speedy trial and failed to show any resulting prejudice; thus, defendant's right to a speedy trial was not violated. Green v. State, 856 So. 2d 396 (Miss. Ct. App. 2003), reversed in part by, remanded by 884 So. 2d 733, 2004 Miss. LEXIS 714 (Miss. 2004).

The defendant's constitutional right to speedy trial was not violated, notwithstanding that 11 months elapsed from the time of his arrest to his trial and that the state did not show good cause for the delay, where (1) although the defendant was imprisoned for a period of time before trial, most, if not all, of his period of imprisonment stemmed from his parole revocation and conviction on subsequent criminal charges, and (2) he did not assert his right to a speedy trial until nine months after his arrest. Jones v. State, 756 So. 2d 852 (Miss. Ct. App. 2000).

The defendant was not denied his constitutional right to a speedy trial, notwithstanding a delay of about 1051 days from his arrest to the commencement of trial, where (1) much of the delay was attributable to the defendant, (2) the delays attributable to the state were necessary for pre-trial business such as the appointment of counsel, a preliminary hearing, the indictment and arraignment, the hearing of several defense motions, the appointment of additional counsel, the granting of a defense expert, the hearing of more motions, a rule on expert fees, and the hearing of a suppression motion, (3) the defendant did not request a speedy trial and only moved for dismissal for the denial of a speedy trial, and (4) there was no prejudice shown by the defendant. Brewer v. State, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

The defendant's right to a speedy trial was not violated where (1) the case was twice continued, first by agreement of the parties, and, next due to a conflict with other trials, (2) there was no actual prejudice to the defendant other than his continued incarceration, and (3) the defendant did not demand a speedy trial until two months before trial when he made a motion to dismiss for failure to try. Rhyne v. State, 741 So. 2d 1049 (Miss. Ct. App. 1999).

The defendant's right to a speedy trial was not violated where (1) the length of the delay was 390 days, (2) the defendant did not raise the speedy trial issue until his motion to dismiss was made on the day of the trial, and (3) the defense was not prejudiced in any way by the delay, notwithstanding the contention that the victim's recollection would have been fresher and she would not have "misidentified" the defendant if he had been tried more promptly. Evans v. State, 742 So. 2d 1205 (Miss. Ct. App. 1999).

The defendant was not forced to choose between his constitutional right to confront a witness against him and his constitutional and statutory rights to a speedy trial when he chose to waive his right to confront an absent chain-of-custody witness and where the trial court questioned him about his decision to go to trial instead of waiting until the next term of court when the witness would be available to testify. Jamison v. State, 741 So. 2d 359 (Miss. Ct. App. 1999).

The defendant waived his right to a speedy trial where he failed to complain about speedy trial issues before pleading guilty. Finley v. State, 739 So. 2d 425 (Miss. Ct. App. 1999).

A 419 day delay between arraignment and trial was not a violation of the defendant's constitutional right to speedy trial where (1) 199 days were attributable to motions for continuances and substitutions of counsel by the defendant, (2) 97 days were attributable to an overcrowded court docket, (3) the defendant failed to assert his right to speedy trial until the day of trial, and (4) the defendant failed to show prejudice. Black v. State, 724 So. 2d 996 (Ct. App. 1998).

Defendant failed to establish speedy trial violation in connection with delay of more than 18 months between his arrest and his indictment and trial, particularly as defendant failed to point to any evidence establishing reason for delay or showing how he was prejudiced, and defendant never asserted his right to speedy trial. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

Defendant has some responsibility to assert right to speedy trial, although state has duty to ensure that defendant receives speedy trial. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Defendant's failure to ask for speedy trial is not dispositive in speedy trial analysis, but must be weighed against other factors. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Although defendant is not required to demand speedy trial, his assertion of such right will weigh more heavily in his favor when determining whether his constitutional right to speedy trial has been violated. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A defendant was denied his constitutional right to a speedy trial where 610 days elapsed from the date of indictment to the date of trial, even though the defendant failed to assert his right to a speedy trial. Although a defendant may have some responsibility to assert his or her speedy trial claim, the primary burden is on the courts and the prosecutors to assure that cases are brought to trial. Thus, the defendant's failure to "consistently badger" the prosecution to proceed with his trial did not eliminate his claim that he was denied a speedy trial. Flores v. State, 574 So. 2d 1314 (Miss. 1990).

A request for a speedy trial is mandatory. New Orleans Baptist Theological Sem. v. Lacy, 219 So. 2d 673 (Miss. 1969).

42. — Right not violated, speedy trial.

Other than his assertion of prejudice, defendant offered no substantiation for his claim of prejudice; having conducted an analysis of the Barker factors, and considering the case in its totality, there was no actionable violation of defendant's constitutional right to a speedy trial. Clark v. State, 14 So. 3d 779 (Miss. Ct. App. 2009).

Defendant's speedy trial rights were not denied by a sixteen-month delay because there was nothing in the record to suggest any impairment of the defense. None of the witnesses for either the State or defendant were unavailable due to the delay in his trial, and there was also no claim of loss of evidence. Booker v. State, 5 So. 3d 411 (Miss. Ct. App. 2008), affirmed by 5 So. 3d 356, 2008 Miss. LEXIS 519 (Miss. 2008).

In defendant's driving under the influence case, defendant's right to a speedy trial was not violated because, assuming arguendo that the applicable date of arrest was April 9, 2004, a "presumptively prejudicial" 473-day period of the delay was attributable to the State, however, defendant failed to make timely demand for a speedy trial or to establish any prejudice to his defense as a result of the delay. Murray v. State, 967 So. 2d 1222 (Miss. 2007).

Defendant's conviction and sentence for strong-arm robbery was proper where he failed to show any constitutional speedy trial violations. He caused the delay, failed to assert his right to a speedy trial, and failed to show any resulting prejudice. Johnson v. State, 904 So. 2d 1203 (Miss. Ct. App. 2004).

43. —Burden of proof, speedy trial.

When length of pretrial delay is presumptively prejudicial, burden of persuasion is on state to show that delay did not prejudice defendant and violate his speedy trial rights. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

State bears burden of providing defendant with speedy trial; therefore, delay that is not attributable to defendant counts against the state, unless state can show good cause for the delay. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Accused is not required to put forth affirmative showing of prejudice to prove his right to speedy trial was violated; nevertheless absence of prejudice weighs against finding of violation. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Where a defendant contended that his statutory and constitutional rights to a speedy trial were violated because he was tried more than 600 days after his arrest and arraignment, the State bore the burden of positively demonstrating that the backlog of drug cases in the court system and the state crime lab, which were alleged to be the reasons for the delay, actually caused the delay in that particular case. McGee v. State, 608 So. 2d 1129 (Miss. 1992).

44. — Sufficiency of evidence, speedy trial.

The defendant was not denied his constitutional right to a speedy trial, notwithstanding a two year delay, because (1) the defendant did not raise a speedy trial issue at trial and, therefore, the prosecutor had no reason to present evidence justifying the delay, and (2) there was no undue prejudice, notwithstanding the defendant's assertion that the victim was more robust and that the defendant was on crutches at the time of the incident at issue, while the victim had diminished in size and the defendant had developed a more muscular build at the time of trial. Winters v. State, 797 So. 2d 307 (Miss. Ct. App. 2001).

The defendant's right to a speedy trial was not violated, notwithstanding a delay between arrest and trial of about one and a half years, where no reason was given for the delay, the defendant asserted his right to a speedy trial just prior to trial, and no prejudice was shown. Forrest v. State, 782 So. 2d 1260 (Miss. Ct. App. 2001).

The defendant's constitutional right to a speedy trial was not violated, notwithstanding a 970 day delay from arrest to trial, because (1) the defendant failed to provide any examples of the failure of the state to provide timely discovery material and frequently requested or consented to a number of continuances, (2) the defendant made little attempt to expedite the proceedings against him and, when he finally asserted his right to a speedy trial, it was not done in a timely fashion, and (3) the defendant failed to provide any specific example of how his defense was hampered by delay. Mitchell v. State, 792 So. 2d 192 (Miss. 2001), writ of certiorari denied by 535 U.S. 933, 122 S. Ct. 1308, 152 L. Ed. 2d 218, 2002 U.S. LEXIS 1623, 70 U.S.L.W. 3577 (2002).

The defendant was not denied his constitutional right to speedy trial, notwithstanding that the state failed to seek temporary custody of the defendant for trial while he was imprisoned in Florida after the defendant formally demanded that his constitutional right to speedy trial be honored, because the only prejudice he alleged for the delay in being tried in Mississippi was the fact that he was prevented from the possibility of serving his Florida sentence and any possible Mississippi sentence concurrently. Cressionnie v. State, 797 So. 2d 289 (Miss. Ct. App. 2001), remanded by 174 Fed. Appx. 246, 2006 U.S. App. LEXIS 9927 (5th Cir. Miss. 2006).

The defendant's constitutional right to a speedy trial was not violated, notwithstanding that his trial occurred more than eight months after his arrest, where (1) the main reason for the overall delay in bringing the case to trial was the state's negligence in preparing the indictment which had to be corrected twice, (2) the defendant never moved for a speedy trial and never requested a trial date and, instead, moved to dismiss on speedy trial grounds approximately one and one-half years after his arrest, and (3) the defendant experienced no prejudice due to the delay. Fulgham v. State, 770 So. 2d 1021 (Miss. Ct. App. Oct. 31, 2000).

The defendant was not denied his constitutional right to a speedy trial, notwithstanding a 20-month period between the defendant's arrest and his trial, where (1) one of the primary reasons for the delay was the defendant's and his co-defendants' motion to sever, (2) the defendant did not assert his right to or demand a speedy trial, although he did move for dismissal for violation of his right to a speedy trial, and (3) the defendant alleged no actual harm to his defense. Armstrong v. State, 771 So. 2d 988 (Miss. Ct. App. 2000).

The defendant's constitutional right to a speedy trial was not violated where his original indictment for robbery with a deadly weapon was dismissed without prejudice because of the state's violation of his statutory right to speedy trial, and he was subsequently reindicted for the same crime; there was no prejudice to the defendant, notwithstanding his assertion that he could not locate a material witness, as he made little effort to locate this witness after the original indictment and made no effort to locate the witness after the reindictment, and the defendant had to assume responsibility for delays due to requested continuances. Thompson v. State, 773 So. 2d 955 (Miss. Ct. App. 2000).

The defendant was not denied his constitutional right to a speedy trial, notwithstanding a delay of 14 months and the prompt assertion of his right to a speedy trial, where (1) the delay was caused by docket congestion, ongoing discovery, and other causes beyond the control of the state, and (2) although the defendant remained incarcerated during the delay, such delay did not prejudice his defense. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

The defendant's right to a speedy trial was not violated, notwithstanding a 15 month delay between indictment and trial, where much of the delay was caused by the fact that the defendant had five different attorneys appointed to represent him over that period, the defendant did not assert his right to a speedy trial until 10 days before trial, and the defendant suffered no prejudice. Stokes v. State, 758 So. 2d 452 (Miss. Ct. App. 2000).

There was no violation of the defendant's constitutional right to a speedy trial, notwithstanding a 471 day delay, where the defendant either joined or initiated continuances for all but 54 days of the delay, and she suffered no prejudice as shown by the fact that she claimed that she needed more time to prepare for trial. Taylor v. State, 754 So. 2d 598 (Miss. Ct. App. 2000).

The state observed the defendant's right to a speedy trial where (1) the time period between arrest and trial was about 11 months, (2) the delay was caused, in part, by a congested court docket, (3) the defendant asserted his right to a speedy trial about nine months after his arrest, and (4) no prejudice was caused by the delay. Jones v. State, 1999 Miss. App. LEXIS 613 (Miss. Ct. App. Nov. 9, 1999), opinion withdrawn by, substituted opinion at 756 So. 2d 852, 2000 Miss. App. LEXIS 76 (Miss. Ct. App. 2000).

The defendant's right to a speedy trial was not violated where (1) the delay between arrest and trial was 574 days, (2) a significant portion of the delay was attributable to a series of defense motions filed over a seven month period, (3) the defendant never asserted his right to a speedy trial, and (4) the defense at trial did not suffer due to the passage of time. Brown v. State, 749 So. 2d 82 (Miss. 1999).

Defendant failed to show that he was prejudiced by any speedy trial violation in delay in bringing him to trial on charge of capital murder; defendant did not claim that, because of delay, witnesses scheduled to testify for defense disappeared or that any evidence was lost or destroyed, and there was no showing that defendant could not defend against charge or that State engaged in oppressive conduct. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) Kolberg v. State, 704 So. 2d 1307 (Miss. 1997).

Defendant was not entitled to appointed counsel in pursuing further discretionary review following affirmance of conviction; thus, defendant could not claim ineffective assistance based on counsel's failure to inform him of affirmance in time to file timely petition for rehearing. Harris v. State, 704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

Defendant failed to adequately demonstrate violation of fundamental right regarding his claim of speedy trial violation in connection with delay of more than 18 months between his arrest and his indictment and trial and, thus, reviewing court would not use rule of plain error to hear speedy trial issue, which was not raised in trial court; defendant's discussion of issue on appeal was brief and did not state how delay violated his rights. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

Defendant was not denied right to speedy trial by delay of 1,027 days between arrest and start of trial; delays were caused by plea bargaining, 3 continuances, 2 changes of defense counsel, motion for change of venue, and requests by defense for additional discovery and trial preparation. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

On a record showing a largely unexplained delay of almost 400 days in bringing the accused to trial, aggravated by some 216 unjustified days in delay following the accused's demand that he be brought to trial, and applying the familiar balancing test, the accused's right to a speedy trial was violated and he was required to be discharged. Beavers v. State, 498 So. 2d 788 (Miss. 1986).

45. —Waiver, speedy trial.

Inmate's right to a speedy trial under U.S. Const. Amend. VI and Miss. Const. Art. III, § 26 was waived when the inmate entered a guilty plea to the charges. Battaya v. State, 861 So. 2d 364 (Miss. Ct. App. 2003).

Inmate's petition for postconviction relief on grounds that his counsel was ineffective for failing to inform him of his right to a speedy trial was denied, as the record showed he had been advised of his right to a speedy trial, and by his guilty plea had waived his constitutional and statutory rights to a speedy trial. Turner v. State, 864 So. 2d 288 (Miss. Ct. App. 2003), writ of certiorari denied by 864 So. 2d 282, 2004 Miss. LEXIS 35 (Miss. 2004).

Failure by defendant to assert his constitutional right to speedy trial does not constitute waiver of such right. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

46. —Habitual offender adjudication, speedy trial.

A defendant's right to a speedy trial was not violated, even though 6 years elapsed between the date of indictment and the actual determination of the defendant's habitual offender status, since habitual offender status is not a crime in and of itself, but is merely a status which enhances the sentence imposed for the conviction of an offense, and, therefore, the determination of habitual offender status is not an "offense" to which the right to a speedy trial would apply. Gray v. State, 605 So. 2d 791 (Miss. 1992).

A defendant was denied his constitutional right to a speedy trial, even though he did not assert his right to a speedy trial until 5 days before trial began, where 370 days elapsed between the date he was arrested and the date his trial began and, because the defendant was convicted in federal court on the charge of making a false statement in the acquisition of a firearm 279 days after his arrest in the case in question, the delay resulted in the defendant being sentenced as an habitual offender. Smith v. State, 550 So. 2d 406 (Miss. 1989).

47. — Retrial, speedy trial.

The defendant's constitutional right to a speedy trial was not violated as to a retrial which followed a mistrial since only 165 days elapsed between the mistrial and the retrial and such delay did not constitute presumptive prejudice. Bryant v. State, 746 So. 2d 853 (Miss. Ct. App. 1998).

A defendant was denied his constitutional right to a speedy retrial where there was a 288-day delay which was presumptively prejudicial, the prosecution offered only the court's docket pages as evidence, there was no evidence in the record justifying the delay or rebutting the presumption of prejudice, and the defendant had made a demand for a speedy retrial on October 13, 1987 and the prosecution did nothing until the defendant moved to dismiss in February of 1988. State v. Ferguson, 576 So. 2d 1252 (Miss. 1991).

A defendant was not denied his right to a speedy trial, even though his retrial did not commence until 383 days after the reversal of his original conviction, where part of the delay could be attributed to the logistics of a change in venue, the defendant apparently did not assert his right to a speedy trial, and there was no prejudice, particularly since it was in the defendant's best interest that the retrial be delayed as both parties searched to secure the attendance of a witness whom the defendant claimed was critically important to have as a live eyewitness at trial; the delay did not violate § 99-17-1 since the 270-day rule does not apply to retrials. Mitchell v. State, 572 So. 2d 865 (Miss. 1990).

Defendant's speedy trial rights were not violated by his retrial approximately 352 days after mistrial where some of the delay was caused by overcrowded dockets necessitating continuances, the defendant failed to assert his right until approximately 3 weeks before his retrial was scheduled to begin, and defendant failed to show prejudice resulting from the delay. Kinzey v. State, 498 So. 2d 814 (Miss. 1986).

Where, in a murder prosecution, three trials of the defendant were initiated within two years of the crime, one ending in a mistrial and two resulting in convictions, but both convictions were reversed for improper instructions or improper argument by the prosecutor, and the defendant alleged harassment by the state, the defendant would not be released and the prosecution terminated, the sequence of events in the proceedings not constituting a denial of the defendant's rights to due process and a speedy trial. Smith v. State, 220 So. 2d 313 (Miss. 1969).

48. —Remedies, speedy trial.

Sole remedy for denial of defendant's right to speedy trial is dismissal of charges against him. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

The proper remedy for denial of a defendant's right to a speedy sentencing is to vacate the sentence and release the defendant from custody. Trotter v. State, 554 So. 2d 313, 86 A.L.R.4th 327 (Miss. 1989).

49. —Habeas corpus, speedy trial.

Habeas corpus petitioner failed to show cause for procedural default of his speedy trial claim, where he failed to demonstrate any objective external factor that impeded his counsel's ability to raise speedy trial challenge on direct appeal, and he failed to allege that his counsel's failure to raise challenge was product of ineffective assistance of counsel. Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

50. —Review, speedy trial.

Where defendant did not raise the issue below, an assertion that her speedy trial rights were violated in a manslaughter case was not heard on review since an appellate court was not equipped to be a fact finder. Miller v. State, 956 So. 2d 221 (Miss. 2007).

Defendant failed to adequately demonstrate violation of fundamental right regarding his claim of speedy trial violation in connection with delay of more than 18 months between his arrest and his indictment and trial and, thus, reviewing court would not use rule of plain error to hear speedy trial issue, which was not raised in trial court; defendant's discussion of issue on appeal was brief and did not state how delay violated his rights. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

51. —Postconviction relief, speedy trial.

Inmate's voluntary act of pleading guilty to the crime of manslaughter foreclosed an appellate court from considering issues relating to the voluntariness of a confession or the right to a speedy trial in a motion seeking post-conviction relief. Young v. State, 877 So. 2d 552 (Miss. Ct. App. 2004).

Defendant's delay of nearly seven years waived his right to use postconviction petition to challenge sentencing delay as violation of his right to speedy trial. Marshall v. State, 680 So. 2d 794 (Miss. 1996).

52. —Direct appeal bar, speedy trial.

Habeas corpus petitioner failed to demonstrate that Mississippi's direct appeal bar was not strictly and directly applied near time of petitioner's direct appeal to cases involving speedy trial claims direct appeal raised for first time on collateral review, as required to render bar inadequate as procedural bar. Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

53. Impartial jury — In general.

Trial court properly denied defendant's motion to quash a venire because defendant did not show that the exclusion of persons with surnames beginning with "T-Z," which was due to an algorithm used by the county's computer system, disproportionally affected any distinctive group in the county; defendant failed to meet the burden of showing that the jury did not represent a fair cross-section of the community. Presley v. State, 9 So. 3d 442 (Miss. Ct. App. 2009).

Appellant inmate asserted that he was denied his constitutional rights to notice and jury trial guarantees under the Sixth Amendment but that issue was raised on direct appeal and decided adversely to the inmate; he had been convicted of capital murder and sentenced to death. The inmate did not demonstrate a novel claim or a sudden reversal of law relative to these issues that would have exempted a single one of those claims from the procedural bar of res judicata; in fact, he again relied on Apprendi just as he did on direct appeal but the issue was without merit and currently barred. Havard v. State, 988 So. 2d 322 (Miss. 2008).

There was no evidence of prejudicial effect on the jury by the judge's comments concerning the drug court where the defense did not object once the jury was empaneled and the jury indicated it would fairly decide the case on the facts and law presented; defendant presented no evidence that the judge's comments had a prejudicial effect on the jury except for the fact that they ultimately found him guilty, and the content of the remarks made by the judge were merely informative and could not be deemed inflammatory. Flake v. State, 948 So. 2d 493 (Miss. Ct. App. 2007).

In a capital murder case, excusing a juror who responded affirmatively when asked if any jurors could not read or write did not violate defendant's constitutional right to an impartial jury; the requirement of Miss. Code Ann. § 13-5-1 that a juror be able to read and write is a reasonable and nondiscriminatory regulation that operates equally against all persons tried by juries. Dycus v. State, 875 So. 2d 140 (Miss. 2004), vacated by, remanded by 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212, 73 U.S.L.W. 3528 (2005).

Any problems with media coverage or prior knowledge concerning a trial and the impartiality of a jury could be and were sufficiently cured through a proper and thorough voir dire of the potential jurors; thus, defendant's right to an impartial jury under the Sixth Amendment was not compromised by the identification of the defendant and the victim in the case through a questionnaire that had been mailed to the venire several weeks prior to jury selection. Crawford v. State, 867 So. 2d 196 (Miss. 2003), writ of certiorari denied by 543 U.S. 866, 125 S. Ct. 205, 160 L. Ed. 2d 110, 2004 U.S. LEXIS 6519, 73 U.S.L.W. 3210 (2004).

Until instructed otherwise by the U.S. Supreme Court, the Mississippi Supreme Court declines to apply Ring v. Arizona retroactively. Stevens v. State, 867 So. 2d 219 (Miss. 2003), writ of certiorari denied by 543 U.S. 858, 125 S. Ct. 222, 160 L. Ed. 2d 96, 2004 U.S. LEXIS 6409, 73 U.S.L.W. 3209 (2004), dismissed by 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008).

Two veniremembers were properly excused for cause where they stated unequivocally that they could not vote for imposition of the death penalty; potential jurors may be dismissed when their views would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and their oaths. Wilcher v. State, 863 So. 2d 719 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

The defendant was not denied a fair trial when the trial court refused to quash the venire on the basis that, of the entire venire of 47 jurors selected for service, 16 had been exposed to pretrial publicity, where those 16 jurors were removed from the venire. Baldwin v. State, 732 So. 2d 236 (Miss. 1999).

The fact that a prospective juror lives in a high drug and high crime area is a race neutral reason for the exercise of a peremptory challenge. Baldwin v. State, 732 So. 2d 236 (Miss. 1999).

A defendant's rights under the Confrontation Clause do not extend to the opportunity to impeach the state's primary witness through the testimony of a witness favorable to the defense. Johnson v. Puckett, 176 F.3d 809 (5th Cir. 1999).

In a forgery prosecution, the defendant was not denied his right to confront one of the two persons authorized to sign the checks that he allegedly signed, notwithstanding that the state did not present that person as a witness, since the defendant had every opportunity to subpoena that person and call him as a witness if he believed his testimony would have helped substantiate a defense. Robinson v. State, — So. 2d —, 1999 Miss. App. LEXIS 320 (Miss. Ct. App. June 8, 1999), remanded by 761 So. 2d 209, 2000 Miss. LEXIS 147 (Miss. 2000).

In a prosecution for defrauding the state government and uttering forgery, where the court erroneously permitted a state investigator to testify regarding insurance investigative reports that he was not involved in preparing, the defendant was denied his right to confront the insurance adjuster who investigated and prepared the files. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), reversed by 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

In a prosecution for drive-by shooting, the near identity of the relevant details in all four statements of both codefendants combined with each defendants' admission that he shot from within the automobile, established a particularized guarantee of trustworthiness that permitted the trial court's introduction of the codefendant's written and videotaped confessions, even though those confessions contained admittedly hearsay statements. Moore v. State, — So. 2d —, 1999 Miss. App. LEXIS 204 (Miss. Ct. App. Apr. 20, 1999), reversed by, remanded by 754 So. 2d 1159, 2000 Miss. LEXIS 2 (Miss. 2000).

A defendant charged with contempt of court has no right to a trial by jury. Walls v. Spell, 722 So. 2d 566 (Miss. 1998).

No right to a jury trial exists where the defendant is prosecuted for multiple petty offenses. Walls v. Spell, 722 So. 2d 566 (Miss. 1998).

Jury is to consider only evidence developed at trial in determining its verdict. Collins v. State, 701 So. 2d 791 (Miss. 1997).

A murder defendant was not denied a fair trial by virtue of the fact that 9 of the 42 members of the regular and special venire panels had relatives who had been murdered where 7 of the members of the venire who had had relatives murdered did not serve on the jury and the defense had sufficient peremptory challenges remaining to remove the other 2 jurors if they so desired. Shell v. State, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

A plaintiff in a medical malpractice case was denied her right to an impartial jury where there were over 40,000 persons in the county from which a jury could have been drawn and the plaintiff was limited to a jury pool of 25, 48 percent of which were connected in some way to the defendant doctor, because of the "statistical aberration" of the makeup of the venire and the strong likelihood that the opportunity for undue influence over other jurors in the case was too great. Hudson v. Taleff, 546 So. 2d 359 (Miss. 1989).

It is within the sound discretion of the trial judge to permit jurors to take notes during the trial in cases where it is deemed desirable or necessary in complicated matters or where both parties agree that jurors may take notes. When jurors are allowed to take notes, the judge should give directions and set limitations on the use of the notes. Wash v. State, 521 So. 2d 890 (Miss. 1988), overruled on other grounds, Wharton v. State, 734 So. 2d 985 (Miss. 1998).

In a prosecution for the sale of marijuana, the defendant was denied his right to an impartial jury where, in the presence of the jury, the trial judge accepted a plea of guilty to the same charge from a codefendant and sentenced the codefendant to prison and where the prosecutor in closing argument characterized the jurors as "law enforcement personnel" and, in comparing the criminal justice system to a chain, made the "grand jury link" the same as the other links. Fulgham v. State, 386 So. 2d 1099 (Miss. 1980).

The right to a trial by an impartial jury is guaranteed by the federal constitution and the state constitution. Adams v. State, 220 Miss. 812, 72 So. 2d 211 (1954).

In addition to the right to be tried by fair, unprejudiced, individual jurors, guided by the evidence the right to "fair and impartial trial" means the right to be tried in an atmosphere in which public opinion is not saturated with bias, hatred and prejudice against the defendant. Seals v. State, 208 Miss. 236, 44 So. 2d 61 (1950).

When sixty-five per cent of jurors examined to try defendant accused of murder say that they either have fixed opinions which cannot be changed by evidence or that they are so biased or prejudiced against him that they cannot give him a fair trial, it is impossible for accused to obtain fair and impartial trial in county and motion for change of venue should be granted. Seals v. State, 208 Miss. 236, 44 So. 2d 61 (1950).

54. —Statutes and court rules, impartial jury.

Defendant had no constitutional right to a jury trial on the issue of habitual-offender status. Johnson v. State, 29 So. 3d 738 (Miss. 2009).

The literacy and age requirements of § 13-5-1 do not violate the constitutional rights of accused persons to be tried by an impartial jury. The literacy requirements of the statute are constitutional, and the statute does not bar persons over 65 years of age from serving on a jury, but merely grants those individuals the privilege to claim an exemption should they desire not to serve. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

Mississippi's exemption of jurors who are illiterate or under 21 years of age, pursuant to § 13-5-1, or over 65 years of age, pursuant to § 13-5-25, did not violate the defendant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Turner v. State, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

55. —Administrative proceedings, impartial jury.

In disciplinary proceedings, attorneys have no right to trial by jury. Mississippi State Bar v. Young, 509 So. 2d 210 (Miss. 1987), petition dismissed, 523 So. 2d 323 (Miss. 1988).

56. — Qualification as juror, impartial jury.

The defendant, who was under 21 years old, was not denied his Sixth Amendment fair cross-section right by the fact that a qualified juror is defined, in part, as being over the age of 21. Williams v. State, 772 So. 2d 1113 (Miss. Ct. App. 2000).

Defendant was not entitled to habeas relief based on alleged denial of Sixth and Fourteenth Amendment rights to a fair and impartial jury where juror, who served as foreman, had daughter who was employed by city police department in unknown capacity. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Both circuit clerks and sheriffs qualify as "interested officials" for purpose of rule that participation of interested officials in juror selection violates due process, since both are officers of the court who have duties in the impaneling of juries. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

A juror in a criminal prosecution should have been struck for cause where his sister was employed as an assistant district attorney. Hartfield v. Hartford Life & Accident Ins. Co., 656 So. 2d 104 (Miss. 1995).

A member of an indicting grand jury may not serve on the defendant's petit jury. The accuser may not also be the trier of fact since such a practice is inconsistent with the constitutional requirement of an impartial jury. Hood v. State, 523 So. 2d 302 (Miss. 1988).

Contention that impartiality of veniremen selected to try defendant was reasonably questioned when it became apparent that there were many close associates of law enforcement on it was without merit where only one juror who had relation to law enforcement official actually served on final jury; court will not reverse simply because member or members of jury are somehow connected with law enforcement officials. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Defendant was denied right to fair trial where one member of jury had been witness for prosecution in pretrial hearing concerning motion for change of venue, juror having testified that defendant could receive fair trial in county; trial court erred in refusing defendant's motion for either mistrial or that juror in question be stricken and alternative substituted. Davis v. State, 512 So. 2d 1291 (Miss. 1987), cert. denied, 485 U.S. 913, 108 S. Ct. 1088, 99 L. Ed. 2d 247 (1988).

Refusal of trial court to disqualify for cause juror who is brother-in-law of chief of police who will be witness in case does not deny defendant impartial jury where juror has stated on voir dire that he will not be influenced by fact that brother-in-law will be witness; nor need former member of board of alderman of town employing chief of police be removed for cause. Smith v. State, 465 So. 2d 999 (Miss. 1985).

57. —Publicity, impartial jury.

Publicity associating a defendant with 3 robberies and 3 rapes was insufficient to entitle him to a change of venue for his trial for rape where the publicity consisted of 4 newspaper articles, 3 of which appeared on the front page, and 6 months of silence intervened between the publicity and the trial. McKinney v. State, 521 So. 2d 898 (Miss. 1988), cert. denied, 494 U.S. 1017, 110 S. Ct. 1321, 108 L. Ed. 2d 497 (1990).

Circuit Court's closure order in capital murder case was reasonable regulation of time, place, and manner of newspaper's enjoyment of its First Amendment right; desire of press to inform public about important criminal proceedings can result in publication of matter that can deprive defendant of his right to fair trial; access of press to trial and pretrial processes may be qualified, and record amply supported Circuit Court's finding that unrestricted access to trial process would result in substantial likelihood of defendant being denied fair trial; additionally, newspaper was not being denied access to pre-trial proceeding in perpetuity, because closure order expired once jury was sequestered and trial began; once that point was reached, newspaper would be granted access to complete transcript of all closed, pre-trial proceedings. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

58. — Racial make-up of jury, impartial jury.

Defendant's convictions for murder, sexual battery, and first degree arson were appropriate because the venire from which the jury was selected was produced by a computer that randomly selected names from the voter rolls and defendant made no objection to the selection process, nor did he present any evidence indicating systematic exclusion of blacks in the jury-selection process; defendant objected only to the result of the selection process, not the manner in which the jury was drawn.

Haynes v. State, 934 So. 2d 983 (Miss. 2006), writ of certiorari denied by 549 U.S. 1306, 127 S. Ct. 1874, 167 L. Ed. 2d 365, 2007 U.S. LEXIS 3602, 75 U.S.L.W. 3511 (2007).

In defendant's trial for the sale of cocaine, defendant failed to make a prima facie showing that the fair cross-section requirement was violated; defendant also failed to show that there was a systematic exclusion of blacks from the jury pool. Yarbrough v. State, 911 So. 2d 951 (Miss. 2005).

The trial court did not err in failing to quash the venire on change of venue, notwithstanding that the county in which the jury was chosen had a lower percentage of black citizens than the county in which the crime occurred and the assertion that the defendant was forced to choose between his right to an impartial jury and his right to a jury of his peers. Baldwin v. State, 784 So. 2d 148 (Miss. 2001).

There is no constitutional right to have a jury mirror any particular community; thus, a capital murder defendant, who was granted a change of venue because of pre-trial publicity, was not improperly denied a second change of venue to a county in which the racial makeup more closely reflected that of the county where the crime occurred where the jury that tried the defendant was selected in a nondiscriminatory manner, and there was no evidence that the jurors were not impartial. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge—that the juror indicated she would have difficulty finding suitable child care during the trial—was sufficiently race-neutral. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Some acceptable race-neutral reasons for challenging a juror are: (1) involvement in criminal activity; (2) unemployment; (3) employment history; (4) relative of juror involved in crime; (5) low income occupation; (6) juror wore gold chains, rings and watch; and (7) dress and demeanor. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A murder defendant's argument that the jury was patently flawed because the jury was white and the defendant was black was without merit. The mere fact that a jury is white and a defendant is black does not violate Batson, but rather it is the racially discriminatory exercise of peremptory challenges to strike black jurors from the jury that violates the Batson rule. Sudduth v. State, 562 So. 2d 67 (Miss. 1990).

Although the defendant has a right to be tried by a jury whose members were selected pursuant to a non-discriminatory criteria, the Sixth Amendment to the United States Constitution has never been held to require that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Britt v. State, 520 So. 2d 1377 (Miss. 1988).

59. —Voir dire, impartial jury.

Federal district court correctly denied state death row inmate's habeas corpus petition; comments by a deputy sheriff called as a venireman, stating that he could not be fair because he had seen crime scene photos in the course of his job, did not taint the resentencing jury or deprive petitioner of due process because the deputy was excused as a juror and because there was no indication that the rest of the venire heard his comments. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Defendant was not denied an impartial jury by allegedly inaccurate responses of a juror during voir dire where the juror was asked if he had ever worked as an employee of a law enforcement office agency, belonging to a state or federal, prison or jail system, or any other type of correctional institution, because the dispute over whether the juror worked as a guard rather than in some other capacity was irrelevant. Russell v. State, 849 So. 2d 95 (Miss. 2003).

A trial court in a capital murder prosecution did not abuse its discretion by refusing to grant the defendant's motion for individual sequestered voir dire of the entire venire where the court asked the collective venire about the effect of pretrial publicity or information received about the case, and the court later asked if there was any reason that a juror felt that he or she could not be fair and impartial, and anyone who responded affirmatively was questioned individually in chambers. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Trial judge's refusal to ask questions on voir dire about contents of news reports concerning accused, who was convicted of murder and sentenced to death, did not violate Sixth or Fourteenth Amendments, where eight of twelve venire persons who were sworn as jurors had answered on voir dire that they had read or heard something about case, but none of eight indicated he or she had formed opinion or would be biased; previous Supreme Court cases had stressed wide discretion of to trial court in conducting voir dire regarding pretrial publicity; since trial judge sat in locale where pretrial publicity was said to have effect, his perception of depth and extent of news stories should be of assistance in deciding how detailed an inquiry to make; voir dire in instant case was not perfunctory and covered subject of possible bias from pre-trial publicity. Mu'Min v. Virginia, 500 U.S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991), rehearing denied, 501 U.S. 1269, 112 S. Ct. 13, 115 L. Ed. 2d 1097.

Prosecutors are not limited in use of any legitimate informational source available as to jurors, nor does prosecutor have to question juror in open court about such information before using it as racially neutral ground to make peremptory strike, as long as source of information and practice itself are not racially discriminatory. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Where funds to pay special prosecutor, in prosecution for murder, were raised by public subscription, defendant's request for list of contributors to aid in selection of jury should have been granted, but it was not reversible error to refuse since each prospective juror could have been asked if he had contributed. Seals v. State, 208 Miss. 236, 44 So. 2d 61 (1950).

60. —Peremptory challenges, impartial jury.

Federal district court correctly denied state death row inmate's habeas corpus petition; although defense counsel was forced to exercise a peremptory challenge to exclude a potential juror who should have been excluded for cause, no federal constitutional error occurred because no violation of the state law governing peremptory challenges was shown and because the challenged juror did not ultimately sit on the jury. Holland v.

Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

The defendant's constitutional right to speedy trial was not violated, notwithstanding that 11 months elapsed from the time of his arrest to his trial and that the state did not show good cause for the delay, where (1) although the defendant was imprisoned for a period of time before trial, most, if not all, of his period of imprisonment stemmed from his parole revocation and conviction on subsequent criminal charges, and (2) he did not assert his right to a speedy trial until nine months after his arrest. Jones v. State, 756 So. 2d 852 (Miss. Ct. App. 2000).

In order to prove that state used peremptory challenges in unconstitutional manner, defendant had to show that he was a member of cognizable racial group, that prosecutor exercised peremptory challenges to excuse venireperson of defendant's case, and that there was an inference that the venirepersons were excluded on account of their race; burden thereafter shifts to state to come forward with race-neutral explanation for challenging jurors, but prosecutor's explanation need not rise to level of challenge for cause. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's stated reason for peremptory challenge against juror, that juror stated that there was nothing she could do about the fact that her sister had been accused of but not charged with killing her brother and that the Lord would take care of it, was sufficiently related to murder prosecution so as not to be deemed pretextual, as her statement could be viewed as placing punishment of wrongdoer in the hands of the Lord. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A prosecutor's race-neutral explanation for peremptorily striking a potential juror need not rise to the level of justifying the exercise of a challenge for cause. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

The State's reasons for using 4 of its 5 peremptory challenges against black jurors were sufficiently race-neutral where the first juror had a pending civil lawsuit, the second juror had worked with a defense witness and the prosecution objected to his age and demeanor, the third juror had previously sat on 2 criminal juries which resulted in one "not guilty" verdict and one mistrial, and the prosecutor was unable to make eye contact with the fourth juror while the juror continuously made eye contact with the defendant. Harper v. State, 635 So. 2d 864 (Miss. 1994).

A capital murder defendant was not denied a fair trial because he was forced to use his last peremptory challenge to remove a juror who was allegedly potentially biased since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury so long as the jury that sits is impartial, and the defendant did not show that an incompetent juror was forced to sit on the jury. Mettetal v. State, 615 So. 2d 600 (Miss. 1993).

The Batson rule applies to both a prosecutor's and a defendant's peremptory challenges. Griffin v. State, 610 So. 2d 354 (Miss. 1992).

Although a peremptory challenge cannot be exercised for a racially discriminatory reason, this does not preclude the exercise of a peremptory challenge for a non-race-based reason that objective and fair-minded persons might regard as absurd. Chisolm v. State, 529 So. 2d 635 (Miss. 1988).

61. —Challenges for cause, impartial jury.

Where the evidence showed that the reasons the prosecution in a robbery case struck several jurors included hostile demeanor, acquaintance with the defense team, employment status, and a last name associated with other criminal defendants, a trial court properly overruled a Batson challenge. Gaskin v. State, 873 So. 2d 965 (Miss. 2004).

Prerequisite to presentation of claim of denial of constitutional rights due to denial of challenge for cause was showing that defendant exhausted all of his peremptory challenges and that incompetent juror was forced to sit on jury by trial court's erroneous ruling. McGowan v. State, 706 So. 2d 231 (Miss. 1997).

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

A prerequisite to presentation of a claim of a denial of constitutional rights due to denial of a challenge for cause is a showing that the defendant had exhausted all of his or her peremptory challenges and that the incompetent juror was forced to sit on the jury due to the trial court's erroneous ruling. Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

The denial of a challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror. Thus, a trial court's refusal to remove 6 jurors for cause did not deprive the defendant of a fair trial where only one of the 6 actually served on the jury and she was not challenged at a time when the defense had 12 peremptory challenges, the defense still had one challenge left as well as an alternate challenge at the completion of the selection process, and the defense counsel never raised any objection to the other 5 jurors. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

62. —Conscientious scruples of jurors, impartial jury.

Defendant was not entitled to habeas relief on claim that venire member was excused without showing of predisposition against death penalty in violation of defendant's Sixth Amendment rights, where prospective juror was a preacher who stated that he could not put aside his strong moral and religious beliefs about the death penalty and follow instructions given by court. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Although record in capital murder case indicated that veniremember who was excused for cause stated during voir dire that he could impose death penalty if circumstances warranted, and that another veniremember with similar name, who was not excused, indicated he could not impose death penalty under any circumstances, trial court did not err, where defense counsel's failure to differentiate between the 2 veniremembers during questioning and parties' subsequent arguments led to conclusion that court reporter mistakenly transposed veniremembers' names. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Even if veniremember who gave conflicting statements as to whether he could impose death penalty was erroneously stricken for cause in capital murder case, defendant's right to impartial jury was not violated, where, because veniremember was panel member number 35, defense would have had to use all 12 peremptory challenges and prosecution would have had to use at least 11 of its peremptory challenges to enable veniremember to serve on jury, and defendant did not claim that any of the 12 jurors who did serve were not impartial. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Even if trial court erred in capital murder case by failing to strike for cause prospective juror who allegedly stated he would always vote for death penalty, defendant's right to impartial jury was not violated, where prospective juror did not serve on defendant's jury panel, and defendant was not forced to use peremptory strike to keep him off panel. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), postconviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Personal opposition to capital punishment is not a constitutional impediment to juror service so long as the juror is able to set aside his or her personal belief and fairly consider all sentencing options under the law; it was therefore error for a trial court to refuse defense counsel an opportunity to further voir dire potential jurors who had expressed reluctance to vote for the death penalty. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution did not deprive the defendant of a jury composed of a fair cross section of the community. Minnick v. State, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

A trial court did not deny defendant's constitutional right to a fair and impartial jury, where it eliminated only those prospective jurors who indicated that their conscientious scruples against the death penalty would prevent them from properly considering the issue of defendant's guilt in accordance with their oath. Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983), rev'd on other grounds, 741 F.2d 805 (5th Cir. 1984), reh'g denied, 747 F.2d 1465 (5th Cir. 1984).

A defendant, found guilty of murder and for whom the jury recommended a sentence of life imprisonment was not deprived of due process and equal protection of the law because of the exclusion of a prospective juror who had scruples against the death penalty, and his exclusion did not result in a panel biased with respect to defendant's guilt. Joseph v. State, 218 So. 2d 734 (Miss. 1969).

63. —Gender discrimination in jury selection, impartial jury.

There was no violation of defendant's constitutional right to a speedy trial under the Sixth Amendment and Miss. Const. art. 3, § 26 or his statutory right to a speedy trial under Miss. Code Ann. § 99-17-1 (Rev. 2000) because although the four-year delay between his arraignment and his trial was unusual, most of the delay was not attributable to the State or defendant, but rather to a crime lab backlog and the appointment of new counsel. Also defendant failed to show he was prejudiced by the delay where he failed to provide the name of an alleged exculpatory witness. Manix v. State, 895 So. 2d 167 (Miss. 2005).

Defendant failed to establish prima facie case of gender discrimination arising from prosecution's exercise of seven peremptory challenges against females where percentage of female venire members struck was nearly equivalent to percentage of females in venire upon which prosecution passed with three peremptory strikes unused; ultimate composition of jury, with eight females, produced percentage of women higher than percentage of females on original venire. Simon v. State, 679 So. 2d 617 (Miss. 1996).

The State was not required to give "gender-neutral" reasons for peremptorily challenging female jurors; the Equal Protection Clause does not extend to gender, and Batson should not be extended to challenges of gender-based discrimination. Simon v. State, 633 So. 2d 407 (Miss. 1993), vacated, 513 U.S. 956, 115 S. Ct. 413, 130 L. Ed. 2d 329 (1994), on remand, 679 So. 2d 617 (Miss. 1996).

64. — Racial discrimination in jury selection, impartial jury.

In defendant's trial for the sale of cocaine, the prosecutor's reasons for striking two potential jurors, based on age and marital status in one instance, and because a juror had had regular contact with defendant in a second instance, were sufficiently race-neutral to survive defendant's Batson challenges. Rogers v. State, 891 So. 2d 268 (Miss. Ct. App. 2004).

Trial court did not err in declaring a mistrial in an armed robbery case because, by the time a Batson challenge was raised, other jurors in the case had already been dismissed; jeopardy did not attach because the record indicated that the jury had not been sworn, despite a trial court's order that stated otherwise. Gaskin v. State, 873 So. 2d 965 (Miss. 2004).

On review, the trial court's determinations under Batson are afforded great deference because they are, in large part, based on credibility; the appellate court will not reverse any factual findings relating to a Batson challenge unless they are clearly erroneous. Murphy v. State, 868 So. 2d 1030 (Miss. Ct. App. 2003), writ of certiorari denied by 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

A Batson challenge based on the race of jurors who were peremptorily challenged was untimely because the challenge was not made until after the jury was selected, sworn, and seated. Dabney v. State, 772 So. 2d 1065 (Miss. Ct. App. 2000).

It is necessary that trial courts make an on-the-record, factual determination of the merits of the reasons cited by the state for its use of peremptory challenges against potential jurors. Robinson v. State, 761 So. 2d 209 (Miss. 2000).

There was no pattern of purposeful discrimination on the basis of race and, therefore, the state was not required to show race-neutral reasons for its peremptory challenges to two black prospective jurors where the state used four of its peremptory strikes on white prospective jurors and used two on black prospective jurors. Fikes v. State, 749 So. 2d 1107 (Miss. Ct. App. 1999).

One factor in determining whether prosecutor's race-neutral explanation for challenge to juror is pretextual is relationship with the reason to the actual facts of the case. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's basis for peremptory challenge against juror, that defense counsel had stated "I love her to death," was sufficiently race-neutral. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Under the Batson test, the prosecutor satisfied the burden of articulating a nondiscriminatory reason for striking a black juror where he explained that he struck the juror because the juror had long unkempt hair, a mustache and a beard, since the wearing of beards and long unkempt hair are not characteristics that are particular to any race. Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), reh'g denied, 515 U.S. 1170, 115 S. Ct. 2635, 132 L. Ed. 2d 874 (1995), on remand, 64 F.3d 1195 (8th Cir. Mo. 1995).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. Colosimo v. Senatobia Motor Inn, Inc., 662 So. 2d 552 (Miss. 1995).

A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in the defendant's case; a defendant may establish a prima facie case of purposeful discrimination in selection of the jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Griffin v. State, 607 So. 2d 1197 (Miss. 1992).

A defendant failed to establish a prima facie case of racial discrimination in jury selection, even though the defendant was black and the prosecution exercised peremptory challenges to eliminate 3 black jurors, where the jurors were excluded because they were acquainted with the defendant; while excluding jurors on the ground that they were acquainted with the defendant might have had a discriminatory effect since the defendant's acquaintances were primarily black, the law does not proscribe the mere incidental exclusion of blacks from a jury. Govan v. State, 591 So. 2d 428 (Miss. 1991).

No prima facie case of racial discrimination was shown in the prosecution's use of peremptory challenges, even though the prosecutor exercised 5 of his 7 peremptory challenges against black jurors, where the victim of the crime charged and the defendant were black, the prosecutor and the defendant had several challenges left, numerous potential black jurors were left uncalled, and one black juror was in the jury box. Dennis v. State, 555 So. 2d 679 (Miss. 1989).

A black defendant made a prima facie showing of purposeful discrimination in the selection of a jury where the jury—including one alternate juror—was composed of 10 white persons and 3 black persons, and where the prosecution exercised 12 peremptory challenges, 7 of which were used to exclude black persons from the jury. Chisolm v. State, 529 So. 2d 630 (Miss. 1988).

Under Batson v Kentucky (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712, defendant raising claim must show (1) he is member of "cognizable racial group;" (2) prosecutor has exercised peremptory challenges toward elimination of veniremen of his race; and (3) facts and circumstances infer that prosecutor used his peremptory challenges for purpose of striking minorities. These components constitute prima facie showing of discrimination necessary to compel state to come forward with neutral explanation for challenging black jurors. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

65. — Race-neutral exercise of peremptory challenges, impartial jury.

During voir dire, defendant challenged four of the state's peremptory strikes against African-American jurors, claiming that they violated the Batson rule requiring the state to provide race-neutral reasons for exercising peremptory strikes; the state provided race neutral reasons for striking four African-American veniremen and thus the state's use of its peremptory strikes against the four veniremen were not pretextual or discriminatory. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

The trial court did not err in finding the state's reasons for peremptory challenges to be facially race neutral where (1) the state used a peremptory challenge against a black social worker and cited as a race-neutral reason, in addition to her profession, her body language and demeanor when informed that the case was a capital murder prosecution, (2) the state struck a potential black male juror for his "bad name" and because he lived in what was known to be a "bad neighborhood" as local law enforcement had informed the prosecution that many persons with this man's surname had been prosecuted in the county, (3) another potential juror struck for living in a "bad neighborhood" was also uncertain regarding his ability to vote for the death penalty, (4) the state used a peremptory challenge against a black woman who had first vehemently expressed her stance against the death penalty and later took the opposite view —

further, this woman's brother had been convicted of aggravated assault and robbery, she had been arrested for DUI, and she lived in a high crime area; (5) a black man was struck for his position against the death penalty and for his DUI conviction, (6) another woman was struck for her body language and for the fact that a relative had been convicted of a crime, (7) the state exercised a peremptory challenge against a black mental health hospital attendant whose opinion regarding the death penalty changed some time between his initial questionnaire and voir dire — he had also been arrested for an expired driver's license, and (8) the state struck a black man who had recently been arrested for an open container violation, while also expressing concern about his truthfulness due to discrepancies between his questionnaire and voir dire. Baldwin v. State, 784 So. 2d 148 (Miss. 2001).

The state presented race-neutral reasons for its peremptory challenges to black jurors where one juror was struck because she was personally acquainted with both the defendant and the victim, one juror was struck because he was personally acquainted with the defendant, the defendant's wife, and the defendant's children; one juror was struck because he was a former client of the defendant's lawyer, one juror was struck because she had a police record, was a known alcoholic, and had several run-ins with police stemming from her drinking problem, and one juror was struck because several witnesses knew him personally and he was known as a long-time alcoholic. Gavin v. State, 767 So. 2d 1072 (Miss. Ct. App. 2000).

A trial judge is not authorized under Batson to defer until the jury selection process has concluded the requirement that the prosecution give its race-neutral reasons for its strikes at the time the inference arises. Florence v. State, 786 So. 2d 409 (Miss. Ct. App. 2000).

The state presented sufficiently race-neutral reasons for its peremptory challenges to five black prospective jurors: (1) a juror's sister had been convicted of a crime and sentenced to the penitentiary; (2) a juror's relative had been convicted of a felony; (3) a juror's husband had been sent to the penitentiary; (4) a juror had a reputation for using drugs and had recently been charged with a DUI; and (5) a juror had several family members who had previous convictions. Myles v. State, 774 So. 2d 486 (Miss. Ct. App. 2000).

The state's explanations for three of seven peremptory challenges to black prospective jurors were sufficiently race-neutral where one juror was stricken because he was acquainted with the defendant's relatives and knew several of the witnesses, another juror was stricken because she knew some of the defendant's family members and made contradictory statements as to whether she believed in the death penalty, and another juror was stricken because she was elderly and thus might not be able to pay proper attention at trial due to her age. Spann v. State, 771 So. 2d 883 (Miss. 2000).

The trial court did not err in finding that the state's peremptory challenges to three black jurors were for racially neutral reasons; one juror was familiar with the defendant's family and also had a brother in prison, another juror was opposed to the death penalty on religious grounds and knew people who were relatives or friends of the defendant, and another juror lived in close proximity to the defendant's mother. Davis v. State, — So. 2d —, 2000 Miss. LEXIS 162 (Miss. June 29, 2000).

The state failed to establish race neutral reasons for its peremptory challenges to several black prospective jurors in the murder prosecution of a black man arising from the death of a white man, where the reasons proffered by the state included (1) a wildly-speculative assertion that two prospective jurors might be the parents of illegitimate children; (2) that one prospective juror seemed to be staring intently at the prosecuting attorney, even though the prosecutor himself was unable to sense any hostility or ill-will; and (3) that another prospective juror slept during a portion of voir dire, though the incident apparently went undetected by the trial court. Robinson v. State, 773 So. 2d 943 (Miss. Ct. App. 2000), remanded by 858 So. 2d 887, 2003 Miss. App. LEXIS 903 (Miss. Ct. App. 2003).

Although the trial judge erred in finding that the defendant failed to establish a prima facie case of discrimination in the exercise of peremptory challenges by the state, the trial judge correctly determined that the explanations offered by the state were race-neutral and that the defendant failed to demonstrate that the state's proffered reasons were pretextual. Puckett v. State, — So. 2d —, 2000 Miss. LEXIS 130 (Miss. June 1, 2000), opinion withdrawn by, substituted opinion at 788 So. 2d 752, 2001 Miss. LEXIS 168 (Miss. 2001).

The circuit court's ruling accepting the state's articulated race-neutral reasons for peremptorily striking a juror was neither clearly erroneous nor against the overwhelming weight of the evidence. Manning v. State, 765 So. 2d 516 (Miss. 2000), writ of certiorari denied by 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142, 2001 U.S. LEXIS 2042, 69 U.S.L.W. 3592 (2001), remanded by 884 So. 2d 717, 2004 Miss. LEXIS 469 (Miss. 2004).

There was no Batson violation where the state offered race-neutral reasons for all of the questioned challenges and the defendant offered no rebuttal to the state's explanations for its peremptory strikes. Gary v. State, 760 So. 2d 743 (Miss. 2000).

The failure of the trial court to make detailed findings with regard to the sufficiency of the race-neutral reasons asserted by the state for its peremptory challenges to six black prospective jurors constituted error and, therefore, the case was remanded to the trial court for a hearing and findings. Johnson v. State, 754 So. 2d 1178 (Miss. 2000).

The trial judge did not err in allowing the prosecution to use peremptory challenges to excuse three jurors on the basis that they were unmarried, unemployed, and had children and, therefore, had no stake in the community. Lard v. State, 749 So. 2d 276 (Miss. Ct. App. 1999).

The trial court in a capital murder prosecution erred by not requiring the State to give racially-neutral reasons for exercising peremptory challenges against 7 out of 13 black jurors on the venire, even though there was no showing that the defendant was of a minority class, and therefore the case would be remanded for a hearing on whether the Batson criteria were violated by the State's exercise of its peremptory challenges. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

The reasons proffered by the State for using 5 of its 7 peremptory challenges against black jurors were sufficient to withstand a Batson challenge where the reasons given were (1) the juror had a brother in the penitentiary; (2) the juror had attended high school with the defendant; (3) the juror wore dark glasses in the courtroom; (4) the juror was employed in a company in which there had been a riot which was quelled by the police; and (5) the juror shared a last name with many persons in the penitentiary and the prosecutor believed he was related to an inmate, and the defense made no attempt to show that the reasons proffered were pretextual, of disparate impact, or not true. Henderson v. State, 641 So. 2d 1184 (Miss. 1994).

The State's reason for striking a potential African-American juror—to get an older man on the jury—was an acceptable, race-neutral reason for exercising a peremptory challenge. Simon v. State, 633 So. 2d 407 (Miss. 1993), vacated, 513 U.S. 956, 115 S. Ct. 413, 130 L. Ed. 2d 329 (1994), on remand, 679 So. 2d 617 (Miss. 1996).

A trial judge is required to make an on-the-record factual determination that each reason proffered by the State for exercising a peremptory challenge is, in fact, race neutral; this requirement is to be prospective in nature. Hatten v. State, 628 So. 2d 294 (Miss. 1993).

The State successfully rebutted a black defendant's Batson challenge to the State's exercise of peremptory challenges to eliminate four black venire members where 2 of the venire members were challenged because they were of an age to be employed and had no occupation, and the other 2 were challenged because they were acquainted with the defendant or her family. Porter v. State, 616 So. 2d 899 (Miss. 1993).

A white defendant had standing to object to the State's use of 5 of its 6 peremptory challenges to strike black jurors; however, the defendant failed to establish a prima facie case of discrimination where the State offered race neutral reasons for striking each individual black juror and the defendant's attorney offered no evidence to rebut the State's reasons for striking the jurors. Green v. State, 597 So. 2d 656 (Miss. 1992).

The reasons given by a district attorney for exercising a peremptory challenge to excuse a black juror were sufficiently race-neutral where the district attorney stated that the juror was a truck driver "which may or may not mean he's a transient," the juror wore overalls with a black T-Shirt in the courtroom, and he was unmarried and did not have children "which shows that he doesn't have a stake in the community like somebody that's established." Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

Jury selection was properly conducted and jurors were not excluded on basis of race where black jurors were excluded for following race-neutral reasons: (1) 22-year-old laborer with eleventh-grade education was stricken because his youth, marital status, and educational level appeared to prosecutor to indicate instability; (2) 49-year-old minister/bus driver was stricken because he was preacher; (3) 35-year-old housewife was removed because she did not reveal her brother's conviction for armed robbery; (4) 38-year-old cafeteria hostess was challenged because of her concerns about sequestration due to having to care for invalid mother; and (5) 25-year-old was stricken from panel because he wore hat into courtroom and his general demeanor suggested to prosecutor that he was unstable, unconcerned, and had no respect for proceedings. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

66 — Race-neutral reason for exclusion, impartial jury.

In a Batson challenge, the defense did not met its burden of showing that the facts and circumstances giving rise to the inference that the prosecutor exercised the peremptory challenges with a discriminatory purpose because the State offered reasons for its peremptory strikes of black venire persons that the trial court considered race-neutral, and the defense failed to rebut those reasons. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

In a capital murder case, the trial court did not err in allowing the State to exercise its peremptory challenges on two black members of the venire as race-neutral reasons for striking them were provided: neither were forthcoming about their arrest records and the underlying crime took place in front of a house belonging to one of the jurors. Howell v. State, 860 So. 2d 704 (Miss. 2003), writ of certiorari dismissed by 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371, 18 Fla. L. Weekly Fed. S 105 (2005).

67. —Capital cases, impartial jury.

Trial court did not abuse its discretion in striking two jurors for cause because: (1) the first juror repeatedly switched positions as to whether she supported or opposed the death penalty, and gave wavering responses when asked whether she could vote for the death penalty; and (2) the second juror responded on her questionnaire that she could not vote for the death penalty, and the trial judge had ample opportunity to observe the second juror's responses and demeanor during voir dire, which he found sufficient to determine that her feelings toward the death penalty would substantially impair her duties to perform as a juror. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Defendant's right to an impartial jury was not violated based on a failure to constitute a cross-section of the community because defendant was not entitled to a jury that mirrored the community; since jury members were selected by computer through voter registration, it was not possible to show that Asian-Americans were systematically excluded from the jury pool. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

In a capital murder case, the unsworn statements of one juror showing that the juror was predisposed to voting for the death penalty without weighing mitigating factors was countered with an affidavit from the juror that the juror had considered all the evidence in the case and the unsworn statement of the second juror did not state that the juror had been silent during voir dire, that she had lied about her views on mitigating evidence, that the juror was unwilling to consider mitigating factors, or that she had a predisposition toward the death penalty that she did not disclose during voir dire; thus, the inmate's claim that the two jurors were predisposed toward voting for the death penalty was unsupported and the inmate was not deprived of his right to a fair and impartial jury under the Sixth and Fourteenth Amendments or Miss. Const. art. 3, §§ 14 and 26. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

A defendant was denied his constitutional right to a fair trial by an impartial jury in the sentencing phase of a capital murder prosecution where, upon conclusion of the guilt phase but before the sentencing phase began, the jury prematurely deliberated and sent a note to the judge indicating their decision that the defendant should be sentenced to death. Rather than questioning the jurors in order to determine whether each of them could remain impartial during the sentencing phase, the judge merely instructed the jurors to "refrain from further deliberations," which was insufficient to insure that the defendant's right to a fair hearing was not prejudiced. Holland v. State, 587 So. 2d 848 (Miss. 1991).

Refusal to grant capital murder defendant's request for change of venue impermissibly deprives defendant of right to impartial jury where defendant has made prima facie showing of community prejudice by submitting affidavit signed by 2 witnesses with knowledge; furthermore, testimony of 15 defense witnesses who state specific reasons why defendant cannot receive fair trial in county in which offense has been committed raises irrebuttable presumption of prejudice. Johnson v. State, 476 So. 2d 1195 (Miss. 1985).

Capital murder defendant is not deprived of right to trial by impartial jury where force and effect of trial court's ruling in improperly excusing juror for cause in order to correct error previously committed by court in refusing to dismiss other jurors for cause, at request of prosecution, after they had unequivocally stated that they could not vote to impose death penalty in any circumstance. Gray v. State, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see Willie v. State, 585 So. 2d 660 (Miss. 1991).

In a prosecution for capital murder, the trial court's excusing of 16 jurors for cause did not violate defendant's Sixth Amendment right to a representative jury, where all 16 who were excluded indicated that they would not follow the law if it meant imposing the death penalty. Booker v. State, 449 So. 2d 209 (Miss. 1984), cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984), vacated, 472 U.S. 1023, 105 S. Ct. 3493, 87 L. Ed. 2d 626 (1985), on remand, 511 So. 2d 1329 (Miss. 1987).

Defendant's Sixth and Fourteenth Amendment rights were not violated in a capital murder case, where the trial court excused a juror for cause who had unequivocally stated that he was opposed to the death penalty to the extent that it would prevent him from making an impartial decision on defendant's guilt, that he would not even consider the court's instructions, and that under no circumstances would he vote for the death penalty. Wilcher v. State, 448 So. 2d 927 (Miss. 1984), cert. denied, 469 U.S. 873, 105 S. Ct. 231, 83 L. Ed. 2d 160 (1984), habeas corpus conditionally granted, 978 F.2d 872 (5th Cir. 1992), reh'g denied, 981 F.2d 1254 (5th Cir. 1992), cert. denied, 510

U.S. 829, 114 S. Ct. 96, 126 L. Ed. 2d 63 (1993), vacated in part, 635 So. 2d 789 (Miss. 1993).

A defendant in a capital murder prosecution was not denied his right to an impartial jury under the Sixth Amendment where the prosecution exercised its peremptory challenges on only the black members of the jury venire. Gaines v. State, 404 So. 2d 557 (Miss. 1981).

68. —Failure to object, impartial jury.

Defendant was barred from asserting claim of state's abuse of its peremptory challenges to exclude all blacks from defendant's jury, which allegedly deprived him of his right to representative jury and to due process of law, where record failed to reflect that defendant had made contemporaneous objection to prosecuting attorney's use of peremptory challenges. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Claim that court erred in permitting state to systematically exclude black veniremen by peremptory challenge, where no objection was raised either during trial or on motion for new trial, was waived and counsel's excuse for waiving claim at trial, that under prior law he felt he would be unsuccessful on point, was insufficient. Jones v. State, 517 So. 2d 1295 (Miss. 1987), vacated 108 S. Ct. 2891, 487 U.S. 1230, 101 L.Ed.2d 925, on remand 602 So. 2d 1170.

Failure of defense counsel to timely object to state's peremptory challenges bars later attempts to advance that claim on appeal; objection is timely only where made prior to impaneling of jury. Jones v. State, 517 So. 2d 1295 (Miss. 1987), vacated 108 S. Ct. 2891, 487 U.S. 1230, 101 L.Ed.2d 925, on remand 602 So. 2d 1170.

Absence of black jurors on jury panel after peremptory challenge by state of only black person who has been called as prospective juror does not violate defendant's right to impartial jury and equal protection where no request has been made for evidentiary hearing and there is nothing to indicate willful, systematic exclusion of black persons from jury. Belino v. State, 465 So. 2d 1043 (Miss. 1985).

69. —Trial conduct, impartial jury.

Defendant's capital murder conviction was proper because his Fifth Amendment and Sixth Amendment rights were not violated by the prosecutor's comments during closing arguments. Wide latitude was given to attorneys in making closing arguments and, given the evidence presented, the court could not say that the verdict was occasioned by unjust prejudice. Davis v. State, 914 So. 2d 200 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 746 (Miss. 2005), writ of certiorari denied by 549 U.S. 856, 127 S. Ct. 133, 166 L. Ed. 2d 98, 2006 U.S. LEXIS 6743, 75 U.S.L.W. 3167 (2006).

In a capital murder case, the inmate alleged that a deputy made improper comments to the jury amounting to unauthorized communications with jurors that prejudiced his case, but the deputy's statement was too innocuous to be prejudicial and the statement alone did not indicate what it was in reference to or the context in which it was made and, even if it was made in reference to the inmate's case, the statement did not show prejudice toward the inmate; thus, the inmate's right to trial by a fair and impartial jury was not violated. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In defendant's conviction for murder of the child while in the commission of felonious abuse and/or battery of the child, there were two notes passed to the trial judge by the bailiff from the jurors, but neither of the notes indicated that the jury had reached a conclusion or that they were deliberating; thus, defendant was not denied the right to an impartial jury. Seeling v. State, 844 So. 2d 439 (Miss. 2003).

Prosecutor's actions in stomping around victim's clothing during closing argument, although theatrical, did not prejudice defendant's right to fair trial, where stomping was brief and part of prosecutor's argument regarding facts of case, although defendant's counsel objected to it, he did not ask court to admonish jury concerning actions, and after objection was sustained, prosecutor continued his argument by changing topics. Berry v. State, 703 So. 2d 269 (Miss. 1997).

Prosecutor's comments during closing arguments that defendant's psychological problems were not special because they have been around since Biblical times did not violate defendant's right to fair trial, as it was merely historical reference to illustrate his point to jury. Berry v. State, 703 So. 2d 269 (Miss. 1997).

Law book sent to jury room, without proper precautions taken to ensure that jury did not read from any inappropriate portions which would conflict with Mississippi law, is extraneous influence upon jury. Collins v. State, 701 So. 2d 791 (Miss. 1997).

Defendant was denied fair trial in murder prosecution when trial court provided jury with law dictionary and directed its attention to definition of premeditation; dictionary's definition of "premeditation" contained cross reference to definition of "malice aforethought" that was inconsistent with state law, and no safeguards were taken to keep jurors from looking into other portions of the dictionary. Collins v. State, 701 So. 2d 791 (Miss. 1997).

In a prosecution for murder, an exclamation from the audience by the victim's mother that the defendant "cold blooded killed my child" did not prejudice the defendant's right to a fair trial where the victim's mother was immediately escorted from the courtroom after her outburst, and the judge then properly admonished the jury to disregard the incident and questioned the jurors to determine whether they could disregard the comments. Bell v. State, 631 So. 2d 817 (Miss. 1994).

A defendant's right to a fair trial by an impartial jury was not prejudiced by the fact that the defendant was brought shackled into the hallway outside the courtroom while some of the jurors were in the hallway, where the defendant was not brought into the courtroom until the shackles were removed, the incident was a technical violation which was not intentional but was coincidental to the jury being out in the hallway, and no evidence was presented to show that the defendant was seen shackled by some of the jury members. Wiley v. State, 582 So. 2d 1008 (Miss. 1991).

Counsel failed to preserve sufficient record from which it could be determined whether mistrial should have been granted where defense counsel brought alleged outside influence of jurors to court's attention through motion for mistrial, but offered little proof in support of this motion; alleged outside influence consisted of juror reporting to bailiff during course of trial concerning rumors regarding defendant's being visited by another prisoner in her cell while the 2 were incarcerated, statement allegedly having been made in front of all other male jurors; court noted that whenever there was question regarding outside influence of jury, trial judge himself ought to examine jury carefully to ensure that its deliberations were based on evidence produced at trial and not extraneous matters. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

70. Appearance of accused in handcuffs, shackles or prison clothes.

In defendant's capital murder case, defendant's right to a fair trial was not violated where the momentary, inadvertent and fleeting sight of defendant in shackles by potential jurors, while being transported into the courtroom, absent prejudice shown, did not require a mistrial. Spicer v. State, 921 So. 2d 292 (Miss. 2006), writ of certiorari denied by 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022, 75 U.S.L.W. 3233 (2006).

71. Confrontation of witnesses — In general.

There was no Confrontation Clause or hearsay violation in an officer's testimony because the officer did not testify that the two people who identified defendant as the shooter were eyewitnesses, the officer did not convey any statements or assertions made by the two anonymous people, either directly or indirectly, and the officer did not reveal the substance of the conversations; the officer stated that defendant became a suspect during the course of her investigation, but it was clear that her investigation involved much more than a conversation with these two people. Thus, it was not apparent that the testimony at issue was hearsay or that the unnamed people could be classified as accusers. Keithley v. State, 111 So. 3d 1202 (Miss. 2013).

Defendant's Sixth Amendment right to confront his accuser was not violated by the court's admission of prior statements by the victim to law enforcement which were inconsistent with his testimony on direct examination and which the victim disclaimed at trial as having been false; victim's appearance on the witness stand at trial provided defendant with the opportunity to confront and cross-examine such victim, which was all that is required by the Sixth Amendment Confrontation Clause. Smith v. State, 25 So. 3d 264 (Miss. 2009).

Trial court permitted defendant to produce evidence of his sons' assault upon the victim through cross-examination of several other witnesses and the trial court's decision not to allow defendant to call the victim's stepbrothers did not deprive defendant of an ample opportunity to present his theory of the case. Caldwell v. State, 6 So. 3d 1076 (Miss. 2009).

Introduction of codefendant's statement was harmless beyond a reasonable doubt where defendant made no effort to suppress his own statements and the only objection made to the introduction of his statement was his joining codefendant's objection on the grounds of hearsay and confrontation; no objection was made which would challenge either the truthfulness, or the voluntariness, or the reliability of defendant's statements, and defendant's confession was the most probative and damaging evidence admitted against him, and it constituted direct evidence of the facts related to the victim's murder; defendant's own statements concerning his participation in the robbery and murder of the victim were uncontradicted and unchallenged, and the evidence in the record was overwhelming and was sufficient to support the jury's verdict. Smith v. State, 986 So. 2d 290 (Miss. 2008).

Defendant's conviction for the sale of a controlled substance was appropriate, in part because defendant suffered no substantial prejudice in that he was not denied his constitutional right to confront witnesses based on the admission of audiotaped telephone recordings of the pre-drug-buy conversations between the confidential informant and unknown persons. Neither the confidential informant nor the law enforcement officials knew the identity of the voices on the tape, other than the confidential informant, nor did the State or any of its witnesses attempt to state or imply that one of the unidentified voices on the tape recording was defendant's. Brown v. State, 969 So. 2d 855 (Miss. 2007).

Victim's mother's testimony about a letter defendant wrote to her while he was incarcerated was an admission by a party-opponent, not considered hearsay, and thus admissible under Miss. R. Evid. 801(d)(2); there could be no violation of the confrontation clause when defendant was the person making the incriminating statement, as defendant could not cross-examine himself, and there was nothing in the testimony about the letter which was an absolute admission of guilt on the part of defendant. Rankin v. State, 963 So. 2d 1255 (Miss. Ct. App. 2007).

Defendant's murder conviction was proper because there was no indication that a witness's co-worker's comments to the witness regarding defendant's identity were "testimonial" within the meaning established by Crawford since the co-worker did not make his comments during a preliminary hearing, before a grand jury, at a former trial, or during a policy interrogation; the co-worker's comments took place between two co-workers at a time when defendant was not a suspect to the murder because, at the time of the comments, no one was aware that the victim had been murdered. Bailey v. State, 956 So. 2d 1016 (Miss. Ct. App. 2007), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

In a robbery case, where defendant's co-defendant had been acquitted and his co-defendant chose "not to testify," the full text of the co-defendant's statement to the police that was admitted into evidence clearly reflected that no specific individual was facially implicated by same. Based on the benign character of the co-defendant's statement in the individual case, and the assuredly disruptive impact that the retroactive application of Crawford v. Washington, 541 U.S. 36, (2004) would undoubtedly have created in the form of innumerable appeals, the appellate court held that Crawford (which barred testimonial out-of-court statements by witnesses under the Confrontation Clause, unless witnesses were unavailable and defendants had prior opportunity to cross-examine them), was not be applied retroactively in defendant's appeal. Bynum v. State, 929 So. 2d 324 (Miss. Ct. App. 2005), affirmed by 929 So. 2d 312, 2006 Miss. LEXIS 261 (Miss. 2006).

Where defendant asserted self defense in what he alleged was the accidental killing of his former girlfriend when he allegedly was confronted by her male friend, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership. However, in a second instance, the State elicited the same information on redirect examination that defendant was barred from eliciting on cross-examination, in regard to whether the male friend had also been a suspect early in the investigation; in the former respect, the error was harmless given the overwhelming weight of the evidence against defendant, and in the latter respect, defendant's right to confrontation was not violated as he suffered no prejudice. Raiford v. State, 907 So. 2d 998 (Miss. Ct. App. 2005).

Trial court erred in admitting police testimony regarding the robbery accomplice's confession because the accomplice refused to testify and the United States Supreme Court has held that under the Bruton rule the lack of cross-examination was a violation of the Confrontation Clause of the Sixth Amendment. However, in light of the overwhelming evidence of defendant's guilt, particularly the testimony of his roommate and former girlfriend, the violation was harmless error. Clark v. State, 891 So. 2d 136 (Miss. 2004), writ of certiorari denied by 544 U.S. 1025, 125 S. Ct. 1999, 161 L. Ed. 2d 869, 2005 U.S. LEXIS 3864, 73 U.S.L.W. 3649 (2005).

Criminal defendant has no Confrontation Clause guarantees at sentencing. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Criminal defendant must be allowed to call witnesses to stand even though defendant is aware that witness, if called, will invoke Fifth Amendment to every question. Butler v. State, 702 So. 2d 125 (Miss. 1997).

The right of confrontation does not require the prosecution to introduce certain witnesses or to call all witnesses who are competent to testify. Harrison v. State, 534 So. 2d 175 (Miss. 1988).

The Confrontation Clause of the United States Constitution operates in 2 separate ways to restrict the range of admissible hearsay. First, in conformity with the preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case, including cases where prior cross-examination has occurred, the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant. The second aspect operates once a witness is shown to be unavailable; reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the clause countenances only hearsay marked with such trustworthiness that there is no material departure from the reason of the general rule. Stoop v. State, 531 So. 2d 1215 (Miss. 1988).

Trial judge committed no error in allowing victim's in-court identification of defendant, despite contention of defendant that in-court identification was result of unnecessarily suggestive viewing of defendant by victim while defendant was being treated at hospital, because under totality of circumstances as contemplated by Manson v Brathwaite (1977) 432 US 98, 53 L Ed 2d 140, 97 S Ct 2243, there was no substantial likelihood of misidentification; analysis of Manson factors showed that victim had viewed defendant at close range for approximately one hour; victim's undivided attention was focused on defendant; victim's initial description of her attacker to police exhibited high degree of accuracy; victim was positive of her identification of suspect, describing his as "a face I'll never forget;" and, time between crime and subsequent confrontation defendant was approximately one hour. Davis v. State, 510 So. 2d 794 (Miss. 1987).

In a sense, the right to confront witnesses clause of the federal and state constitutions are hearsay rules elevated to constitutional status. Mitchell v. State, 495 So. 2d 5 (Miss. 1986).

The confrontation clause operates in two ways to restrict the range of admissible hearsay. First, it establishes a rule of necessity whereby in the usual case the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant. Even then his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. United States v. Washington, 688 F.2d 953 (5th Cir. 1982).

Defendant waived his right to confrontation where he failed to object in the trial court on the constitutional ground later relied upon on appeal as the basis for reversible error. Montgomery v. Parrish, 279 So. 2d 156 (Miss. 1973).

Upon the trial of a defendant in a criminal action, the state is under no duty to produce all of the witnesses present when the defendant's confession was given; except when the voluntariness of the confession is at issue. Bounds v. State, 271 So. 2d 435 (Miss. 1973).

72. —Statutes and court rules, confrontation of witnesses.

Under Rule 803(6), Miss. R. Ev., a custodian of the records of the Mississippi Crime Lab may introduce laboratory reports in a narcotics possession or sale case, except where the defendant objects on the ground that his or her Sixth Amendment right to confront the person who prepared the test is being violated. Kettle v. State, 641 So. 2d 746 (Miss. 1994).

73. —Time right accrues, confrontation of witnesses.

Right of confrontation does not attach until criminal prosecution has begun. Singing River Elec. Power Ass'n v. State ex rel. Miss. Dep't of Envtl. Quality, 693 So. 2d 368 (Miss. 1997).

Although a defendant was entitled to a preliminary hearing, he was not prejudiced by the lack of one where he was afforded ample opportunity through his pretrial hearings to confront the State's witnesses. Rogers v. State, 599 So. 2d 930 (Miss. 1992).

74. —Discovery, confrontation of witnesses.

Defendant's right to a fair trial was not violated where defendant could not show that a discovery violation was committed by the State or that he was prejudiced in any way when there was nothing in the record showing knowledge on the part of the State of either of the two defense witnesses, and defendant made no showing how the police could have known of them and thus failed to disclose them; even though defendant claimed prejudice because police and/or the DA's office failed to find certain witnesses who would have helped him in his defense, he put on no proof at trial of an alleged inadequate investigation. Morris v. State, 927 So. 2d 744 (Miss. 2006).

Electric power company's confrontation clause rights were not violated by denial of access to reports containing identities of informants who told Department of Environmental Quality (DEQ) that electric power company was improperly disposing of regulated environmental waste, where company was not subject of criminal, civil, or administrative charges prior to its filing of complaint. Singing River Elec. Power Ass'n v. State ex rel. Miss. Dep't of Envtl. Quality, 693 So. 2d 368 (Miss. 1997).

A denial of a list of witnesses does not always amount to a prejudicial denial of due process, particularly where student witnesses in a school disciplinary proceeding are involved, since a school board has not been given the power of subpoena. However, school boards should be especially sensitive to the right of students to know the complete nature of the charges, especially where charges of misconduct are denied and proof is based solely on testimony of other students. Although confrontation may not be an absolute necessity—or even advisable—in every case, written statements should ordinarily be provided. Findings of fact should be made, especially where there are multiple allegations. School boards should take note that although courts should not become involved in running schools, expulsion and suspension are severe sanctions requiring solemn attention to a pupil's rights. Jones v. Board of Trustees of Pascagoula Mun. Separate Sch. Dist., 524 So. 2d 968 (Miss. 1988).

Inability of criminal defendant to do independent testing of substance at issue in criminal proceeding does not violate defendant's right to confront state's expert witness who testifies regarding test made on substance where entire substance has been consumed during state testing, and there is no evidence that state tests were unauthorized or that state was negligent in consuming entire substance. Washington v. State, 478 So. 2d 1028 (Miss. 1985).

75. — Child abuse, confrontation of witnesses.

There was no plain error in the failure to either make a Sixth Amendment objection or at least to have such an objection clearly preserved on the record; thus, the court determined that defendant's argument for the first time on appeal that the introduction of a video demonstrating a "shaken baby" episode violated his Sixth Amendment right to confront witnesses was without merit. Rumfelt v. State, 947 So. 2d 997 (Miss. Ct. App. 2006).

In a sexual battery of a child case, the victim's grandmother, the babysitter, the psychotherapist, and the doctor were not working in connection with the police; further, their statements were not made for the purpose of aiding in the prosecution because (1) the victim's unsolicited statements were made to his grandmother and his babysitter for the sake of his well-being and not for the purpose of furthering the prosecution; and (2) his statements to the psychotherapist and the doctor were for the purpose of seeking medical and psychological treatment. The victim was taken to the psychotherapist and the doctor at the family's request and not sent there by police to further their investigation; thus, their testimony did not violate the Confrontation Clause. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

In a sexual battery of a child case, the statements testified to by a police officer and a detective were testimonial and should have been excluded under the Confrontation Clause; therefore, the trial court erred in admitting them. However, similar testimony was properly admitted from four other witnesses; therefore, the testimony was duplicative, and the error was harmless. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

In a prosecution for felonious child abuse arising from the defendant's beating of his 9-year-old son, the defendant's constitutional right to confront his accuser was not violated, in spite of the defendant's argument that his accuser was his wife and that he was not allowed to "confront" her, where the defendant's wife was not a witness at the trial, the defendant was allowed to fully cross-examine all State witnesses against him, and the record did not indicate that the defendant's wife ever accused him of felonious child abuse. Ahmad v. State, 603 So. 2d 843 (Miss. 1992).

In noncriminal cases involving allegations of child abuse by the parent, the right of confrontation should be accorded to the accused parent. Bailey v. Woodcock, 574 So. 2d 1369 (Miss. 1990).

76. —Child witnesses, confrontation of witnesses.

In a case involving sexual abuse of children, defendant's Sixth Amendment claim was rejected because he failed to show that he was prejudiced by the denial of the right to view the demeanor of the children as they testified via closed circuit television, pursuant to Miss. R. Evid. 617. Therefore, defendant's motions for a mistrial and a new trial were properly denied. Rollins v. State, 970 So. 2d 716 (Miss. 2007).

Trial did not violate a defendant's confrontation rights in admitting a child victim's video statement where he was allowed to cross-examine the victim after she testified in court and he was given an opportunity for re-cross-examination after the statement was entered. Penny v. State, 960 So. 2d 533 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 384 (Miss. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 386 (Miss. 2007).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as a part of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause violation argument was without merit. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Social worker was properly allowed to testify as to statements made by the victim in a child-fondling case because Miss. R. Evid. 803(25) applied, and considering the social worker's testimony at the preliminary hearing and the trial court's review of the videotape of the interview, the victim's statements at the interview bore substantial indicia of reliability. Further, defendant's right to confrontation was not violated because the victim testified at trial and defendant cross-examined her. Elkins v. State, 918 So. 2d 828 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), writ of certiorari denied by 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564, 74 U.S.L.W. 3685 (2006).

For statement made by child of tender years describing act of sexual contact performed with or on child by another to be admissible, reliability of statement must be judged independently of any corroborating evidence. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

Sixth Amendment confrontation clause did not absolutely prohibit state from using one-way closed-circuit television for receipt of testimony by child witness in child abuse case, as face-to-face confrontation is not indispensable element of confrontation guarantee, and in narrow circumstances competing interest may warrant dispensing with confrontation at trial and word "confront" cannot simply mean face to face confrontation; statutory procedure insured reliability of evidence by subjecting it to rigorous adversarial testing and thereby preserved essence of effective confrontation; state's interest in physical and psychological well being of child abuse victims may be sufficiently important to outweigh defendant's right to face accusers in court in some cases. Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), on remand, 322 Md. 418, 588 A.2d 328.

77. — Informants, confrontation of witnesses.

In a case involving possession of methamphetamine, possession of precursor materials, and false pretenses, plain error was shown because there was a violation of the state and federal Confrontation Clauses based on the admission into evidence of two search warrants and an affidavit that included hearsay statements attributed to a confidential informant. Regardless of the strength of the properly admitted evidence, it could not have been said beyond a reasonable doubt that the documents did not prejudice defendant. Johnson v. State, — So. 3d —, 2014 Miss. LEXIS 150 (Miss. Mar. 13, 2014).

Even assuming that the issue was not barred, there would be no merit to the confrontation issue where it was clear that the confidential informant did not testify; the right to confront witnesses did not extend beyond those witnesses called to testify against an accused; consequently, there was no merit to defendant's contention that he was denied his right to confrontation as secured under the Sixth Amendment. Sweet v. State, 910 So. 2d 735 (Miss. Ct. App. 2005).

Defendant's confrontation rights are not violated when a police officer testifies about the statement of a confidential informant if the informant is available for cross-examination; moreover, an officer's testimony regarding an informant's statement that defendant sold drugs was not hearsay because it was merely offered to show the reason behind the officer's actions, and it was not offered to prove the truth of the matter asserted. Stubbs v. State, 878 So. 2d 130 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 936 (Miss. 2004).

Statement of an officer to explain why a particular person was approached on a certain date was admissible because it did not constitute hearsay; moreover, the statement did not violate defendant's right to confrontation because the officer was cross-examined at trial, despite the officer's actions being based on the statements of several anonymous tipsters. Hill v. State, 865 So. 2d 371 (Miss. Ct. App. 2003).

The defendant in a drug related prosecution was not denied his right of confrontation by the absence of a confidential informant because the testimony of a police officer with regard to a prior sale of cocaine by the defendant to the informant did not include anything which was outside the realm of his own personal knowledge and did not include anything that was solely within the first hand knowledge of the confidential informant. Donerson v. State, 812 So. 2d 1081 (Miss. Ct. App. 2001).

Tape recordings of defendant's conversation with government informant who did not testify were supported by adequate indicia of reliability to be admissible in drug conspiracy case without violating defendant's confrontation clause rights; government agent was present when conversations occurred and identified defendant's voice, and controlled drug deal occurred in accordance with instructions provided by defendant during one of the recorded conversations. United States v. Dixon, 132 F.3d 192 (5th Cir. 1997), cert. denied, 522 U.S. 1061, 118 S. Ct. 721, 139 L. Ed. 2d 661, 523 U.S. 1096, 118 S. Ct. 1581, 140 L. Ed. 2d 796 (1998).

In a prosecution for sale of a controlled substance, the defendant was not deprived of his constitutional right to confront witnesses on the ground that the State failed to provide information as to the whereabouts of an informant where the defendant did not allege any bad faith by the State, and the State provided evidence as to its good faith attempt to locate the informant. Campbell v. Campbell, 618 So. 2d 116 (Miss. 1993).

A trial court erred in determining that a defendant was not entitled to disclosure of the identity of a confidential informant where, without the informant's eyewitness testimony, the State's case would have rested almost exclusively on the uncorroborated and doubtful testimony of 2 codefendants; however, the trial court's error did not require reversal where the defendant discovered the informant's identity at trial and subsequently confronted and cross-examined him, since confrontation and cross-examination are the very rights which require disclosure of material witnesses in the first place and the defendant fully exercised those rights at the trial. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

The trial court did not err in failing to require the state to divulge the identity of the person who informed the officers that the defendant had contraband in his apartment where the informant was not an active participant in the commission of the crime, nor was he present when the defendant was apprehended in the commission of the crime charged, nor was the informant a witness against the defendant. Wood v. State, 322 So. 2d 462 (Miss. 1975).

Where it appears that an informer was a participant in the crime or is a material witness essential to the defense of the accused, the state must divulge the name of the informer to the defendant. Conviction for possession of marijuana was reversed where the state refused to divulge the name of the informer who knew who had possession of the marijuana within the 24 hours prior to defendant's arrest and who knew that that man was not the defendant. Raper v. State, 317 So. 2d 709 (Miss. 1975).

What an informant told police officers in the course of their investigation was hearsay and inadmissible to the jury, and where such hearsay was incriminating as to the defendant the case was reversed and remanded. Ratcliff v. State, 308 So. 2d 225 (Miss. 1975).

78. — Hearsay, confrontation of witnesses.

Purported statements of unidentified persons at the company that manufactured the bullets involved in a crime constituted hearsay, and because it was unclear who contacted the company, perhaps double hearsay, and its admission resulted in a violation of the Confrontation Clause. Burdette v. State, 110 So. 3d 296 (Miss. 2013).

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. Birkhead v. State, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Neighbor's hearsay testimony did not violate defendant's Sixth Amendment, U.S. Const. Amend. VI, right, because only testimonial hearsay was capable of violating the Sixth Amendment; the victim's child's statements to the neighbor were not made for any prosecutorial purpose and was nontestimonial, and the investigator's testimony was responsive to questions from the State as to why he contacted the Department of Human Services to pick up the children from the scene. Neal v. State, 15 So. 3d 388 (Miss. 2009).

Because defendant could have recalled the victim after the admission of the Miss. R. Evid. 803(25) testimony but chose not to do so, the admission of this hearsay evidence did not violate his Sixth Amendment, U.S. Const. Amend. VI, right to confront his accuser. Caldwell v. State, 6 So. 3d 1076 (Miss. 2009).

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

In a sexual battery and touching of a child for lustful purposes case, as the trial court was correct in its determination that the statements made by the child to her mother and to her therapist were nontestimonial in nature, they did not trigger the protections of the confrontation clause, and defendant's right to confrontation was not violated. Bishop v. State, 982 So. 2d 371 (Miss. 2008).

While the trial court erred in allowing a store clerk's hearsay testimony under Miss. R. Evid. 802 regarding another person telling her defendant's name, it was harmless because the only testimony of that witness that was prejudicial to defendant was all admissible in that the prejudicial feature of the witness's testimony was that she identified defendant, even if she did not know him by name, and she noticed the vehicle that he drove, even if she did not know it to be the victim's. Bailey v. State, — So. 2d —, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), opinion withdrawn by, substituted opinion at, modified by 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

Defendant claimed that his trial counsel was ineffective, but as defendant voluntarily assumed the role of trial counsel, he could not claim that his adviser failed to provide him with adequate representation; simply put, defendant could not benefit on appeal from his own ineptitude at trial. Jackson v. State, 943 So. 2d 720 (Miss. Ct. App. 2006).

Because a laboratory report was admitted without a sponsoring witness, it was hearsay pursuant to Miss. R. Evid. 801(c), and the admission of the report violated defendant's Sixth Amendment right to confrontation because defendant had no opportunity to cross-examine anyone on the conclusions of the laboratory; however, the court concluded that the admission was harmless error because the proper admission of the initial test contained the same evidence, and the testimony of certain witnesses about the initial test was sufficient to support the jury's verdict against defendant. Jones v. State, 881 So. 2d 209 (Miss. Ct. App. 2002), affirmed by 2003 Miss. LEXIS 588 (Miss. Oct. 30, 2003).

Trial judge improperly considered medical evidence as factor in finding sufficient indicia of reliability for admission of child victim's hearsay statement to mother in sexual battery prosecution; to be admissible under Confrontation Clause, hearsay evidence must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. Hennington v. State, 702 So. 2d 403 (Miss. 1997).

Reliability of child's hearsay statement must be judged independently of any corroborating evidence; otherwise Confrontation Clause may be violated. Hennington v. State, 702 So. 2d 403 (Miss. 1997).

Testimony admitted under former testimony exception to hearsay rule does not violate Confrontation Clauses of Federal and State Constitutions. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

A trial court in a murder prosecution erred in allowing the prosecutor to cross-examine a witness about a certified lab report of results of the defendant's drug screen test, where the test results were never offered into evidence during the trial and the witness had no actual knowledge of the drug screen analysis; without the testimony of a sponsoring witness with personal knowledge of the facts contained therein, the drug screen report was inadmissible hearsay, and without the opportunity to cross-examine the person responsible for the information contained in the report, the defendant's right to confront witnesses secured by the Sixth Amendment and Article 3, § 26 of the Mississippi Constitution were violated. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

In determining whether a minor rape victim's hearsay statements qualify under the residual hearsay exception, a proper consideration for the court as to the requirement of "sufficient guarantees of trustworthiness" of the victim's statements would be the behavior of the victim and her own mental and emotional condition as indicative of having undergone some severe emotional trauma such as sexual abuse. In considering the admissibility of testimony of this nature, a court must be extremely careful that on the one hand the rights of a defendant are protected under the witness confrontation clauses of the federal and state constitutions and the Mississippi Rules of Evidence, and, on the other hand, that testimony which on balance should be admitted under the framework of the Rules of Evidence is not excluded. Leatherwood v. State, 548 So. 2d 389 (Miss. 1989).

At the joint trial of 2 defendants charged with conspiracy to commit murder, admission, in prosecution's case-in-chief, of co-conspirators' post-arrest statements, wherein each co-defendant pointed a finger at the other, was reversible error, where these statements fell outside the co-conspirator's exemption from the hearsay rule, did not interlock in substantial particulars, and were not attended by other indicia of reliability sufficient to satisfy the conspirators' rights under the confrontation of witnesses clauses of federal and state constitutions. Mitchell v. State, 495 So. 2d 5 (Miss. 1986).

Police officer's testimony that robbery suspect was identified by third party not present in courtroom and not available to be confronted and cross-examined violates right of confrontation. Miller v. State, 473 So. 2d 945 (Miss. 1985).

79. — Unavailable witnesses, confrontation of witnesses.

Testimony that the victim, on the day that the victim was murdered, had made a complaint that money was missing from the victim's bank account was admissible because the statement was not admitted to prove that money was missing from the victim's account, but only to show that the victim had reported the theft to the authorities, which tended to show that defendant had felt threatened, and, thus, had a motive for the murder of the victim. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Testimony that defendant had a sexual relationship with one of the victims, his step-son's wife, was properly admitted under Miss. R. Evid. 804(b)(5) because the trial court carefully analyzed the five requirements of trustworthiness, materiality, probative value, interests of justice, and notice; furthermore, defendant failed to object on the basis of the Confrontation Clause. Rubenstein v. State, 941 So. 2d 735 (Miss. 2006).

Defendant's confrontation rights under U.S. Const. Amend. VI and Miss. Const. Art. III, § 26 were not compromised in capital murder case because the trial court had determined that the victim, who was the declarant, was unavailable and that the evidence in question showed adequate indicia of reliability and trustworthiness. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

In a capital murder case, defendant's confrontation rights were not violated by the admission of a co-defendant's statement where the evidence showed that the co-defendant had committed suicide prior to trial, because they were offered to rebut defendant's evidence of statements that the co-defendant had made to inmates. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

There was no violation of the defendant's right to confront witnesses against him when a witness testified about DNA evidence, notwithstanding that the witness did not perform the actual tests on the various DNA samples collected from the defendant, where she did perform the scientific analysis of the data obtained. Byrd v. State, 741 So. 2d 1028 (Miss. Ct. App. 1999).

The admission of a calibration certificate for an intoxilyzer without testimony from the calibration officer does not, in general, violate the confrontation clauses in the Mississippi or United States constitutions, as long as the proper foundation is laid. Harkins v. State, 735 So. 2d 317 (Miss. 1999).

Where defense counsel was aware that the codefendant was unavailable as a witness, but nevertheless placed another witness on the witness stand to introduce statements made by the codefendant which favored the defendant, it was rationally inconsistent and constitutionally wanting for defense counsel to later argue that the subsequent introduction of the codefendant's statements which disfavored the defendant was in violation of the defendant's right to confront the codefendant. Jordan v. State, 728 So. 2d 1088 (Miss. 1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

In a prosecution for a contract murder, the defendant's right of confrontation was not violated when the state called the coperpetrator to the stand, and the coperpetrator invoked his Fifth Amendment privilege against self-incrimination, notwithstanding the contention that the state knew that he would do so and that the state put the coperpetrator on the witness stand solely to allow the jury to infer impermissibly that the defendant had hired him; only one question was asked of the coperpetrator, establishing concretely that he would not testify, and there was no intimation in the question that the coperpetrator had ever confessed to his and the defendant's guilt but was now remaining silent. Saunders v. State, 733 So. 2d 325 (Miss. Ct. App. 1998).

In a prosecution for suborning perjury, it was error for the court to permit the introduction into evidence of a statement by the nontestifying codefendant that the defendant was going to pay him $5,000 and give him two ounces of cocaine if he won his case, notwithstanding the assertion that the statement was not introduced to prove the truth of the matter asserted. United States v. Walker, 148 F.3d 518 (5th Cir. 1998).

In a prosecution for knowingly making false material declarations under oath, the introduction into evidence of statements made by the nontestifying codefendant did not violate the defendant's right of confrontation since none of the statements directly implicated the defendant in perjuring himself. United States v. Walker, 148 F.3d 518 (5th Cir. 1998).

The introduction of an audiotape of a conversation between the defendant and an unavailable witness did not violate the defendant's right of confrontation where (1) the tape was authenticated by two other persons, both of whom had the opportunity to hear the defendant and recognize his voice, and (2) both witnesses testified as to the chain of custody of the tape. Thomas v. State, 711 So. 2d 867 (Miss. 1998).

Statements of unavailable witnesses may be precluded where they lack indicia of reliability and trustworthiness. Williams v. State, 667 So. 2d 15 (Miss. 1996).

In order for statement of unavailable witness to be admissible under confrontation clause, particularized guarantees of trustworthiness must be shown from totality of circumstances, including only those relevant circumstances that surround making of statement and that render declarant worthy of belief. Williams v. State, 667 So. 2d 15 (Miss. 1996).

Admission of defendant's wife's statement which inculpated defendant and exculpated wife from criminal liability for shooting of victim violated confrontation clause since statement lacked particularized guarantees of trustworthiness where wife was unavailable to testify, wife was involved in placing shooting victim's body in trunk of car, giving her motive to fabricate, and statement was given while she was in custody. Williams v. State, 667 So. 2d 15 (Miss. 1996).

80. —Guilty plea, confrontation of witnesses.

A guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial, and the right that the prosecution prove each element of the offense beyond a reasonable doubt. Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

81. —Test results, confrontation of witnesses.

Defendant's confrontation rights were not violated because as the technical reviewer assigned to the case, the witness was familiar with each step of the complex DNA testing process conducted by the analyst; the witness personally analyzed the data generated by each test conducted by the analyst and signed the report. Galloway v. State, 122 So. 3d 614 (Miss. 2013), writ of certiorari denied by 189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685, 82 U.S.L.W. 3685 (U.S. 2014).

Admission of a crime lab report was error because the surrogate testimony that was used to enter the report into evidence was presented by a police officer with no apparent relation to the Mississippi Crime Laboratory or to the report, and the analysts were not found to be unavailable, and defendant had no prior opportunity for cross-examination; the admission of the document without live testimony from an individual involved in the analysis constituted a violation of the Confrontation Clause. Burdette v. State, 110 So. 3d 296 (Miss. 2013).

While an analyst's supervisor was not involved in the testing of a substance that proved to be cocaine, as he was sufficiently involved with the analysis and had intimate knowledge about it and the report prepared by the analyst, his testimony did not violate defendant's right of confrontation under U.S. Const. amend. VI. Jenkins v. State, 102 So. 3d 1063 (Miss. 2012), writ of certiorari denied by 133 S. Ct. 2856, 186 L. Ed. 2d 914, 2013 U.S. LEXIS 4749, 81 U.S.L.W. 3702 (U.S. 2013).

In the context of the defendant's rights to confrontation, a supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was actively involved in the production of the report and had intimate knowledge of analyses even though he or she did not perform the scientific tests first hand. Grim v. State, 102 So. 3d 1073 (Miss. 2012), writ of certiorari denied by 133 S. Ct. 2856, 186 L. Ed. 2d 914, 2013 U.S. LEXIS 4827, 81 U.S.L.W. 3702 (U.S. 2013).

Though a laboratory supervisor who testified that a substance was cocaine was not involved in the actual testing, he had reviewed the report for accuracy and signed it as the case technical reviewer, and was sufficiently involved with the analysis and overall process that his testimony did not violate defendant's right of confrontation under the Sixth Amendment, U.S. Const. amend. VI. Grim v. State, 102 So. 3d 1073 (Miss. 2012), writ of certiorari denied by 133 S. Ct. 2856, 186 L. Ed. 2d 914, 2013 U.S. LEXIS 4827, 81 U.S.L.W. 3702 (U.S. 2013).

While the State's expert was accepted as an expert in toxicology, there was no testimony that she was in any way involved in the testing of defendant's blood specimen or that she was actively involved in the production of the report and had intimate knowledge of the analyses even though she did not perform the tests first hand, and the trial court erred in admitting the test results without evidence that the expert actually performed the test or participated in its analysis; however, because overwhelming evidence was presented to the jury that defendant was intoxicated, this error was harmless. Debrow v. State, 972 So. 2d 550 (Miss. 2007).

Defendant's confrontation rights were not violated when the trial court did not require an expert to analyze and testify to the chemical analysis of the ingredients in cold medicine as the evidence was properly admitted under Miss. R. Evid. 803(24) as the medicine had a label that was made in normal process of nationwide manufacturing and distribution by an established pharmaceutical company, thus, the label as to the medicine's ingredients had substantial indicia of trustworthiness. Burchfield v. State, 892 So. 2d 248 (Miss. Ct. App. 2004), affirmed by 892 So. 2d 191, 2004 Miss. LEXIS 1346 (Miss. 2004).

Defendant's confrontation rights were not violated, even though defendant was unable to question the expert who performed the actual analysis on the substance found in defendant's home as required by Miss. R. Evid. 803(6), because another witness who was charged with verifying the results did testify, and the witness was capable of testifying to the test results and the chain of custody. Mooneyham v. State, 842 So. 2d 579 (Miss. Ct. App. 2002), writ of certiorari denied by 2003 Miss. App. LEXIS 394 (Miss. Ct. App. Feb. 27, 2003), writ of certiorari denied by 837 So. 2d 771, 2003 Miss. LEXIS 223 (Miss. 2003).

In a prosecution for driving while intoxicated, the trial court's refusal to compel production of an intoxilyzer machine into court to conduct a demonstration did not violate the defendant's constitutional right to be confronted by the witnesses against him and to have compulsory process for obtaining witnesses in his favor, where the trial court ordered the city to allow the defendant the opportunity to run a test in the police station where the intoxilyzer machine was situated, the defendant failed to show that he would be unable to do what was needed in order to properly defend the case by examining and testing the machine at the police station, the defendant made no showing that he could substantially replicate the conditions of the night of his arrest, and moving the intoxilyzer machine to the court house would have been substantially disruptive and inconvenient to the city law enforcement authorities. Goforth v. City of Ridgeland, 603 So. 2d 323 (Miss. 1992).

82. — Medical reports, confrontation of witnesses.

Defendant's conviction for DUI maiming was proper because he was not denied his right to confrontation. The trial judge properly ruled that the deputy's motive or intent for obtaining consent from defendant was irrelevant, and evidence of it should not have been presented to the jury; additionally, defendant never properly moved the trial court to make an on-the-record finding outside the presence of the jury, nor did defendant ever proffer any evidence that he was suffering from diminished capacity to consent to the blood test. Irby v. State, — So. 3d —, 2010 Miss. LEXIS 423 (Miss. Aug. 12, 2010), opinion withdrawn by 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), substituted opinion at 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

"Abuse record" prepared by attending physician was not created for the purpose of aiding the prosecution and was not testimonial, but rather was used in the treatment of the abuse viction, defendant's child, and therefore its admission at trial did not violate defendant's right to confront witnesses testifying against her under U.S. Const., Amend VI. Anthony v. State, 23 So. 3d 611 (Miss. Ct. App. 2009).

83. — Cross-examination, confrontation of witnesses.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. §§ 97-3-19(2)(f), he argued unsuccessfully that the prosecution committed misconduct by improperly cross-examining a mitigation witness, thereby depriving him of a fundamentally fair sentencing. The witness, a former teacher, was questioned about defendant's drinking habits and illegal drug use, and, while defendant argued that there was no evidentiary basis for that line of questioning, the questioning was based a mental health evaluation that was properly before the court; since the questioning of the witness was to test her knowledge of defendant's habits, there was no battle of opinions between the doctor who prepared the report and the witness such that the doctor had to be called as a witness to avoid a violation of the Confrontation Clause. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (2010).

Trial judge did not err in not allowing defendant to question arresting police officers regarding their termination from the police department because the testimony was not relevant as defendant's assertions were general in nature, and defense counsel never established with certainty why the two officers were terminated and what effect that had on defendant's case; defendant's right to confrontation was not violated. Betts v. State, 10 So. 3d 519 (Miss. Ct. App. 2009).

Although a trial court abused its discretion when it denied defendant the opportunity to re-cross-examine a victim about the victim's probation revocation, the error was harmless because defendant was allowed an extensive opportunity to impeach the victim regarding the victim's drug use and criminal history; the jury also heard evidence that the victim was smoking marijuana on the day of the shooting. Moore v. State, 1 So. 3d 871 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 59 (Miss. 2009).

Videotaped testimony of forensic interviewer and victim was hearsay, but based on the fact that law enforcement was intimately involved in obtaining the interview and was present at the interview, the videotaped interview was testimonial in nature; defendant was not unduly prejudiced because he cross-examined the victim later during the trial and even called her during his case-in-chief, and he had the opportunity to question her about her statements on the videotape and in general. Williams v. State, 970 So. 2d 727 (Miss. Ct. App. 2007).

Defendant's convictions for murder and aggravated assault were proper where he was not denied his constitutional right to confrontation because he was permitted to cross-examine the living victim as well as all other witnesses who testified for the State. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

Victim testified at the trial, and defendant had the opportunity to extensively cross-examine him, and therefore his right to confront witnesses against him under the Sixth Amendment was not violated; the videotape of the victim's statement to the police was not offered as direct evidence, but was offered as a prior consistent statement under Miss. R. Evid. 801(d)(1)(B) to refute defense counsel's implication that the tape had been fabricated, and the witness testified and was cross-examined. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

Because defendant lacked the opportunity to cross-examine his co-defendant, the trial court erred in allowing the police officer to testify concerning the co-defendant's statement; however, the erroneous admission of the statement was harmless error where the impact of the erroneously admitted statement was so insignificant that it could not have contributed in any meaningful way to the guilty verdict. Bynum v. State, 929 So. 2d 312 (Miss. 2006), writ of certiorari denied by 549 U.S. 962, 127 S. Ct. 403, 166 L. Ed. 2d 286, 2006 U.S. LEXIS 7652, 75 U.S.L.W. 3195 (2006).

Defendant's conviction for fondling was appropriate because a forensic examiner's testimony was not in violation of the Confrontation Clause of the Sixth Amendment since the examiner was available to testify as a witness and defendant did have the opportunity to cross-examine him. Higdon v. State, 938 So. 2d 340 (Miss. Ct. App. 2006).

Any error that occurred as a result of the trial court excluding defendant's line of questioning to the victim about the victim's grand jury testimony was harmless error as the testimony that defendant was trying to elicit, that the victim had previously told others he did not know who his assailant was, was before the jury as the victim had admitted that he had told people that during cross-examination. Thus, defendant's confrontation rights were not violated. Harris v. State, 901 So. 2d 1277 (Miss. Ct. App. 2004), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 279 (Miss. 2005).

Trial court did not violate defendant's confrontation rights in limiting his examination of two eyewitnesses to the shooting as defendant was questioning the witnesses about whether they were told what to testify by the police when he had no basis in fact for doing so, and was repeating questions that had already been answered. Harris v. State, 901 So. 2d 1277 (Miss. Ct. App. 2004), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 279 (Miss. 2005).

In a case involving receiving stolen property, defendant's confrontation rights were not violated when a trial court allowed the State to exceed the scope of cross-examination during redirect to ask about money orders cashed in Mississippi because defense counsel opened the door to such testimony by inquiring about which states the money orders had been cashed in. Massey v. State, 863 So. 2d 1019 (Miss. Ct. App. 2004).

Defendant did not agree to the admission of the packages of medication or waive his right to confront and cross-examine the person who labeled the medication as containing ephedrine, and the State failed to present any evidence that the medications had been chemically analyzed and determined to contain ephedrine or pseudoephedrine; thus, the State failed to carry its burden of proof as to an essential element of possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance, and defendant's Sixth Amendment right to confrontation was violated; therefore, the trial court reversed his conviction. Burchfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 660 (Miss. Ct. App. July 22, 2003), opinion withdrawn by, substituted opinion at 892 So. 2d 248, 2004 Miss. App. LEXIS 538 (Miss. Ct. App. 2004).

Trial court did not commit reversible error by prohibiting trial counsel from delving into victim's prior criminal history. McNair v. State, 814 So. 2d 153 (Miss. Ct. App. 2001).

In a prosecution for selling crystal methamphetamine, the right of the defendant to confront witnesses against him was violated where he was not permitted to cross-examine a confidential informant with regard to his out-of-state drug violation which occurred after his purchases from the defendant. White v. State, 785 So. 2d 1059 (Miss. 2001).

Where a defense witness invoked the Fifth Amendment, so that his testimony on direct-examination yielded nothing, the trial court erred in permitting the prosecutor to cross-examine the witness concerning a prior statement made by him; when the prosecutor, through the use of leading questions, parades before the jury the "testimony" of a silent witness, this violates the confrontation clause since the prosecutor cannot take the stand to be cross-examined by the defendant about the silent witness' "testimony". Balfour v. State, 598 So. 2d 731 (Miss. 1992).

A defendant's constitutional right to confront witnesses was violated by the prosecution's attempted cross-examination of a witness who had been called as an adverse witness by the defendant, where the witness pleaded her privilege against self-incrimination on direct examination, and then, on cross-examination, the prosecuting attorney purportedly read from the witness' pre-trial statement, which implied the defendant's guilt, before each of the witness' claim of privilege against self-incrimination. However, the error was harmless beyond a reasonable doubt where the evidence against the defendant was overwhelming. Hansen v. State, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

A trial court erred in admitting accomplices' statements into evidence in a murder prosecution under Rule 106, Miss. R. Ev., which contemplates the introduction of a writing by a party and contemporaneous introduction of other parts of the statement to prevent the misleading of the jury, where the defense counsel was merely cross-examining the police officer who investigated the accomplices and he in no way introduced parts of these statements into evidence. Additionally, there were serious confrontation problems since the jury was unable to observe the demeanor of the accomplices when they made the unsworn statements and the statements were taken under the coercive atmosphere of police interrogation. Welch v. State, 566 So. 2d 680 (Miss. 1990).

A trial court committed reversible error during the sentencing phase of a capital case in permitting the prosecutor to use a psychiatric evaluation to cross-examine a defense witness in violation of the Sixth Amendment right to confront witnesses where the doctors who wrote the evaluation were not called for trial and could not be cross-examined by the defendant. Lanier v. State, 533 So. 2d 473 (Miss. 1988).

Mere calling of witness by State who invoked Fifth Amendment privilege against self-incrimination would not be sufficient grounds for reversal of capital murder conviction; however, where state was allowed to call other witnesses to testify regarding alleged confession given by that witness, wherein he had detailed events of murder and implicated defendant as party to murder, defendant's right to confront and cross-examine witnesses presented against her was violated. Witness invoking Fifth Amendment privilege against self-incrimination and refusing to answer any questions regarding confession effectively prevented defendant from conducting meaningful cross-examination in violation of her constitutionally protected rights; fact that defendant was allowed to cross-examine both witnesses concerning circumstances under which confession was given could not hardly be substitute for meaningful cross-examination of declarant himself; state's contention that this evidence was properly admitted to impeach testimony given by witness was rejected, where state was allegedly attempting to impeach witness concerning statement that was accurate and truthful, which was that jury had previously decided whether he had killed decedent; court stated that it knew of no authority where truthful statements were held to be impeachable; instruction to jury that testimony was to be viewed only for impeachment purposes did nothing to diminish importance of this testimony and certainly did not cure constitutional error. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

Circuit Court erred when it refused to allow cross-examination of principal witness for State because one accused of crime has right to broad and extensive cross-examination of witnesses against him, and evidence that material witness has received favored treatment at hands of law enforcement authorities, particularly where that witness is himself subject to prosecution, is probative of witness' interest or bias and may be developed through cross-examination or otherwise presented to jury. Suan v. State, 511 So. 2d 144 (Miss. 1987).

Party improperly denied cross-examination is not required to make pro-offer of witness' testimony as would otherwise be required. Suan v. State, 511 So. 2d 144 (Miss. 1987).

Defendant was denied fundamental right to be confronted with witnesses against him because restriction on cross examination in trial court prevented defendant from questioning key prosecution witness concerning bias or motive in testifying. Foster v. State, 508 So. 2d 1111 (Miss. 1987).

Cross-examination of victim was not unduly restricted either to develop defendant's state of mind at time of incident or for pure impeachment purpose, where cross-examination involved collateral issue concerning business practices of victim and did not constitute viable defense to indictment for aggravated assault, and was sufficiently extraneous to charge in indictment and sufficiently unprovoked by victim's direct testimony that restriction of the cross-examination was matter within discretion of trial judge. Black v. State, 506 So. 2d 264 (Miss. 1987).

In a prosecution for rape, the trial court correctly excluded evidence concerning the prosecutrix' sexual conduct after holding an in-chambers hearing to determine if such testimony would be relevant, where the prosecutrix unequivocally testified that she had not had sexual intercourse with anyone during the month prior to the rape, where defendant produced no evidence to the contrary, and where any evidence of her sexual conduct prior to the month before the rape would be too remote and, therefore incompetent, irrelevant and immaterial; thus, defendant was not denied his constitutional right to cross-examine and confront the witnesses against him. Johnston v. State, 376 So. 2d 1343 (Miss. 1979).

In a prosecution for grand larceny, the trial court did not commit prejudicial error in admitting a codefendant's incriminatory statement into evidence during the state's case in chief where the codefendant later testified in his own behalf and was cross-examined by counsel for defendant; thus, defendant's Sixth Amendment right of confrontation was not violated. Langston v. State, 373 So. 2d 611 (Miss. 1979).

The defendant was denied the right to a full and complete cross-examination when the witness, whether rightfully or not, successfully invoked the privilege against self-incrimination, and the defendant's motion for the court to instruct the jury to disregard the witness' testimony should have been sustained, and failure of the court to do so was error. Frackman v. Deposit Guar. Nat'l Bank, 296 So. 2d 695 (Miss. 1974).

In a forgery prosecution, dismissal of the state's witness after he had given the only evidence introduced in the case which identified the defendant as the person who cashed the check, and had indicated that the defendant had cashed bad checks on other occasions, without giving the defendant an opportunity to cross-examine the witness, was prejudicial error, since it denied the defendant his right to be confronted by witnesses against him, and deprived him of due process of law. Crapps v. State, 221 So. 2d 722 (Miss. 1969).

84. —Collateral matters, confrontation of witnesses.

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross-examine one victim regarding the intoxication; the evidence was properly excluded under Miss. R. Evid. 401 and 402 because defendant presented no evidence that smoking marijuana increased a person's propensity for violence generally or that smoking marijuana increased the victim's propensity for violence. Since defendant did not meet the threshold for establishing the probative value of the evidence, the testimony on whether the victim had been smoking marijuana the morning of the assault was irrelevant. Rouster v. State, 981 So. 2d 314 (Miss. Ct. App. 2007).

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross examine one victim regarding the intoxication. The trial court properly balanced the probative and prejudicial effects of the evidence under Miss. R. Evid. 403, and found that the proposed testimony would have had no probative value because the possible testimony of marijuana usage was not linked to a propensity for violence; also, the prejudicial fact that the possible intoxication was of an illegal substance — marijuana — and not mere alcohol, further outweighed any probative effect. Rouster v. State, 981 So. 2d 314 (Miss. Ct. App. 2007).

In defendant's trial on charges of violating Miss. Code Ann. § 97-11-53, inducement to influence a public official to approve a property owner's construction project, the trial court did not violate defendant's Sixth Amendment right to confront witnesses in limiting defendant's cross-examination of the property owner because defendant sought to inquire about other lawsuits in which the property owner was involved and the trial court had determined that the property owner had not been convicted of any of the wrongdoings for which defense counsel wished to impeach his testimony, thus the trial court ruled that the testimony sought to be elicited from the property owner would not have been allowed by Miss. R. Evid. 609 and that it would have been unduly prejudicial, in violation of Miss. R. Evid. 403. Because the trial court's ruling was in accordance with the Mississippi Rules of Evidence, no abuse of discretion was present. Edmonson v. State, 906 So. 2d 73 (Miss. Ct. App. 2004).

A trial court's refusal to permit a capital murder defendant to impeach an eyewitness regarding his statement that he had been employed by his cousin for part of the previous year did not deprive the defendant of his constitutional right to confront witnesses against him since the issue of the witness' employment was a collateral matter; the constitutional right to confront witnesses applies only to issues pertinent to the crime charged, and the general rule that a party may not impeach a witness on collateral matters is applicable. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, Weatherspoon v. State, 732 So. 2d 158 (Miss. 1999).

85. —Waiver, confrontation of witnesses.

Introduction of statements by codefendant did not violate defendant's rights under the Confrontation Clause where, since codefendant did the actual shooting and was the only other witness to the shooting besides defendant, given the fact that he gave conflicting statements, the obvious purpose in admitting the statements was to call into question whether anything codefendant said about defendant's participation could be believed; since there was a legitimate trial tactic or purpose involved in putting the statements into evidence, there was no ground to find that the waiver of the right of confrontation was invalid. Campbell v. State, 883 So. 2d 115 (Miss. Ct. App. 2004).

Defendant's right of confrontation was not violated by the admission of his codefendant's redacted statement, as all references to defendant were omitted. Broomfield v. State, 878 So. 2d 207 (Miss. Ct. App. 2003).

In defendant's capital murder case, a court properly allowed an expert to testify on behalf of a coworker where the witness had been involved in the lab analysis, and the testimony did not concern an essential element of the crime. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

Defendants' convictions for armed robbery were proper where the first defendant was not denied his confrontation rights under U.S. Const. Amend. VI because of the admission of the other defendant's redacted statement; the record reflected that all references to the first defendant were omitted. Broomfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 914 (Miss. Ct. App. Oct. 7, 2003), opinion withdrawn by, substituted opinion en banc at 878 So. 2d 207, 2004 Miss. App. LEXIS 1182 (Miss. Ct. App. 2004).

Trial court did not abuse its discretion in refusing to allow a defendant on trial for capital murder to attempt to impeach a former police detective who had been arrested for, but not convicted, of bribery because the arrest was irrelevant to the detective's credibility and the acts were too far removed to have probative value; trial court's action did not deprive defendant of his right to confront the witness. Ellis v. State, 856 So. 2d 561 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 1223, 2003 Miss. LEXIS 892 (Miss. 2003).

Defendant's conviction for depraved heart murder was proper where the trial court did not err when it overruled defendant's objection to the testimony of a witness regarding statistical data regarding DNA evidence because defendant objected on the ground that the witness was not a statistician and thus not qualified to testify about statistical results but the witness did not make the statistical calculations about which he was testifying; further, there was no error and defendant was not denied his rights to confront and cross-examine witnesses against him. Edwards v. State, 856 So. 2d 587 (Miss. Ct. App. 2003), writ of certiorari dismissed by 860 So. 2d 1223, 2003 Miss. LEXIS 812 (Miss. 2003), writ of certiorari denied by 187 L. Ed. 2d 69, 2013 U.S. LEXIS 6108, 82 U.S.L.W. 3180 (U.S. 2013).

Defendant did not agree to the admission of the packages of medication or waive his right to confront and cross-examine the person who labeled the medication as containing ephedrine, and the State failed to present any evidence that the medications had been chemically analyzed and determined to contain ephedrine or pseudoephedrine; thus, the State failed to carry its burden of proof as to an essential element of possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance, and defendant's Sixth Amendment right to confrontation was violated; therefore, the trial court reversed his conviction. Burchfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 660 (Miss. Ct. App. July 22, 2003), opinion withdrawn by, substituted opinion at 892 So. 2d 248, 2004 Miss. App. LEXIS 538 (Miss. Ct. App. 2004).

Trial court did not err in admitting the tape-recorded statement of defendant's mother, who was unavailable at the time of trial based on her mental condition, under Miss. R. Evid. 804(b)(5) because (1) the mother was able to give an accurate statement when it was taken and (2) the statement was reliable because she was an eyewitness to the incident where defendant fatally shot defendant's brother, and there was no reason to believe that the mother harbored prejudice against one son or the other; even if it was error for the trial court to have admitted the statement, the error was harmless and there was no violation of the Confrontation Clause under U.S. Const. Amend. VI, Miss. Const. Art. 3, § 26 because the evidence proved convincingly that defendant's conviction of manslaughter was proper. Thornton v. State, 841 So. 2d 170 (Miss. Ct. App. 2003).

The right of confrontation under the Sixth Amendment of the United States Constitution and the Mississippi Constitution does not inure to the benefit of the State in prosecuting criminal cases. Randall v. State, 806 So. 2d 185 (Miss. 2001).

The Confrontation Clause was violated when a co-defendant's incriminating statement was introduced at a joint trial, even if the jury was instructed to consider the statement only against the person who made it. Harrington v. State, 793 So. 2d 626 (Miss. 2001).

The defendant was not denied the right to confront his accuser, notwithstanding his assertion that an investigator for the juvenile division of the state police was his primary accuser, but that the state chose not to call her to testify at trial; the record revealed that the defendant was allowed to fully cross-examine all of the state's witnesses who testified against him and there was no indication in the record that the investigator ever accused the defendant of murdering the victim. Conley v. State, 790 So. 2d 773 (Miss. 2001).

In a prosecution for abuse of a vulnerable adult, the failure of the state to call an investigator for the Mississippi Attorney General's Office as a witness did not result in a violation of the defendant's right of confrontation since the investigator did not witness the events at issue and was not an original accuser. Boatner v. State, 754 So. 2d 1184 (Miss. 2000).

Where there was no evidence in the record to suggest that the defendant dissented to his attorney's decision to stipulate to the testimony of a handwriting expert at the time it was made, the trial court did not abuse its discretion in allowing such stipulation, and the defendant thereby waived his right to confront the handwriting expert. Waldon v. State, 749 So. 2d 262 (Miss. Ct. App. 1999).

86. Compulsory process.

Although cross-examination of the victim of an armed robbery regarding his indictment on an aggravated assault charge might have caused the jury to disbelieve the victim's testimony against defendant, the trial court properly excluded the evidence because the victim had invoked his Fifth Amendment right against self-incrimination and defendant's Sixth Amendment rights had to yield to the victim's Fifth Amendment rights. Renfro v. State, 118 So. 3d 560 (Miss. 2013).

Where defendant's wife was his co-defendant, both were charged with drug possession, co-defendant moved for a directed verdict at the close of the State's case, and the trial court delayed granting co-defendant's motion until the conclusion of the presentation of all of the evidence, defendant did not assert a valid claim in arguing that his rights under the Sixth and Fourteenth Amendments were violated because, if co-defendant had been timely discharged, she would have testified on his behalf and given testimony that exculpated him of the charged offense. Defendant could cite no authority for his standing to claim trial error for the failure to grant a co-defendant's motion for a directed verdict, and the trial court would not be placed in error on an alleged untimely grant of a motion for a directed verdict in favor of a co-defendant based on defendant's compulsory process argument. Roach v. State, 7 So. 3d 911 (Miss. 2009), writ of certiorari denied by 558 U.S. 949, 130 S. Ct. 399, 175 L. Ed. 2d 274, 2009 U.S. LEXIS 7474, 78 U.S.L.W. 3206 (2009).

Defendant's conviction for manslaughter was appropriate because defendant was guilty of a willful discovery violation since he offered no reason whatsoever for not disclosing the statements at issue, even though the case had been pending for approximately four years; because defendant's discovery violation was willful, his Sixth Amendment right to compulsory process was not violated. Lindsey v. State, 965 So. 2d 712 (Miss. Ct. App. 2007).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because the circuit court did not err in failing to grant defendant's motion for a continuance since the record contained no affidavits or any other indication that anyone knew a probationer's whereabouts, and there was no indication that the probationer would likely have been available at some time in the future. Jackson v. State, 962 So. 2d 649 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Defendant's discovery violation in not providing a defense witness list to the State until the morning that the trial began was willful and motivated by a desire to obtain a tactical advantage, and therefore, the circuit court properly excluded the evidence and did not violate the Compulsory Process Clause. Morris v. State, 927 So. 2d 744 (Miss. 2006).

The exclusion of a defense witness by the trial court was not a violation of the defendant's Sixth Amendment compulsory process rights where the witness was excluded because the defendant failed to provide the name of the witness to the state in a timely manner. Beckwith v. Anderson, 89 F. Supp. 2d 788 (S.D. Miss. 2000).

The defendant was not denied his right to have compulsory process for obtaining witnesses in his favor where (1) the state issued several subpoenas on behalf of the defendant, but each was returned unserved, and (2) the defendant failed to make a reasonable effort to locate one witness and made no effort at all to find another witness. Thompson v. State, 773 So. 2d 955 (Miss. Ct. App. 2000).

In a prosecution for driving while intoxicated, the trial court's refusal to compel production of an intoxilyzer machine into court to conduct a demonstration did not violate the defendant's constitutional right to be confronted by the witnesses against him and to have compulsory process for obtaining witnesses in his favor, where the trial court ordered the city to allow the defendant the opportunity to run a test in the police station where the intoxilyzer machine was situated, the defendant failed to show that he would be unable to do what was needed in order to properly defend the case by examining and testing the machine at the police station, the defendant made no showing that he could substantially replicate the conditions of the night of his arrest, and moving the intoxilyzer machine to the court house would have been substantially disruptive and inconvenient to the city law enforcement authorities. Goforth v. City of Ridgeland, 603 So. 2d 323 (Miss. 1992).

A judge's refusal to permit a criminal defendant's children to testify did not violate federal and state constitutional provisions entitling a defendant to access to witnesses where the judge provided the defendant with an opportunity show a "colorable need" for calling the children to testify and the defendant failed to show such a need. Edwards v. State, 594 So. 2d 587 (Miss. 1992).

A defendant's constitutional right to compulsory process for obtaining witnesses in his favor was violated where the trial court quashed the defendant's subpoenas to a district attorney and 2 deputy sheriffs who allegedly had first-hand knowledge of incidents that had happened at the county jail which would have been relevant to the defense of duress, since without their testimony the defendant had no defense to the charge of conspiracy to commit a jail escape. Hentz v. State, 542 So. 2d 914 (Miss. 1989).

Since Bar disciplinary proceedings are inherently adversarial proceedings of a quasi-criminal nature, in the course of those proceedings there is secured to the accused attorney the right to due process of law, and within such secured due process right is the right of the accused attorney to have access to compulsory process for obtaining attendance of witnesses at critical stages of the proceedings. Attorney K. v. Mississippi State Bar Ass'n, 491 So. 2d 220 (Miss. 1986).

Disciplinary proceedings against an attorney before the Committee on Complaints were held in violation of the attorney's due process rights secured by United States and Mississippi constitutions and by Mississippi Code § 73-3-307, where, at a critical stage, no subpoena was issued, despite the attorney's verbal and written request therefor, to secure the attendance of the chancery judge whom the attorney had allegedly deceived, and the judge, who was a crucial witness, did not appear before the Committee. Attorney K. v. Mississippi State Bar Ass'n, 491 So. 2d 220 (Miss. 1986).

Fact that evidentiary rules may restrain testimony to be given by witness called by accused does not, in itself, violate accused's right to process to call witness. Holmes v. State, 483 So. 2d 684 (Miss. 1986).

Trial court's refusal to summon prisoners to testify in capital murder case, as requested by defendant, does not violate defendant's right to compulsory process where testimony by prisoners would be inadmissible hearsay. Gray v. State, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see Willie v. State, 585 So. 2d 660 (Miss. 1991).

In a prosecution for forgery, the trial court's refusal to provide defendant, an indigent, with funds to procure a handwriting expert to counter testimony of the state's expert witness was not a denial of defendant's state or federal constitutional right to process for such witness where defendant's guilt or innocence was scarcely, if at all, dependent on the state's expert witness; the determination of whether the state owes an indigent the duty of providing an expert as a part of due process must be made on a case by case basis. Davis v. State, 374 So. 2d 1293 (Miss. 1979).

In a criminal prosecution, where the trial court was without authority to compel the attendance of witnesses requested by the defendant under any circumstances, so long as they were outside the state, the court's denial of compulsory process for the attendance of three witnesses confined in penitentiaries in other states, and a fourth witness who resided out of the state, did not constitute a denial of due process or equal protection. Diddlemeyer v. State, 234 So. 2d 292 (Miss. 1970), cert. denied, 400 U.S. 917, 91 S. Ct. 177, 27 L. Ed. 2d 157 (1970).

Code 1942 § 1895 does not authorize a court to procure the attendance and testimony of witnesses for an accused at public expense, and an accused is not deprived of his constitutional right to compulsory process and to due process of law and equal protection of the laws by the refusal of a court to order an allowance for the payment of witnesses sought by the defendant to be subpoenaed from another state pursuant to such section. Diddlemeyer v. State, 234 So. 2d 292 (Miss. 1970), cert. denied, 400 U.S. 917, 91 S. Ct. 177, 27 L. Ed. 2d 157 (1970).

87. Assistance of counsel — In general.

Defendants were not denied the effective representation of counsel when the court properly denied a continuance to allow defendants' counsel to prepare for trial after he took the case a few days before trial because defendants pointed to no witness whose questioning might have made a difference, nor did they point to anything in the documents that could have been discovered had counsel had more time to review the case. Salts v. State, 984 So. 2d 1050 (Miss. Ct. App. 2008), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 334 (Miss. 2008).

Defendant was not denied his Sixth Amendment right to counsel because defendant entered a valid guilty plea, waiving defendant's rights under the Sixth Amendment, and defendant had appointed counsel from the time charged until defendant entered a guilty plea and had also retained counsel at the time defendant entered a plea. Frith v. State, 984 So. 2d 316 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 293 (Miss. June 12, 2008).

Defendant claimed ineffective assistance of counsel during his trial for possession of marihuana and cocaine, and possession of a weapon; however, defendant merely raised the issue in his brief without pointing to any part of the record that would substantiate his claim; as such, the issue was without merit. Chester v. State, 935 So. 2d 976 (Miss. 2006).

Appellant's conviction for two counts of sexual battery was upheld because he did not allege that he suffered any untoward consequences because he did not have pre-indictment counsel, aside from the fact that he was indicted; he claimed only that, if counsel had been available, counsel could have objected to the hearsay testimony introduced during the grand jury proceedings, and could have filed a motion to dismiss. Jones v. State, 962 So. 2d 571 (Miss. Ct. App. 2006).

In an armed robbery case, defendant's counsel was not ineffective by spending as much time as he did attempting to show that defendant left his fingerprints at the scene on an earlier occasion as defendant's fingerprints were the only physical evidence tying defendant to the crime scene; had defense counsel succeeded in establishing that defendant left his fingerprints at some time unconnected with the robbery, then his alibi would have been strengthened. As such, the actions of defendant's counsel concerning the fingerprint evidence fell within the wide range of reasonable professional assistance. Madison v. State, 923 So. 2d 252 (Miss. Ct. App. 2006).

In a possession of cocaine case, defendant was not denied effective assistance of counsel when his attorney failed to object to the jurisdiction of the trial court after the State amended the indictment to include the habitual offender charge. The trial court had jurisdiction under Miss. Unif. Cir. & County Ct. Prac. R. 7.09, and the evidence showed that defendant was afforded a fair opportunity to present a defense and was not surprised with the habitual offender amendment, as required by Rule 7.09. Troupe v. State, 922 So. 2d 844 (Miss. Ct. App. 2006).

Defendant's counsel was not ineffective because a potential juror made no indication during the extensive questioning following her objectionable comments that in any way revealed that she would be unable to be fair and impartial in deciding whether defendant was guilty or not guilty, and if found guilty, in deciding the appropriate sentence; given the multiple opportunities that the potential juror had to notify the trial court or the attorneys of any potential problems she may have had in sitting on the jury, trial counsel's performance was not so deficient that it prevented counsel from functioning as guaranteed by the Sixth Amendment. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

Where defendant gave false names to police upon being detained, it was not error to allow impeachment of defendant at trial with statements he made to police prior to being given his Miranda warnings. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

Denial of the inmate's petition for post-conviction relief was proper where he was not denied the effective assistance of counsel because the record reflected that he was represented by one of two attorneys during all parts of the plea and sentencing hearing. Nothing occurred following the departure of one attorney that would have been uniquely within his knowledge so as to make that representation inadequate. McBride v. State, 914 So. 2d 260 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 720 (Miss. 2005).

As to his conviction for murder, defendant did not demonstrate that the outcome of his trial would have been different if his counsel had objected to the district attorney's leading questions to deputies and the district attorney's eliciting of prior bad acts testimony from the victim's family members and a neighbor. He merely asserted that had counsel been as diligent with objections on said matters, he would have received a fair trial, and that statement did not satisfy the prejudice prong of Strickland; defendant's account of the events that led to the victim's death was not corroborated by any of the eyewitnesses, the physical evidence refuted his account that the victim was shot accidentally during a close struggle, and because he was hopelessly guilty, he was not entitled to a new trial on grounds counsel was ineffective. Jones v. State, 911 So. 2d 556 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 599 (Miss. 2005).

There was no physical evidence linking defendant to the burglary but the jury was provided with physical evidence connecting his accomplice to the crime. Then, the jury was told that defendant was able to identify his accomplice close to the crime scene when said identification had already been suppressed due to the violation of defendant's Fifth and Sixth Amendment rights at the time of his arrest (Miranda violation); thus, the identification testimony by the officer was unquestionably prejudicial, the prosecutor's closing argument further compounded the problem by linking the physical evidence connecting the accomplice to the crime to defendant, and the trial court committed reversible error in denying defendant's motions for a mistrial and for a new trial. Carpenter v. State, 910 So. 2d 528 (Miss. 2005).

Although a few of the questions asked could be considered leading questions, Miss. R. Evid. 611(c), because of the age of the witnesses and the limited manner in which the questions were used, it was doubtful that the trial judge would have disallowed the questions; therefore, defendant would have benefitted little by an objection from counsel. Thus, defendant's ineffective assistance of counsel claim was denied. Barrett v. State, 886 So. 2d 22 (Miss. Ct. App. 2004), writ of certiorari denied by 887 So. 2d 183, 2004 Miss. LEXIS 1371 (Miss. 2004).

There is a clear line of cases authorizing a trial court in the prosecution of a sexual offense to permit evidence of past sexual crimes of the accused; thus, it was not error to admit evidence of defendant's past sexual offenses. Therefore, there could be no claim of ineffective assistance of counsel premised on the failure of trial counsel to object. Barrett v. State, 886 So. 2d 22 (Miss. Ct. App. 2004), writ of certiorari denied by 887 So. 2d 183, 2004 Miss. LEXIS 1371 (Miss. 2004).

Inmate's counsel was not ineffective simply because he had not had a lot of death penalty cases and was involved in three death penalty cases at the same time as the inmate failed to show any errors that resulted from either issue that prejudiced him. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Denial of post-conviction relief was affirmed because the inmate failed to demonstrate that his counsel's performance was deficient, and considering the totality of the circumstances, the performance of the inmate's counsel was neither deficient nor prejudicial. In his plea petition, the inmate affirmed that he was satisfied with the advice of his counsel, the inmate's plea petition clearly stated that the sentencing range for the sale or transfer of cocaine was zero to 30-years, with 60-years for enhanced punishment for a habitual offender, and the inmate made no specific allegations of action or inaction on the part of his counsel that resulted in prejudice to his defense. Falconer v. State, 873 So. 2d 163 (Miss. Ct. App. 2004).

Defendant was not deprived of his constitutional right to effective representation as defendant failed to show that his attorney's representation was defective and that the defective performance deprived him of a fair trial. Mayo v. State, 886 So. 2d 734 (Miss. Ct. App. 2004), writ of certiorari denied by 887 So. 2d 183, 2004 Miss. LEXIS 1383 (Miss. 2004).

In a robbery and assault case, defendant failed to demonstrate that the outcome of his trial would have been different if counsel had objected to the State's closing argument tactic, regarding comment on defendant's failure to testify, as the contention concerning the prosecutor's summation was without merit and there was compelling eyewitness testimony implicating defendant; therefore, defendant's ineffective assistance of counsel claim failed. Woods v. State, 883 So. 2d 583 (Miss. Ct. App. 2004).

Denial of post-conviction relief was proper, because counsel was not ineffective, as petitioner told the judge that his lawyer had explained all the law related to the aggravated assault offense and any possible defenses; petitioner affirmed that the decision to enter a guilty plea was his; and the affidavits offered by petitioner and his mother, which asserted that the attorney would not permit the mother's joining the discussion between attorney and client, did not prove constitutional deficiency. Tenner v. State, 868 So. 2d 1067 (Miss. Ct. App. 2004).

Defendant's aggravated assault conviction was upheld because he was not denied effective assistance of counsel by counsel's failure to file a motion to dismiss based on speedy trial grounds, because his right to a speedy trial was not violated; therefore, counsel had no basis for filing the motion. Jackson v. State, 864 So. 2d 1047 (Miss. Ct. App. 2004).

In a case where the inmate was convicted of two counts of uttering a forgery, pursuant to Miss. Code Ann. § 99-19-155(b), the contents of the victim's impact statement relating to alleged threats of harm to the victim and her family made 10 years before were improperly admitted at the sentencing hearing and a reasonably competent attorney would find it necessary in the vigorous defense of his client's rights to make some effort to exclude or, at least, counteract such a damaging victim impact statement; thus, trial counsel's failure to do so caused his standard of representation to fall below that required by Strickland and the trial court's decision denying an evidentiary hearing on the inmate's motion for post-conviction relief from his judgment of sentence was reversed. Swindle v. State, 881 So. 2d 281 (Miss. Ct. App. 2003), reversed by 881 So. 2d 174, 2004 Miss. LEXIS 713 (Miss. 2004).

Defendant produced no evidence to show his attorney's representation was deficient, or why the substitution of counsel prejudiced him; the substitution of attorneys five days before trial did not result in a denial of effective assistance of counsel, and the jury instruction given was proper; had counsel objected, he would have placed defendant in jeopardy of receiving an enhanced sentence. Wolverton v. State, 859 So. 2d 1073 (Miss. Ct. App. 2003).

Inmate did not receive ineffective assistance of counsel during the guilt phase of the trial or at sentencing because he did not show that counsel's performance was deficient and he did not show prejudice due to any of the alleged errors in counsel's performance; thus, defendant's constitutional right to effective assistance of counsel was not violated. Crawford v. State, 867 So. 2d 196 (Miss. 2003), writ of certiorari denied by 543 U.S. 866, 125 S. Ct. 205, 160 L. Ed. 2d 110, 2004 U.S. LEXIS 6519, 73 U.S.L.W. 3210 (2004).

Petitioner's Fifth and Sixth Amendment rights were not violated when doctors, outside the presence of counsel, performed a psychiatric evaluation to determine his ability to stand trial; the doctors advised the petitioner that anything he said could be used against him during the sentencing phase of trial, and they offered to allow the petitioner to call his attorneys. Wilcher v. State, 863 So. 2d 719 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Petitioner failed to show that he was prejudiced in any fashion by his attorney's decision not to assert a Batson challenge; the Sixth Amendment has never been held to require that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the populations. Wilcher v. State, 863 So. 2d 719 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, the record lacked any evidence that defendant presented himself as anything but mentally competent and there was no evidence to indicate that defendant's attorney was on notice of any psychiatric problem or that defendant's mind was or could be impaired; thus, there was no basis for defendant's attorney to request a mental evaluation of defendant, he was not incompetent for failing to request a mental evaluation of defendant, and defendant's motion for post-conviction relief was properly denied. Richardson v. State, 856 So. 2d 758 (Miss. Ct. App. 2003).

The strategy where a defendant tries to introduce evidence, fails, and then testifies in accordance with the trial court's evidentiary rulings, is neither perjury nor ineffective assistance of counsel. Russell v. State, 849 So. 2d 95 (Miss. 2003).

Inmate's petition for post-conviction relief on grounds that his counsel was ineffective for failing to inform him of his right to a speedy trial was denied, as the record showed he had been advised of his right to a speedy trial, and by his guilty plea had waived his constitutional and statutory rights to a speedy trial. Turner v. State, 864 So. 2d 288 (Miss. Ct. App. 2003), writ of certiorari denied by 864 So. 2d 282, 2004 Miss. LEXIS 35 (Miss. 2004).

Although the circuit court found that the justice court judge denied petitioner the constitutional right to counsel under Miss. Const. Art. 3, § 26 and the U.S. Const. Amend. VI, petitioner clearly had notice of the pending trial, petitioner and petitioner's attorney were aware that the motion for continuance, which the trial court did not err in denying, had been denied; thus, the justice court judge did not err in proceeding to trial in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 and petitioner was not denied the constitutional right to counsel. In re Chisolm, 837 So. 2d 183 (Miss. 2003).

Section 47-5-138 of the Mississippi Code is not rendered unconstitutional by the fact that it contains no provision granting inmates a right to counsel in appealing a revocation of good time credits under the statute as there is no right of counsel for appeals from inmate lawsuits which have been dismissed as frivolous. Tubwell v. Anderson, 776 So. 2d 654 (Miss. 2000).

The prosecution's cross-examination and closing argument references to the defendant's exercise of his constitutional right to counsel did not rise to such a level as to constitute plain error and, therefore, the defendant was procedurally barred from raising the issue on appeal. Riddley v. State, — So. 2d —, 1999 Miss. App. LEXIS 541 (Miss. Ct. App. Aug. 24, 1999), affirmed by 777 So. 2d 31, 2000 Miss. LEXIS 167 (Miss. 2000).

The appellant was denied her right to counsel where the judge proceeded with a contempt hearing without informing her of her right to seek the advice of an attorney and the ramifications if she did not seek one. Terry v. State, 718 So. 2d 1097 (Miss. 1998).

Strickland standard to determine ineffective assistance of counsel claims applies to appellate counsel as well as trial counsel. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

There was no procedural bar to defendant raising for first time on appeal allegation that his right to counsel was denied. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

The Sixth Amendment does give a criminal defendant a right to choose his or her counsel, but that right is not absolute. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

State constitution's right to counsel embraces all rights guaranteed to criminally accused defendant by the Sixth Amendment. Triplett v. State, 666 So. 2d 1356 (Miss. 1995).

Representation by a legal intern, acting under authority of § 73-3-207, does not constitute the actual assistance of counsel guaranteed by the Constitution. Benbow v. State, 614 So. 2d 398 (Miss. 1993).

A defendant's right to have counsel present during interrogation was respected and his confession was admissible, where the defendant was given the opportunity to confer with his attorney who advised him to confess, even though the defendant only conferred with his attorney by telephone; there is no reason on principle why telephonic access to counsel is legally less significant than "eyeball-to-eyeball" access. Riddle v. State, 580 So. 2d 1195 (Miss. 1991).

It was basically unfair for the trial court in a prosecution for murder to force defendant to offer his testimony and that of his witnesses to the jury after a fatiguing day in court and at a time when both counsel and jury were exhausted; moreover, due process of law necessitated a forum for defendant to present his case within reasonable hours and under reasonable circumstances. Parker v. State, 454 So. 2d 910 (Miss. 1984).

Where an accused was represented by retained counsel at his trial, there was no obligation on the part of the trial judge to inform the accused after conviction that he had the right to appeal and to have court-appointed counsel and free transcripts if he was indigent. Bennett v. State, 293 So. 2d 1 (Miss. 1974), overruled on other grounds, Triplett v. State, 579 So. 2d 555 (Miss. 1991).

The Sixth Amendment to the Federal Constitution provides that accused in a criminal prosecution shall have the assistance of counsel for his defense, and the Sixth Amendment is applied to state prosecutions through the Fourteenth Amendment. Watson v. State, 196 So. 2d 893 (Miss. 1967).

An indigent defendant charged with a felony is entitled to be represented by counsel irrespective of whether he pleads guilty or is tried on a not guilty plea. Scott v. State, 190 So. 2d 875 (Miss. 1966).

88. — Questioning or comments about exercise of right to counsel, assistance of counsel.

Cross-examination of the defendant and comments during closing argument about the fact that the first person called by the defendant in a murder prosecution was his attorney did not constitute plain error; the prosecution's remarks on the defendant's right to counsel in no way impugned his assertion of self-defense and, if anything, they were merely an attack on his assertions that he fully cooperated with police. Riddley v. State, — So. 2d —, 1999 Miss. App. LEXIS 237 (Miss. Ct. App. Apr. 20, 1999), opinion withdrawn by, substituted opinion at 1999 Miss. App. LEXIS 541 (Miss. Ct. App. Apr. 20, 1999).

89. — Pro se representation, assistance of counsel.

Trial court did not err in allowing defendant to proceed pro se on a kidnapping charge, and defendant could not allege ineffective assistance of counsel; record contained nothing to suggest that the trial court should have questioned defendant's claims to have a college degree and to have taken correspondence courses in law from Harvard while defendant was in prison. Brooks v. State, 835 So. 2d 958 (Miss. Ct. App. Jan. 28, 2003).

The trial judge properly allowed the defendant to represent himself while ordering his court-appointed counsel to remain in the courtroom as an advisor where, although the defendant never waived his right to counsel, it was clear that he did not want to proceed with his court-appointed counsel and wanted the trial court to appoint another lawyer to represent him, which would have led to an extensive delay in his trial. Henley v. State, 729 So. 2d 232 (Miss. 1998).

Trial judge was fully justified in taking defendant's silence as admissions of his court-appointed attorneys' statements that defendant refused to have them represent him and wished to represent himself; attorneys' statements were made in defendant's presence, defendant had capacity to object or refute statements by attorneys but did not say anything, and defendant refused to answer when judge asked him if he wanted to represent himself. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

"Hybrid representation" encompasses both participation of defendant in conduct of his trial when he has not effectively waived assistance of attorney to defend him and participation by attorney in conduct of trial when defendant is defending pro se. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

Role of attorney in situation where defendant has not effectively waived assistance of counsel is that of "co-counsel", and role of attorney in situation where defendant has effectively waived counsel and is proceeding pro se is that of "standby" or "advisory" counsel; former tends to involve more active role in representation of defendant than latter. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

Following factors are considered in deciding whether trial judge granted hybrid representation: defendant's accessibility to counsel; stage of trial at which he requests participatory role in his defense; magnitude of role he desires to assume; whether trial court encourages immediate and constant accessibility of counsel; and nature and extent of assistance of counsel which has been provided up to point of request, including both substantive and procedural aid. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

Defendant who received hybrid representation during trial was not deprived of his right to counsel; court-appointed attorneys were at defendant's counsel table during entire trial, attorneys' efforts were met with defendant's uncooperative attitude and disposition, and attorneys represented defendant vigorously when it became apparent that defendant was content to sit by and do nothing. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

In determining whether a trial court granted "self-representation" or "hybrid representation" to a defendant, and thus whether a waiver of the right to counsel was necessary, the factors to be considered include: (1) the defendant's accessibility to counsel; (2) whether and how often the defendant consulted with counsel up to the point of the request; (3) the stage of trial at which the defendant requested a participatory role; (4) the magnitude of the role the defendant desired to assume; (5) whether the trial court encouraged immediate and constant accessibility of counsel; and (6) the nature and extent of assistance of counsel which had been provided up to the point of the request, including both substantive and procedural aid. Metcalf v. State, 629 So. 2d 558 (Miss. 1993).

A criminal defense counsel did not render constitutionally ineffective assistance of counsel where the defendant requested during trial that the defense counsel be dismissed but the court denied the request, and thereafter the defendant acted pro se with the attorney present and ready and willing to assist the defendant in the case, and therefore the attorney, as stand-by counsel, was without authority, discretion or control. Estelle v. State, 558 So. 2d 843 (Miss. 1990).

The trial court did not err in granting the defendant's motion to act as co-counsel where, at trial, appointed counsel and another attorney were present at the counsel table, made suggestions and offers of advice and assistance, drew instructions, and participated to some extent in the trial of the case. Richardson v. State, 402 So. 2d 848 (Miss. 1981).

When defendant waived his right to counsel and elected to proceed pro se but where the trial court appointed counsel to assist him during trial, the hybrid representation that defendant received during trial provided him with effective assistance because it was clear from the record that the two attorneys were not casual observers where they conducted voir dire, handled jury challenges, made numerous objections throughout trial, conducted cross-examination of witnesses, conducted the direct examination of witnesses, made a motion for a directed verdict, presented the closing argument in the guilty phase, represented defendant at sentencing, made the opening statement on behalf of defendant in the sentencing phase, conducted the examination of witnesses during the sentencing phase, and filed a motion for a new trial. Goff v. State, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 559 U.S. 944, 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (2010).

90. — Plea proceedings as ineffective assistance of counsel, assistance of counsel.

Defendant's counsel was not ineffective during plea proceedings where the trial judge and defense counsel went to great lengths to lead defendant through the plea process and made sure that defendant's guilty plea to the sale of cocaine was intelligent and voluntary; defendant testified under oath, during the guilty plea, that defendant was satisfied with counsel's representation. Coleman v. State, 979 So. 2d 731 (Miss. Ct. App. 2008).

Since an inmate was unable to show that he was prejudiced by an attorney's failure to subpoena a witness in a plea negotiation, a claim of ineffective assistance of counsel failed in a petition seeking post-conviction relief. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Inmate's petition for post-conviction relief was denied under Miss. Code Ann. § 99-39-11 because a transcript of a plea hearing failed to establish that counsel induced him into pleading guilty; there was a strong presumption of the validity of the statements made by the inmate during the actual plea hearing, and as such, a claim of ineffective assistance of counsel failed. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Appellate court found no merit to appellant's claims that his attorney deceived him into believing that he would receive a lighter sentence if he pled guilty, and that his attorney instructed him to lie to the trial court by stating that he had not been promised anything in return for his guilty plea where appellant had told the trial court that his plea was voluntary and that he was satisfied with the assistance of his attorney. Jones v. State, 962 So. 2d 571 (Miss. Ct. App. 2006).

Colloquy between defendant and the court showed the lack of merit in his claim that counsel was ineffective. During his plea colloquy, defendant stated that he was satisfied with the advice of his counsel and stated that his counsel had fully and completely explained the charges that he was facing and any defenses that he would have; nothing in the record indicated that defendant's counsel was deficient in any way, and defendant stated specifically that no one, including his attorney, had induced or coerced him into making his plea. Strohm v. State, 923 So. 2d 1055 (Miss. Ct. App. 2006).

Defendant's motion for post-conviction relief, filed after he pled guilty to two counts of murder, was properly dismissed without a hearing where counsel's advice that a trial could result in a guilty verdict and the death penalty did not support an argument of ineffectiveness; counsel had a duty to inform defendant of the possible outcomes of conviction. Booker v. State, 954 So. 2d 448 (Miss. Ct. App. 2006).

Trial court did not err under Miss. Code Ann. § 99-39-11(2) in denying petitioner an evidentiary hearing on his post-conviction petition because there was no evidence in the record other than his bald assertions that counsel performed inadequately; defendant's testimony at his sentencing hearing did not indicate any confusion as to the result of his guilty plea, and it also did not indicate any dissatisfaction with counsel. Knight v. State, — So. 2d —, 2006 Miss. App. LEXIS 808 (Miss. Ct. App. Oct. 31, 2006), opinion withdrawn by, substituted opinion at, modified by 983 So. 2d 348, 2008 Miss. App. LEXIS 145 (Miss. Ct. App. 2008).

Post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine because there was nothing in the record to overcome the presumption that defendant received effective assistance of counsel, as defendant acknowledged under oath in his petition to enter a plea of guilty that his lawyer did all that anyone could do to counsel and assist him, and that he was satisfied with the advice and help that he received. Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006).

Trial court properly denied defendant's motion for post-conviction relief after he pled guilty to armed robbery because he stated in his plea colloquy that he had not been coerced into pleading guilty and that he was satisfied with the advice of his attorney. Counsel's advice that defendant plead guilty was clearly within the range of competence demanded of attorneys in criminal cases. Williams v. State, 922 So. 2d 853 (Miss. Ct. App. 2006).

Defendant's unlawful killing of the victim clearly met all of the elements outlined in Miss. Code Ann. § 97-3-47, and the jury would have been entitled to find him guilty of manslaughter on the record before the appellate court; there was no error in defendant's representation at the plea proceeding, much less any error so prejudicial to rise to the level required by Strickland and Bevill; thus, defendant failed to prove an exception to the procedural bar for post-conviction relief. Smith v. State, 922 So. 2d 43 (Miss. Ct. App. 2006).

Defendant did not receive ineffective assistance of counsel where, when questioned by the trial judge as to whether he understood that he was entering into an Alford appeal, and if he understood its consequences, defendant answered affirmatively; defendant also answered affirmatively when asked if defendant understood the minimum and maximum sentences for the crimes to which he was pleading; it was clear that defendant was not entitled to relief and the trial court was correct in refusing to grant an evidentiary hearing. Cole v. State, 918 So. 2d 890 (Miss. Ct. App. 2006), writ of certiorari dismissed by 927 So. 2d 750, 2006 Miss. LEXIS 213 (Miss. 2006).

Inmate's request for post-conviction relief was denied because there was no showing of ineffective assistance of counsel regarding the legality of an extradition and an indictment, as well as a sentence imposed as a habitual offender, since these issues could not have been challenged after the entry of guilty plea. Kelley v. State, 913 So. 2d 379 (Miss. Ct. App. 2005).

Inmate's request for post-conviction relief was denied because there was no showing of ineffective assistance of counsel with regards to plea proceedings where the issues were not pled with specificity. Kelley v. State, 913 So. 2d 379 (Miss. Ct. App. 2005).

Inmate's request for post-conviction relief was denied because there was no showing of ineffective assistance of counsel on the issue of failing to interview a victim in a statutory rape case since counsel stated during the plea hearing that discovery had been conducted. Kelley v. State, 913 So. 2d 379 (Miss. Ct. App. 2005).

Inmate's request for post-conviction relief was denied because there was no showing of ineffective assistance of counsel during a plea proceeding on the issue of failing to pursue an insanity defense since the issue was abandoned by the inmate, and the inmate stated that he had no mental impairment. Kelley v. State, 913 So. 2d 379 (Miss. Ct. App. 2005).

Inmate's request for post-conviction relief was denied because there was no showing of ineffective assistance of counsel in a plea proceeding since there was no evidence that a conflict of interest existed based on a sheriff's son working at an attorney's office or at a paternity testing center. Kelley v. State, 913 So. 2d 379 (Miss. Ct. App. 2005).

91. —Administrative proceedings, assistance of counsel.

Defendant's claim that his counsel was ineffective for failing to reassert a speedy trial violation when defendant's trial was rescheduled from November 2, 2002, to May 6, 2003, was rejected as the record contained no information about the delay. Clayton v. State, 946 So. 2d 796 (Miss. Ct. App. 2006), writ of certiorari dismissed by 947 So. 2d 960, 2007 Miss. LEXIS 64 (Miss. 2007).

A pharmacist, whose license was revoked by the Board of Pharmacy, was not deprived of his right to retain counsel, in spite of his argument that he was denied procedural due process when the Board's agent implied that the charges against him were not serious in nature and thereby coerced him into not retaining counsel, where the agent merely stated that the decision to retain an attorney for the hearing was the pharmacist's choice and told him "You may just want to go down and talk to them, though," the pharmacist received notice that clearly highlighted his right to retain counsel, and the notice clearly stated that the charges could result in suspension or revocation of his pharmacy license. Duckworth v. Mississippi State Bd. of Pharmacy, 583 So. 2d 200 (Miss. 1991).

92. —Probation or parole revocation proceedings, assistance of counsel.

Post-conviction relief was properly denied, because petitioner was not improperly denied a right to counsel at his probation revocation hearing, as the record did not reflect that petitioner obtained or requested counsel during the revocation hearing, and the trial court was under no duty to appoint counsel for petitioner during the revocation proceeding. Newsom v. State, 904 So. 2d 1095 (Miss. Ct. App. 2004).

Probationers and parolees do not "have, per se, a right to counsel at revocation hearings." Whether probationers have a right to counsel must be answered "on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." Riely v. State, 562 So. 2d 1206 (Miss. 1990).

A probationer was not deprived of the right to counsel at his probation revocation hearings in violation of his constitutional rights where the circuit court did not actually "disallow" the probationer to have legal representation but merely refused to continue the hearing in response to his belated request for more time to obtain counsel, the case was not "complex or otherwise difficult to develop," and counsel was provided upon the probationer's request prior to the fourth hearing before the circuit court and prior to his appeal to the Supreme Court. Riely v. State, 562 So. 2d 1206 (Miss. 1990).

93. —Joint representation, assistance of counsel.

Even though the trial court appoints counsel in an advisory capacity, such counsel is still obligated to provide the defendant with adequate assistance in accordance with the defendant's requests. Hill v. State, 134 So. 3d 721 (Miss. 2014).

Motion of petitioner under death sentence to vacate or set aside judgment and sentence on the ground of ineffective assistance of trial counsel due to fact that same counsel represented petitioner and 2 others would be denied in absence of showing of any instance where any of the 3 were in any adversarial or conflicting position during or as a result of the joint representation during either the guilt or sentencing phase of the trial. Stringer v. State, 485 So. 2d 274 (Miss. 1986), cert. denied, 479 U.S. 922, 107 S. Ct. 327, 93 L. Ed. 2d 300 (1986).

Joint representation of co-defendants is not per se violation of right to effective assistance of trial counsel. Stringer v. State, 485 So. 2d 274 (Miss. 1986), cert. denied, 479 U.S. 922, 107 S. Ct. 327, 93 L. Ed. 2d 300 (1986).

94. — Accrual of right, assistance of counsel.

In an action challenging the plaintiff's incarceration for nine months in a Madison County jail as a result of a Hinds County detainer, without hearing or court appearance, the plaintiff sufficiently established a violation of his Sixth Amendment rights to support the denial of qualified immunity to the defendants with regard to such claim since the bench warrant underlying the detainer was based on the plaintiff's alleged failure to appear for sentencing on two burglary charges, the government was committed to a prosecution of these two charges, and the Sixth Amendment rights to be informed of the charges and to be represented by counsel had attached. Jones v. City of Jackson, 203 F.3d 875 (5th Cir. 2000).

In the absence of any affirmative evidence that the defendant accepted the representation of an attorney at the time of his initial appearance, there was no basis to exclude the defendant's subsequent apparently voluntary statement based on the violation of any right accruing to him under the Sixth Amendment. Beckum v. State, — So. 2d —, 1999 Miss. App. LEXIS 91 (Miss. Ct. App. Mar. 9, 1999), reaffirmed by 1999 Miss. App. LEXIS 722 (Miss. Ct. App. Mar. 9, 1999).

There was no violation of the defendant's Sixth Amendment right to counsel as there was no evidence suggesting that he asserted his right to counsel during his interrogation by the police. McGilberry v. State, 741 So. 2d 894 (Miss. 1999), writ of certiorari denied by 529 U.S. 1006, 120 S. Ct. 1273, 146 L. Ed. 2d 222, 2000 U.S. LEXIS 1788, 68 U.S.L.W. 3565 (2000).

A statement made by the defendant to a police officer should not have been admitted into evidence where (1) at his initial appearance, the defendant marked "yes" in response to the question "Do you want to talk to a lawyer before or during the time you are questioned" on his initial appearance form, (2) the statement was made two days later in an interrogation initiated by the police officer, and (3) this improperly obtained confession was the defendant's sole admission that he actually shot the victim. Porter v. State, 732 So. 2d 899 (Miss. 1999).

The introduction into evidence of an incriminating statement made by the defendant to his cellmate did not violate his right to counsel since such right had not accrued at the time that he made the statement where the statement was made several months before adverse criminal proceedings were commenced against the defendant. United States v. Walker, 148 F.3d 518 (5th Cir. 1998).

Delay of approximately 24 hours between time of arrest and initial appearance before magistrate did not warrant suppression of confession given by defendant prior to initial appearance; defendant was arrested by warrant while he was already in jail, defendant was informed of his right to remain silent, his right to attorney, and his right to stop answering questions at any time and to ask for attorney, and defendant did not ask for appointment of counsel on charge for which he was arrested. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Right to counsel, both federal and state varieties, attaches at point in time when initial appearance before magistrate ought to have been held. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Defendant's Sixth Amendment right to counsel with respect to murder charge attached when he was arrested by warrant while already in jail for another offense. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

The rule in Edwards v. Arizona (1981) 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880, reh. den. (1981) 452 U.S. 973, 69 L. Ed. 2d 984, 101 S. Ct. 3128 or Arizona v. Roberson (1988) 486 U.S. 675, 100 L. Ed. 2d 704, 108 S. Ct. 2093 concerning the interrogation of an accused on an unrelated charge after the Fifth Amendment right to counsel has been asserted, does not apply when the accused does not remain in continuous custody; a non-contrived, non-pretextual break in custody where the accused has reasonable opportunity to contact his or her attorney dissolves an Edwards or Roberson claim. Willie v. State, 585 So. 2d 660 (Miss. 1991).

Recording of conversations involving defendant and undercover agent, which were prior to her being indicted or placed under arrest, did not violate constitutional right to counsel, because such right becomes applicable only when government's role shifts from investigation to accusation, and at time of conversation defendant was neither under indictment, nor arrest, nor had arrest warrant been issued. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

A statement made at the jail by defendant in response to a question by the deputy sheriff as to whether she had killed the victim violated her Sixth Amendment right to counsel, which had attached, since the question was without benefit of counsel. Cannaday v. State, 455 So. 2d 713 (Miss. 1984), cert. denied, 469 U.S. 1221, 105 S. Ct. 1209, 84 L. Ed. 2d 351 (1985), cert. denied, 469 U.S. 1229, 105 S. Ct. 1229, 84 L. Ed. 2d 366 (1985).

Representation by counsel is not required at a preindictment investigatory lineup. Bankston v. State, 391 So. 2d 1005 (Miss. 1980).

To require that in all events a person arrested for a misdemeanor involving drunkenness must be advised of his right to counsel immediately upon being detained is not required by the Sixth Amendment to the Constitution of the United States. Capler v. City of Greenville, 207 So. 2d 339 (Miss. 1968), cert.

denied, 392 U.S. 941, 88 S. Ct. 2323, 20 L. Ed. 2d 1403.

95. —Invocation of right, assistance of counsel.

Confronting a suspect with the incriminating evidence compiled against him after he has invoked his right to counsel, and without any initiation on the part of the suspect, is precisely the kind of psychological ploy that definition of interrogation in Innis was designed to prohibit. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's right to counsel was violated by police-initiated interrogation after he asserted his right to counsel because an officer showed defendant the evidence file in an attempt to have him reconsider his request for counsel; a tactic that proved successful as defendant was not prompted to speak until he reviewed the evidence. Because the actions of the officer constituted police-initiated custodial interrogation, a valid waiver could not be established simply by showing that defendant responded to the interrogation. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's capital murder convictions were proper where his Fifth, Sixth, and Fourteenth Amendment rights to counsel and to remain silent were not violated. He made no objection at trial; there was no testimony concerning defendant's use of counsel or his right to remain silent; and the State's questioning was designed solely to elicit a chronological version of the events involved in the investigation of the murders not the fact that the defendant requested an attorney during the State's investigation. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

A murder defendant's initial refusal to sign a waiver of rights form did not constitute a demand for an attorney where he was not questioned again until more than 32 hours had lapsed when he was presented with incriminating physical evidence connecting him to the crime, and he was again advised of his rights before further questioning; thus, admission of his confession into evidence did not violate his constitutional right against compulsory self-incrimination or right to an attorney. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

An accused invoked her Fifth Amendment right to counsel at the time of her arrest when she asked for an attorney and stated that she was not going to sign any papers or answer any questions without having a lawyer present; the accused invoked her Sixth Amendment right to counsel and the state counterpart right secured by Article 3, § 26 of the Mississippi Constitution at her initial appearance when she indicated a desire for representation and an interest in contacting her family to ascertain their progress in hiring a lawyer for her. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

A defendant's question during interrogation—"Don't you think I need a lawyer?"—constituted an ambiguous request for an attorney, requiring the officers to cease interrogation except for that intended to clarify the defendant's request. The officers' response to the defendant's ambiguous request, which culminated in the defendant's decision to waive his rights, did not exceed constitutional parameters where the officers responded by twice explaining the defendant's option to exercise his Miranda rights or to relate "his side of the story." Holland v. State, 587 So. 2d 848 (Miss. 1991).

A defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel were not violated by the admission of his confession into evidence, even though the confession was obtained after the defendant initially refused to sign a waiver of rights form and had stated that he would not sign anything until he talked to his mental health counselor. The defendant's refusal to sign the waiver of rights form was not a per se invocation of his Fifth Amendment rights. Additionally, the defendant's request for a mental health counselor was not a per se invocation of his Fifth Amendment rights; a request for someone other than an attorney does not invoke a defendant's Fifth Amendment rights, and a mental health counselor is not qualified to protect a defendant's Fifth Amendment rights. Similarly, neither the defendant's request to speak to his mental health counselor nor his temporary refusal to sign the waiver form constituted a request for counsel so as to invoke his Sixth Amendment right. Mohr v. State, 584 So. 2d 426 (Miss. 1991).

A trial court's admission of a defendant's confession into evidence violated the defendant's Fifth and Fourth Amendment rights where the defendant had invoked her right to counsel and 2 officers subsequently told her that a codefendant had made a statement implicating her in their criminal activity, after which the defendant wrote a statement admitting to the crimes. The admission of the confession in violation of the defendant's constitutional rights was not harmless error where the confession in question was the only confession available. Balfour v. State, 580 So. 2d 1203 (Miss. 1991).

When a suspect requests counsel while being informed of his or her rights, the police should complete the reading of the suspect's rights, then ask the suspect to state clearly what he or she elects to do. If the suspect indicates that he or she wishes to remain silent, then the interrogation must cease. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

Admission of written statement into evidence violated defendant's constitutional rights where, after Miranda rights were read, father of defendant informed police that attorney was desired and that no statement would be made until one was present. After this right had been invoked, officer continued questioning at which point defendant gave oral statement, which was reduced to writing following day. Prosecution could not show that defendant understood and waived his rights where officer stated that Miranda rights were read to him and defendant was asked if he understood it, to which he replied "yes", but rights were not discussed with defendant. Impermissible questioning which occurred in police station after defendant had invoked right to counsel bears on admissibility of written statement which was obtained following morning. Reuben v. State, 517 So. 2d 1383 (Miss. 1987).

If the right to counsel or the privilege against self-incrimination is waived at an initial trial which is later reversed, on appellate review, on retrial defendant can re-invoke rights previously waived. State v. Caldwell, 492 So. 2d 575 (Miss. 1986).

96. — Necessity for assignment of counsel, assistance of counsel.

The lower court did not err in failing to appoint counsel at the defendant's probation revocation hearing where the defendant was sentenced at the time of his guilty plea to a period of 10 years, although suspended, and the trial judge had at the plea hearing informed the defendant that a violation of the conditions of probation would result in revocation of his probation and execution of the 10-year sentence. Crowell v. State, 801 So. 2d 747 (Miss. Ct. App. 2000).

Absent valid waiver of his right to counsel, if uncounseled defendant is sentenced to prison, conviction itself is unconstitutional. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

Once Sixth Amendment right to counsel has attached and been asserted, state must honor that right by doing more than simply not preventing accused from obtaining the assistance of counsel; Sixth Amendment also imposes on state an affirmative obligation to respect and preserve accused's choice to seek this assistance. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

It is not the duty of law enforcement officers and prosecutors, nor the function of the courts, to insist that a person accused of a crime actually confer with an attorney before talking about the crime nor is there any prescribed procedure or form to be followed in the waiver of the right to such assistance. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

Circuit Court did not deprive defendant of opportunity to secure his own counsel in pre-trial proceedings where court appointed counsel advised court he had conferred with defendant through interpreter and been informed defendant's family would hire attorney; although arraignment on same date was premature and should have been deferred, no prejudice occurred because plea of not guilty was entered, and even if it was not settled on that date that court appointed counsel would remain defendant's attorney, this arrangement did later become final. During 3 week lapse between time of defendant's arraignment and beginning of trial, no further mention of another attorney was made; first mention of another attorney only came following verdict in guilt phase of trial. Faraga v. State, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

The Sixth and Fourteenth Amendments require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense, and thus, the constitutional rights of an indigent defendant (charged with an offense for which imprisonment, fine, or both, is authorized upon conviction) are not violated when the defendant, after being tried in state court without appointed counsel, is fined rather than imprisoned upon being convicted. Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979).

Where a court desires to preserve its discretion to impose a jail sentence as a direct result of a conviction of an indigent misdemeanant under an alternative sentencing statute, the court must make a decision before the accused formally pleads and, in the absence of a valid waiver, appoint counsel to represent the indigent; If a court decides that only a fine will be imposed in the event of conviction, the court need not appoint counsel for the indigent, and the court's decision as to this matter should be dictated into the record or otherwise preserved for appellate purposes; There will be no violation of the indigent's sixth amendment right to counsel if such a fine is later converted into a jail sentence because of the defendant's failure to pay the fine after reasonable measures designed to aid payment prove unsuccessful. Nelson v. Tullos, 323 So. 2d 539 (Miss. 1975).

Failure to provide counsel for a defendant while a crime of rape was under investigation by the police and he was interrogated in connection with the offense was not a violation of his constitutional rights when no attempt was made by the prosecution to use in evidence any confession, admission, or statement of any kind extracted from the defendant after his arrest. Davis v. State, 204 So. 2d 270 (Miss. 1967), rev'd, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969).

Where the record indicates beyond question that the defendant, charged with assault and battery, was indigent, that he desired an attorney to represent him, and that he did not consciously and intelligently waive such appointment it was reversible error to force him to trial on the charge without an attorney. Mississippi State Highway Comm'n v. Glenn, 178 So. 2d 677 (Miss. 1965).

In view of the mandatory decisions of the U.S. Supreme Court, counsel must be appointed to represent a defendant charged with a felony in the absence of an intelligent and competent waiver of counsel by him and it is incumbent upon the trial court to determine whether such a waiver has been made, and the determination, as well as the facts on which it is based, should appear in the record. Conn v. State, 251 Miss. 488, 170 So. 2d 20 (1964).

97. — Questioning of defendant after request for assistance of counsel.

Although a voluntary statement made by defendant was in violation of the Fifth and Sixth Amendments because defendant had asked for an attorney, it was properly used for impeachment purposes during a murder trial; moreover, the failure to provide a limiting instruction on such was not error since defendant did not make such a request, and therefore a motion for a mistrial was properly denied. Sipp v. State, 936 So. 2d 326 (Miss. 2006).

A defendant's statements should have been suppressed where he invoked his right to remain silent and to have an attorney present after he was taken into custody and Mirandized by Tennessee authorities, and he was subsequently Mirandized by Mississippi officers without his having initiated the conversation. Duplantis v. State, 644 So. 2d 1235 (Miss. 1994), cert. denied, 514 U.S. 1123, 115 S. Ct. 1990, 131 L. Ed. 2d 876 (1995), appeal after remand, 708 So. 2d 1327 (Miss. 1998).

Once an accused has asserted the Sixth Amendment right to counsel at arraignment or a similar proceeding, the police may not initiate interrogation; if the police initiate interrogation after the right has been asserted, any waiver by the defendant for that interrogation is invalid. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

A trial court erred in admitting a defendant's confession evidence since the confession was tainted by the constitutional violation of the defendant's Sixth Amendment right to counsel and rights secured by Article 3, § 26 of the Mississippi Constitution, where the defendant "waived her rights" and made the confession after a sheriff department investigator and deputy initiated contact with her within less than 4 hours after she invoked the right to counsel at her initial appearance; the confession was also tainted by violation of the defendant's Fifth and Fourteenth Amendment rights since the defendant had also requested a lawyer and declined to waive any rights at the time of her arrest. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

Once an accused has requested an attorney, it is improper for either the same or another law enforcement officer to question the accused about his or her criminal conduct. If the accused indicates in any manner at any time prior to or during questioning that he or she wishes to remain silent or to have access to counsel, the officers must cease interrogation. When the accused asks for counsel, the officers may not resume interrogation until counsel has been provided, except where the accused voluntarily reinitiates the discussion of the charges. If the accused requests access to counsel, all officers of the prosecution force are bound thereby, including those who have no actual knowledge of the request. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

A defendant's confession should not have been admitted into evidence where the confession was obtained by law enforcement officers after the defendant made a request for an attorney to the justice court judge who was considering binding him over to await the action of the grand jury, and one of the officers heard the defendant's request. Although the defendant may only have meant that he wanted a lawyer for court proceedings and did not want a lawyer to advise him before being questioned about the crime, the officers did not seek to make such a determination, but simply proceeded to question the defendant, knowing that he was a cocaine addict and to some extent, because of such addiction, judgment-impaired at the time. No intelligent, knowing waiver of the right to counsel, which the defendant had expressed to the justice court judge, could be found from an officer testifying that he simply orally gave the defendant the Miranda warning. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

A police officer's initiation of an interview with a murder suspect did not violate the suspect's constitutional right to counsel, even though the suspect had invoked his right to counsel several days earlier during the course of an interview with FBI agents, he had been provided with counsel who had advised him not to speak to anyone, and he did not sign a waiver of rights form before speaking with the police officer, where the officer warned the suspect that he need not speak to him in the absence of counsel, and the suspect did not tell the officer that he wished to have a lawyer present before speaking to him. Minnick v. State, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

A defendant's verbal statement, which was given after the defendant asserted his right to counsel, should have been suppressed even though the defendant signed a statement waiving his constitutional rights, including the right to counsel "at this time," where the defendant invoked his right to counsel after signing the statement, and counsel was not furnished. Burnside v. State, 544 So. 2d 1352 (Miss. 1988).

Notwithstanding defendant's claim that his request to consult an attorney had been refused, there was no error in admitting his written statement into evidence where the defendant, as well as 2 police officers attending the interrogation when the statement was given, testified that it was freely and voluntarily given, and the officers testified that there was strict adherence to the Miranda warnings. Trunell v. State, 487 So. 2d 820 (Miss. 1986).

98. —Questioning of defendant after counsel was hired or appointed without counsel present, assistance of counsel.

Criminal defendant's incriminating statement had to be suppressed as his right to counsel was violated when he was interrogated by a detective without his counsel present after the detective had informed defendant's counsel that the detective would not be questioning defendant as State had not established that defendant had validly waived his right to counsel. Beckum v. State, 786 So. 2d 1060 (Miss. 2001).

The defendant was entitled to suppression of a statement given to the police where (1) an attorney was represented to appoint the defendant at his initial appearance and bond was set, (2) later the same day, the attorney passed a detective and the defendant while in the hallway of the police department, the attorney asked the detective if he was going to question the defendant, and the detective responded, "no," and (3) the detective then questioned the defendant and obtained a statement from him. Beckum v. State, 786 So. 2d 1060 (Miss. 2001).

Defendant's Sixth Amendment right to counsel was not violated, despite his claim that authorities obtained statement from him after counsel had been appointed for him, where defendant did not request an attorney or in any way assert his Sixth Amendment right to counsel, and he waived his right to counsel before each inculpatory statement was given. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Where defendant initiated contact with authorities, questioning after attorney had been appointed for him did not violate his Sixth Amendment right to counsel. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Where defendant did not request attorney or in any way assert his Sixth Amendment right to counsel, questioning after attorney had been appointed for him did not violate his right. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

If a defendant has not asserted his or her Fifth Amendment right to counsel, the fact that the defendant is appointed counsel to protect his or her Sixth Amendment right does not preclude interrogation on unrelated offenses. As long as the defendant is given the Miranda warning and makes a knowing and voluntary waiver, any statements obtained during the interrogation are admissible. Willie v. State, 585 So. 2d 660 (Miss. 1991).

99. — Questioning of defendant without presence of counsel retained for different matter, assistance of counsel.

Federal and state murder prosecutions of the defendant, although identical in their respective elements, were separate offenses for purposes of the Sixth Amendment because they were violations of the laws of two separate sovereigns, i.e., the State of Mississippi and the United States, and, therefore, because the Sixth Amendment is offense-specific, the defendant's statements during an interview with federal officers were not barred in his federal prosecution, even though they were made when he was represented by counsel in the state proceeding. United

States v. Avants, 278 F.3d 510 (5th Cir. 2002), writ of certiorari denied by 536 U.S. 968, 122 S. Ct. 2683, 153 L. Ed. 2d 854, 2002 U.S. LEXIS 5081, 70 U.S.L.W. 3799 (2002).

The court properly rejected the contention that because the defendant was represented by counsel in another proceeding, he was not to be questioned with regard to the crime at issue outside the presence of that counsel. Crawford v. State, 716 So. 2d 1028 (Miss. 1998), cert. denied, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 458 (1998).

100. —Time that assistance is provided, assistance of counsel.

Defendant's conviction for capital murder was proper where he was not denied his right to counsel because, at the time of his confession, he was merely a suspect who had been brought to the sheriff's department for questioning and thus, his U.S. Const. Amend. VI right to counsel had not yet attached. Further, as his confession occurred during a custodial interrogation, he had a U.S. Const. Amends. V and XIV right to have counsel present, but the lower court found the testimony of the officers that defendant had not invoked his right to counsel more credible than defendant's assertion that he had done so. Brink v. State, 888 So. 2d 437 (Miss. Ct. App. 2004), writ of certiorari denied by 888 So. 2d 1177, 2004 Miss. LEXIS 1475 (Miss. 2004), writ of certiorari denied by 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744, 2005 U.S. LEXIS 3129, 73 U.S.L.W. 3620 (2005).

A defendant was not denied effective assistance of counsel because he was not represented by counsel for approximately 2 months following his arraignment where he made no showing that he experienced any adverse effect or "untoward consequence flowing directly from denial of counsel" and there was no indication that the State took advantage of the situation or that any further proceedings were conducted. Johnson v. State, 631 So. 2d 185 (Miss. 1994).

The failure to provide a defendant with an initial appearance until five days after his arrest even though a judge was available at all times constituted reversible error where the defendant gave a confession in the absence of counsel and in violation of his right to counsel as a consequence of the delay, and the defendant's conviction for capital murder was based entirely on his confession. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

The explanation of lineup procedures did not constitute improper further interrogation of the defendant after he invoked his right to counsel, where the lineup procedures were not explained for the purpose of eliciting incriminating statements from the defendant, and the explanation of the lineup procedures did not constitute words or actions reasonably likely to elicit an incriminating response. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

A delay of over 2 months from the time of the defendant's capture to the time counsel was appointed did not deny the defendant his constitutional right to effective assistance of counsel. Corley v. State, 536 So. 2d 1314 (Miss. 1988).

An "eleventh hour" appointment of counsel does not amount to a per se denial of the right to effective assistance of counsel. Bostic v. State, 531 So. 2d 1210 (Miss. 1988).

A defendant's right to counsel had not attached at the time of a pre-indictment line up where the record did not reflect that the defendant was or reasonably ought to have been charged with a crime prior to that time. Nixon v. State, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

Delay in affording counsel to defendant was not sufficient to warrant reversal of conviction, absent showing that accused experienced some untoward consequence flowing directly from denial of counsel, where, during time defendant was without counsel, no confession was obtained from him, nor was any lineup held, nor did State in any way take advantage of his lack of counsel; defendant's only argument for reversal was that his only witness disappeared during this interlude, whom he contended promptly provided counsel would have been able to locate and have available for trial. Wright v. State, 512 So. 2d 679 (Miss. 1987).

101. — Substituted counsel, assistance of counsel.

Defendant's right to be represented by his choice of retained counsel was not violated when a trial court denied his motion for a continuance on the morning of trial so that he could discharge his substitute counsel and hire new counsel where there was adequate time between his original attorney's activation to Iraq and trial for him to retain other counsel. Sturkey v. State, 946 So. 2d 790 (Miss. Ct. App. 2006), writ of certiorari denied, writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 65 (Miss. 2007), writ of certiorari denied by 552 U.S. 918, 128 S. Ct. 276, 169 L. Ed. 2d 201, 2007 U.S. LEXIS 10167, 76 U.S.L.W. 3165 (2007).

Where defendant fired his court-appointed counsel on the day before trial and was told he could represent himself, be represented by former counsel, or have hybrid representation, the trial court's denial of his motion for a continuance to obtain substitute counsel was not an abuse of discretion or a violation of his right to counsel. Fields v. State, 879 So. 2d 481 (Miss. Ct. App. 2004), writ of certiorari denied by 882 So. 2d 234, 2004 Miss. LEXIS 992 (Miss. 2004).

Circuit Court did not err in refusing to grant continuance following guilt phase of trial, and before sentencing phase, to allow defendant to hire another attorney, because if defendant wanted another attorney he should have notified court of such fact prior to trial; Circuit Court acted within its discretion in denying motion of counsel to withdraw, on stated basis that during course of trial defendant became un-cooperative with him. Faraga v. State, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

State trial court did not violate defendant's Sixth Amendment right to counsel by denying defendant's motion for continuance until deputy public defender initially assigned to defend him was available, where senior trial attorney who was assigned to represent defendant after deputy public defender was hospitalized told court that he was fully prepared and ready for trial. Morris v. Slappy, 461 U.S. 1, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983), on remand, 724 F.2d 841.

102. — Critical stage, assistance of counsel.

The defendant was denied his right to counsel where he was stopped shortly after a robbery on the basis of a description given by the victim, taken back to the scene of the crime, and identified there by the victim. Pickens v. State, — So. 2d —, 1998 Miss. App. LEXIS 919 (Miss. Ct. App. Oct. 27, 1998).

The taking of a handwriting exemplar is not a critical stage, and, therefore, there is no right to have counsel present. Burns v. State, 729 So. 2d 203 (Miss. 1998), cert. denied, 527 U.S. 1041, 119 S. Ct. 2406, 144 L. Ed. 2d 804 (1999).

The taking of a dental impression is not a critical stage at which a person has a right to counsel. Brewer v. State, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

Defendant was not entitled to habeas relief on claim that confessions were taken in violation of the Sixth Amendment where he signed written waivers before each statement that he gave to authorities investigating the murders. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Petitioner's claim in habeas petition that his confessions were taken in violation of the Sixth Amendment was procedurally barred from review by district court where petitioner failed to raise it at trial, on direct appeal, or in first motions for post-conviction relief, and state Supreme Court determined claim was time barred; petitioner could not proceed on habeas petition on the assumption that all or most of his previous counsel were ineffective for raising every single issue asserted in habeas petition. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

It is a matter of fundamental fairness and due process that the defendant is entitled to be apprised of communications between the court and the jury during deliberations. The defendant is also entitled to be represented by counsel during this very important procedure. Edlin v. State, 523 So. 2d 42 (Miss. 1988).

Arraignment as practiced in Mississippi does not constitute critical stage whereby presence of counsel is required under Sixth Amendment because no substantial prejudice results to defendant; arraignment proceeding simply serves to inform accused of charges against him, and indictment is read and accused enters plea or one is entered for him; even if defendant pleads guilty, this may later be withdrawn and will be inadmissible at subsequent trial. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

The period immediately after arrest for intoxication is not a "critical stage" of the proceedings for purposes of the right to counsel. Ewing v. State, 300 So. 2d 916, 95 A.L.R.3d 701 (Miss. 1974).

The court's refusal to permit the defendant in a murder trial to confer with her counsel during a two hour recess, immediately following the conclusion of her direct examination in her own behalf, was an unconstitutional denial of her right to counsel at a crucial stage of the trial, was highly prejudicial, and constituted reversible error. Pendergraft v. State, 191 So. 2d 830 (Miss. 1966), cert. denied and appeal dismissed, 394 U.S. 715, 89 S. Ct. 1453, 22 L. Ed. 2d 671 (1969).

103. —Line up, assistance of counsel.

Defendant's assertion that his U.S. Const., Amend. VI, right was violated by having no counsel present at a photographic lineup was without merit and an accused did not enjoy the right to counsel during a photographic lineup. Christmas v. State, 10 So. 3d 413 (Miss. 2009).

In appellant's capital murder case, counsel was ineffective in regard to a lineup identification because attorneys presented affidavits that they were not present at the lineup, and the witness's identification of appellant was crucial to the State's case. Minimal efforts on the part of trial counsel could have confirmed the presence or non-presence of counsel at the lineup. Howell v. State, 989 So. 2d 372 (Miss. 2008).

In a murder case, defendant's right to counsel was not violated during the line-up as defendant did not ask for counsel once given the opportunity and did not refuse to participate in the line-up after given the option of whether to participate. Brooks v. State, 905 So. 2d 678 (Miss. Ct. App. 2004), reversed by, remanded by 903 So. 2d 691, 2005 Miss. LEXIS 191 (Miss. 2005).

Defense counsel's failure to file a witness list until the morning of trial, which resulted in the trial court excluding defendant's alibi witnesses, in defendant's trial for strong-arm robbery, did not constitute ineffective assistance of counsel because defendant was not prejudiced by counsel's negligence; both the victim and her boss had gotten a good look at defendant during the incident, the victim had picked defendant out of a photo line-up, and both were able to identify defendant at trial; the outcome of the trial would not have been different even if defendant's girlfriend and his family members had been allowed to support defendant's alibi. Ransom v. State, — So. 2d —, 2003 Miss. App. LEXIS 459 (Miss. Ct. App. May 20, 2003), opinion withdrawn by, substituted opinion at 918 So. 2d 710, 2004 Miss. App. LEXIS 972 (Miss. Ct. App. 2004).

Only an actual confrontation with the defendant at a lineup is the critical stage which requires the right to counsel. Thus, the presence of counsel was not required at a post-lineup encounter between the witness and the police, at which the defendant was not present, since there was no "actual confrontation" between the defendant and the witness. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

A photographic lineup is not a "critical stage" of criminal proceedings and, therefore, an accused enjoys no right to counsel in connection with a photographic lineup. Magee v. State, 542 So. 2d 228 (Miss. 1989).

The violation of a defendant's right to counsel at his lineup was harmless constitutional error beyond a reasonable doubt where the witness did not identify the defendant at the lineup and the witness' in-court identification testimony was not impermissibly tainted by anything that occurred at the lineup. Magee v. State, 542 So. 2d 228 (Miss. 1989).

Although the denial of the defendant's right to counsel at a line up was a technical violation of his constitutional right to counsel, it was "harmless constitutional error" where the witnesses' identification of the defendant was based on their view of the defendant at the time of the crime rather than on the line up identification and there was other overwhelming evidence favoring conviction. Jimpson v. State, 532 So. 2d 985 (Miss. 1988).

A voice "lineup" closely resembles the trial-like confrontation of a corporeal lineup and amounts to a critical stage of criminal proceedings for which counsel should be present. Nicholson v. State, 523 So. 2d 68 (Miss. 1988).

Prosecution had commenced and, therefore, the defendant's constitutional right to counsel had attached at the time of a line up where an arrest warrant had issued and the defendant was in custody. Livingston v. State, 519 So. 2d 1218 (Miss. 1988).

Impromptu viewing by robbery victim of robbery suspect in jail does not constitute showup at which suspect's attorney should be present where viewing is not arranged or authorized by state but is independent act of private individual who is frequent visitor to jail and is often allowed to go into cell block area. Thompson v. State, 483 So. 2d 690 (Miss. 1986), habeas corpus dismissed 914 F.2d 736, rehearing denied 920 F.2d 931, certiorari denied, 111 S. Ct. 1083, 498 U.S. 1124, 112 L. Ed. 2d 1187.

A defendant's Sixth Amendment rights were not violated by the failure to suppress testimony in regard to a lineup identification, where the defendant had intelligently waived his right to counsel at the time of the lineup which he was requesting and insisting upon. Anderson v. State, 413 So. 2d 725 (Miss. 1982).

Counsel is not required at a pre-indictment lineup or showup. Hobson v. State, 285 So. 2d 464 (Miss. 1973).

104. — Guilty plea, assistance of counsel.

Defendant failed to show that defendant received ineffective assistance of counsel during a guilty plea proceeding because counsel did not coerce defendant into pleading guilty, but simply informed defendant of the likely outcome of the case, believing it would be in defendant's best interest to enter a guilty plea. Defendant, at 55 years old, was charged with four counts of fondling a child; each count carried a maximum penalty of fifteen years in prison. Mayhan v. State, 26 So. 3d 1072 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 58 (Miss. 2010).

Defendant's claim that his attorney rendered ineffective assistance of counsel because he led defendant to believe that he would be placed in the drug court program was without merit as during his guilty plea hearing, defendant swore that his lawyer had not promised him anything to get him to plead guilty and defendant swore that he was satisfied with the services of his attorney. Bliss v. State, 2 So. 3d 777 (Miss. Ct. App. 2009).

Defendant did not receive ineffective assistance of counsel where in the petition to enter his guilty plea, defendant clearly acknowledged that his sentence was up to the court and that he could receive zero to ninety years imprisonment; defendant indicated his satisfaction with his attorney's advice and recognized that if he had been told by his lawyer that he might receive a lighter sentence this was merely a prediction and not binding on the court. Davis v. State, 5 So. 3d 435 (Miss. Ct. App. 2008).

Defendant did not demonstrate ineffective assistance of counsel where his guilty plea admitted all elements of a formal charge and operated as a waiver of all non-jurisdictional defects contained in an indictment; defendant was unable to name any witnesses that should have been interviewed and his attorney advised him of the maximum and minimum sentence. Nichols v. State, 994 So. 2d 236 (Miss. Ct. App. 2008).

Trial counsel was not deficient in failing to inform defendant that he could have been charged with carjacking when neither defendant nor his trial counsel had any choice in the matter. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Defendant's trial counsel was not inefficient where defendant neither professed his innocence, nor called attention to the impairment of any defense as a result of not being informed of his ineligibility for parole; trial counsel informed defendant that a conviction for armed robbery carried with it ineligibility for parole. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Denial of the inmate's motion for postconviction relief was proper in part because he failed to show the ineffective assistance of counsel, as there was no proof that his attorney did not explain the charges to him; to the contrary, the inmate twice swore under oath that his attorney explained the charges to him and that he understood them. Knight v. State, 959 So. 2d 598 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 538 (Miss. 2007).

Defendant raised a claim of ineffective assistance of counsel which required a full evidentiary hearing where there was evidence that the victim's girlfriend poured boiling water on him, along with defendant's testimony that someone else committed this act, which was enough to raise a reasonable doubt that defendant committed the offense; this evidence may have changed the outcome had the parties gone forward. Hannah v. State, 943 So. 2d 20 (Miss. 2006).

Any advice by counsel that defendant would be eligible for parole was incorrect and constituted deficient performance, and having shown deficient performance, defendant had to prove that he would not have pled guilty but for the incorrect advice; if his attorney improperly advised him of his eligibility for parole, defendant was entitled to a hearing to investigate his claim that he would not have pled guilty but for the incorrect advice. Garner v. State, 928 So. 2d 911 (Miss. Ct. App. 2006), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 252 (Miss. 2006), writ of certiorari denied by 549 U.S. 1060, 127 S. Ct. 677, 166 L. Ed. 2d 528, 2006 U.S. LEXIS 9138, 75 U.S.L.W. 3283 (2006), remanded by 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006).

Defendant did not carry his burden of proving that ineffective assistance of counsel led him to plead guilty to armed robbery when he otherwise would have asserted his innocence where defendant, in open court, had responded during his plea allocution that he was satisfied with the legal advice and services of his attorney. At no point in his plea of guilty and sentencing did defendant assert his innocence. Vandergriff v. State, 920 So. 2d 486 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of the inmate's petition; the inmate was unable to show that but for the ineffective assistance of counsel he would not have pled guilty because the inmate stated that he was pleased with his counsel's representation at the plea hearing. Further, the inmate's counsel had the armed robbery charge reduced to simple robbery. Ivy v. State, 918 So. 2d 84 (Miss. Ct. App. 2006).

Inmate failed to establish his claims that he was deprived of effective assistance of counsel because he was persuaded to plead guilty, and that his guilty plea was involuntary and was entered after being ill advised by his counsel, as his counsel was obligated to advise him that the potential consequences of trial and conviction of both counts could be a maximum of 120 years imprisonment, and the inmate acknowledged that he had been informed that a guilty plea would waive his right to a public and speedy trial by jury, his right to confront adverse witnesses, and his right to protection against self incrimination. Epps v. State, 926 So. 2d 242 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate did not establish that he was deprived of effective assistance of counsel during his plea hearing, because his mother and his sister testified that the inmate's attorney had told him that he would be pleading guilty to simple assault and would be sentenced to time served, and that testimony directly contradicted the inmate's testimony at the actual plea hearing where he acknowledged that he was pleading guilty to aggravated assault. Riggs v. State, 912 So. 2d 162 (Miss. Ct. App. 2005).

To the extent that the inmate's trial counsel erroneously advised the inmate that he would be eligible for parole after 10 years, the advice was incorrect and the counsel's performance was deficient; thus, the inmate was entitled to an evidentiary hearing to determine if he would have pled differently had the correct advice about parole been given. Garner v. State, — So. 2d —, 2005 Miss. App. LEXIS 695 (Miss. Ct. App. Sept. 27, 2005), opinion withdrawn by, substituted opinion at, remanded by 928 So. 2d 911, 2006 Miss. App. LEXIS 119 (Miss. Ct. App. 2006).

Denial of an inmate's motion for post-conviction relief was affirmed as the inmate's claim that his guilty plea was not knowing and voluntary due to his counsel's alleged deficient performance was contradicted by the inmate's statements at the plea hearing that he understood the consequences of his plea and was satisfied with his counsel's performance. Gonzales v. State, 915 So. 2d 1108 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate provided nothing more than his own affidavit to establish that he was deprived of effective assistance of counsel and did not allege that had it not been for his counsel's alleged ineffectiveness that he would not have pled guilty. Covington v. State, 909 So. 2d 160 (Miss. Ct. App. 2005).

Defendant's motion for post-conviction relief was properly denied because defendant's claim of ineffective assistance of counsel concerning defendant's guilty pleas was without merit as the record showed that defendant expressed satisfaction with his guilty plea and his attorney's performance. Further, defendant stated at the plea hearing that he understood the sentencing recommendation to which he subsequently objected. Sykes v. State, 909 So. 2d 120 (Miss. Ct. App. 2005).

Defendant was not prejudiced after defense counsel was excused from the courtroom during a plea proceeding where the only issue raised after counsel's departure was the trial judge's decision to retain jurisdiction over the case. In any event, defendant was represented by another attorney at that time with whom he was familiar. McBride v. State, — So. 2d —, 2005 Miss. App. LEXIS 314 (Miss. Ct. App. May 10, 2005), opinion withdrawn by, substituted opinion at 914 So. 2d 260, 2005 Miss. App. LEXIS 524 (Miss. Ct. App. 2005).

Record clearly demonstrated that defendant was informed that should he plead guilty to the crime, his plea of guilty would act as a waiver to a direct appeal to the Mississippi Supreme Court pursuant to Miss. Code Ann. § 99-35-101. Further, it could not be said that counsel's brief moment of confusion regarding which charges the State would pursue, rose to the level of ineffective assistance of counsel and the record clearly indicated that the trial judge explained to defendant the terms of the plea agreement; thus, defendant was not denied either due process or effective assistance of counsel. Sykes v. State, 895 So. 2d 191 (Miss. Ct. App. 2005).

Defendant argued that his counsel was deficient for failing to inform him of the elements of burglary and escape; however, defendant told the judge he understood the charges and sentences available and, as a result, he pleaded guilty with full knowledge. In a post-conviction relief proceeding, the elements of the claim of ineffective assistance of counsel must be pleaded with specificity, which defendant failed to do. Gaddis v. State, 904 So. 2d 1197 (Miss. Ct. App. 2004).

Post-conviction relief was properly denied in a D.U.I. case because the driver's counsel was not ineffective, as counsel properly informed him that if he did not accept the offered plea bargain, the State would charge him as an habitual offender, and the driver's claim that he could not have been charged as a habitual offender, based on his contention that at least one of his prior offenses had occurred before the habitual offender statute went into effect, was clearly wrong. Lawson v. State, 882 So. 2d 783 (Miss. Ct. App. 2004).

Defendant never told the trial judge in his post-conviction relief motion what additional discovery materials would have disclosed nor how such material would have affected his decision to plead guilty, such that he did not demonstrate ineffective assistance of counsel that would have led to a different result; even taking defendant's claims of ineffective assistance of counsel as true, he did not show that the performance of his trial counsel caused him to plead guilty or was in any other manner deficient. Chandler v. State, 883 So. 2d 614 (Miss. Ct. App. 2004).

As an inmate had two prior felony convictions, one of which was for aggravated assault, he could have been indicted as an habitual offender under to Miss. Code Ann. § 99-19-83; therefore, his counsel did not provide ineffective assistance by warning him that this would occur unless he pled guilty. Hearvey v. State, 887 So. 2d 836 (Miss. Ct. App. 2004).

Inmate was not deprived of effective assistance of counsel prior to pleading guilty; the appellate court noted that at the inmate's hearing he admitted to committing the crimes, admitted that he was voluntarily entering his plea, and that his attorneys had properly advised him concerning his constitutional rights and the consequences of pleading guilty. Farris v. State, 881 So. 2d 392 (Miss. Ct. App. 2004).

Because neither the plea transcript nor any other evidence showed that defendant had ever received correct information about his parole eligibility, he successfully alleged that he had received ineffective assistance of counsel due to his attorney's incorrect advice about his parole eligibility and he was entitled to an evidentiary hearing to explore the merits of his claim. Thomas v. State, 881 So. 2d 912 (Miss. Ct. App. 2004).

Appellant was properly denied post-conviction relief, because, regardless of a procedural bar, it was clear from the record of the plea colloquy that appellant was informed of the consequences of a guilty plea; thus, appellant's claim that counsel was ineffective for failing to inform appellant of the consequences of a guilty plea was without merit. Williams v. State, 872 So. 2d 711 (Miss. Ct. App. 2004).

Appellant was properly denied post-conviction relief, because appellant's guilty plea, statements he made during the plea hearing, and his attorney's signed certificate demonstrated that there had been effective assistance of counsel. Jackson v. State, 872 So. 2d 708 (Miss. Ct. App. 2004).

Defendant offered no evidence to support his contention that his lawyer had given him bad advice in advising him to plead guilty to support his ineffective assistance claim; when asked at his guilty plea hearing whether he was satisfied with the advice and help given by his attorney, defendant responded affirmatively. Wofford v. State, 875 So. 2d 251 (Miss. Ct. App. 2004).

Appellate court found no indication that defendant's attorney had performed in a deficient manner where defendant told the judge he was guilty of manslaughter, affirmed that his attorney had explained everything in his petition to plead guilty and that he understood everything in the petition; there was no evidence that defendant's attorney performed in a deficient manner or that any supposed deficiency in any way prejudiced defendant. Thomas v. State, 861 So. 2d 371 (Miss. Ct. App. 2003).

Valid guilty plea operated as a waiver of all non-jurisdictional rights or defects that were incident to trial; defendant was fully advised of his rights and the maximum sentences he faced if he chose to go to trial, and he was provided a detailed admonishment prior to accepting his guilty plea, such that defendant's plea was made knowingly, intelligently, and voluntarily and he waived any rights regarding the allegedly coerced confession. Swindoll v. State, 859 So. 2d 1063 (Miss. Ct. App. 2003).

Because defendant's guilty plea petition failed to mention any deficient performance by his counsel and defendant represented that he was satisfied with counsel's representation, he did not receive ineffective assistance. Swindoll v. State, 859 So. 2d 1063 (Miss. Ct. App. 2003).

Inmate entered his guilty plea in a manner that was knowing, voluntary, and intelligent, and he testified that no one made any promises, coerced, or induced him into pleading guilty; the record of the hearing belied the inmate's claims that counsel was ineffective for allegedly misleading him and coercing him into pleading guilty. Glass v. State, 856 So. 2d 762 (Miss. Ct. App. 2003).

Evidence was insufficient to establish ineffective assistance of counsel in connection with the defendant's guilty plea where the trial court engaged in a lengthy course of inquiry with the defendant as to his understanding of the difference between a plea of guilty and not guilty and that, if he elected to plead guilty, the choice was solely his, and where the defendant merely alleged that his attorneys were insufficiently vigorous in their efforts to persuade him to submit to a trial. Magee v. State, 752 So. 2d 1100 (Miss. Ct. App. 1999).

The defendant was not denied effective assistance of counsel in connection with his guilty plea, notwithstanding the assertion by the defendant that counsel informed him that he had an agreement with the Department of Corrections and would only serve two and one-half years as a result of his guilty plea, where the defendant was apprised of his rights and the possible consequences of his guilty plea, defense counsel's associated, local counsel informed the defendant prior to his plea that he would receive a sentence of 20 years if he entered a plea of guilty, and the trial judge informed the defendant that the district in which he was pleading did not negotiate plea bargains and that the maximum sentence that might be imposed was 20 years. Martin v. State, 749 So. 2d 375 (Miss. Ct. App. 1999).

Attorney provided ineffective assistance of counsel where he persuaded defendant to plead guilty to the charges with the collateral intention of covering up the fact that counsel was unprepared for trial, failed to check into defendant's alibi defense, and defendant was unable to read the statements contained in the petition to enter a guilty plea stating that defendant was satisfied with the legal advice given him, which statements were read to him by his counsel, with no other witnesses present. Kirksey v. State, 728 So. 2d 565 (Miss. 1999).

Defense counsel was not ineffective where (1) he negotiated a plea bargain, but the defendant failed to accept it by the deadline and, thus, the agreement lapsed, (2) he then relayed the defendant's desire to enter a guilty plea to the court when instructed to do so by the defendant, and (3) he explained the constitutional rights waived and consequences of pleading guilty. Tobias v. State, 724 So. 2d 972 (Ct. App. 1998).

Strickland test for determining whether defense counsel was ineffective applies to challenges to guilty pleas based on ineffective assistance of counsel. Walker v. State, 703 So. 2d 266 (Miss. 1997).

Defendant failed to establish that his counsel's failure to advise him, prior to his entry of guilty plea, of mandatory minimum sentence constituted ineffective assistance of counsel; defendant's plea bargain added only concurrent sentence and dropped four pending criminal charges, defendant had answered affirmatively at plea hearing to question regarding whether he was satisfied with legal services and advice of his counsel, and defendant's counsel stated in affidavit that defendant had known of legal consequences of plea and that defendant had agreed plea was best course of action. Ashby v. State, 695 So. 2d 589 (Miss. 1997).

Counsel was not ineffective in advising defendant to plead guilty to charge of felony driving under the influence (DUI); counsel, along with district attorney, explained charges contained in indictment and possible sentencing range, and defendant was not prejudiced by counsel's failure to advise him of typographical error in indictment. Drennan v. State, 695 So. 2d 581 (Miss. 1997).

In addition to determining that defendant who seeks to plead guilty or waive right to counsel is competent, trial court must satisfy itself that waiver of his constitutional rights is knowing and voluntary. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

Defendant who pled guilty to capital murder in order to avoid trial that would have subjected him to possible death sentence failed to show he was prejudiced, as required to support ineffective assistance of counsel claim; only thing that might have been different had case gone to trial was sentence defendant received. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

Allegations by defendant who had pleaded guilty to charge of capital murder in order to avoid death penalty that sentences received by his accomplices were substantially less than his were insufficient to state claim of ineffective assistance of counsel; record indicated that accomplices, with one exception, were not given extremely reduced sentences as compared to defendant, and prosecutor stated that accomplice who received substantially reduced sentence had been involved in murder to lesser extent than others. Simpson v. State, 678 So. 2d 712 (Miss. 1996).

Defendant did not receive ineffective assistance of counsel in entering guilty plea to 2 counts of armed robbery, where counsel gave defendant accurate information about consequences of being found guilty after trial, defendant swore under oath that plea was voluntary, trial court questioned defendant as to voluntariness of plea prior to plea hearing, and defendant had prior experience in dealing with felony charges and was familiar with court proceedings. Roland v. State, 666 So. 2d 747 (Miss. 1995).

Standard generally applicable to determine claims of ineffective assistance of counsel is also applicable to judge counsel's performance in entry of guilty plea. Roland v. State, 666 So. 2d 747 (Miss. 1995).

A murder defendant was not denied effective assistance of counsel by his attorney's admission of his guilt of the crime where the evidence of guilt was overwhelming, and the attorney admitted that the defendant was guilty of simple murder, not capital murder, and submitted a lesser-included offense instruction in accordance with the argument. Woodward v. State, 635 So. 2d 805 (Miss. 1993).

A defendant who was convicted of armed robbery was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether he was afforded ineffective assistance of counsel during the plea process, where the defendant alleged that his attorney erroneously informed him that if he accepted the prosecution's plea bargain offer of 15 years imprisonment he would be eligible for parole after serving 3 years and 9 months of his sentence, and that he would not have accepted the prosecution's plea bargain offer had he known that he would be ineligible for parole for 10 years pursuant to § 47-7-3(1)(d), which provides that a person convicted of robbery and sentenced to more than 10 years imprisonment shall not be eligible for parole until after serving at least 10 years of the sentence. Alexander v. State, 605 So. 2d 1170 (Miss. 1992).

When a convicted defendant challenges his guilty plea on grounds of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity. Reynolds v. State, 521 So. 2d 914 (Miss. 1988).

A defendant who, in reliance upon his counsel's advice that he could receive the death penalty at a second trial, following upon a first trial conviction and life sentence for murder, entered a guilty plea prior to such second trial and was sentenced to life imprisonment, could not withdraw his guilty plea on the grounds that it was entered as a result of ineffective assistance of counsel, where, at the time given, counsel's advice was correct, and became incorrect only several years later when the United States Supreme Court and the Mississippi Supreme Court ruled that the double jeopardy clause of the state and federal constitutions precluded imposition of the death penalty when defendant had previously been sentenced to life imprisonment for the same crime. Odom v. State, 498 So. 2d 331 (Miss. 1986).

Defendant who enters plea of guilty to charge of armed robbery pursuant to plea bargain agreement in reliance upon erroneous advice of attorney that defendant will be eligible for earned good time and will be subject to release after serving 7 years of sentence is entitled to vacation of guilty plea and reinstatement of innocent plea when Mississippi Department of Corrections changes administrative policy to comply with §§ 47-5-139, 47-7-3, thereby requiring that defendant serve minimum of 10 years. Coleman v. State, 483 So. 2d 680 (Miss. 1986).

Denial of the inmate's petition for post-conviction relief was proper where he offered no proof that his defense counsel had been ineffective and failed to present his claims with any specificity as required by Miss. Code Ann. § 99-39-11(2). Puckett v. State, 879 So. 2d 920 (Miss. 2004), writ of certiorari denied by 544 U.S. 924, 125 S. Ct. 1638, 161 L. Ed. 2d 483, 2005 U.S. LEXIS 2506, 73 U.S.L.W. 3555 (2005), dismissed by 615 F. Supp. 2d 494, 2009 U.S. Dist. LEXIS 26433 (S.D. Miss. 2009).

105. — Mental examination, assistance of counsel.

Defense counsel was not ineffective in withdrawing his request for a mental evaluation of defendant after he could find no independent information suggesting that defendant was ever found to be in need of psychiatric or psychological care and no indication that defendant would not be competent to stand trial or that he had been legally insane at the time of the offense. Counsel was not deficient because he was intimately familiar with defendant, his family, and his background and because he conducted his own investigation and, after consulting with defendant, withdrew his request for a mental evaluation as originally filed and asked that an evaluation be conducted for purposes of securing mitigating evidence for use during the penalty phase of defendant's capital murder trial. Goff v. State, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 559 U.S. 944, 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (2010).

Denial of the inmate's motion for post-conviction relief was appropriate because his counsel was not ineffective; his counsel had filed for the inmate to undergo a mental examination and counsel further took the inmate's mental condition into consideration when asking for a lenient sentence. Hayes v. State, 935 So. 2d 1133 (Miss. Ct. App. 2006).

In an ineffective assistance of counsel claim, certainly the decision to introduce the 1985 diagnosis could be considered a reasonable strategic decision made by trial counsel inasmuch as had the evaluation been introduced, the State would have rebutted with the 2002 evaluation which found that defendant was not mentally retarded. Also, because defendant's claim for protection under the prohibition against executing mentally retarded individuals failed, the claim of ineffective assistance of counsel based upon the failure to introduce the 1985 evaluation had to also fail. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

In defendant's ineffective assistance of counsel claim that counsel was deficient in failing to introduce evidence of mental health mitigation and the 1985 evaluation finding him mildly mental retarded, trial counsel made a strategic, tactical decision not to introduce the 1985 evaluation as that evidence was contradicted by the 2002 evaluation, which presented a strong case that defendant was not mentally retarded, evidenced that defendant was untruthful in his trial testimony, and affirmatively showed that defendant's confession was not coerced. Thus, defense counsel was not ineffective. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

The defendant was entitled to present the issue to the trial court of whether his trial counsel was ineffective in failing to seek other expert assistance when a state hospital mental examination produced no report, and whether such inaction resulted in any prejudice to his case at sentencing. Brown v. State, 749 So. 2d 82 (Miss. 1999).

The Sixth Amendment was not violated when a court-appointed physician testified on rebuttal during the sentencing phase of the defendant's murder prosecution, notwithstanding that the physician gleaned information about the defendant by observing his competency hearing and that defense counsel did not have notice that such would occur, since the defense was on notice that the physician would be called in rebuttal if the defendant called his own expert to testify. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Rebuttal testimony of psychologist and psychiatrist appointed at state's request was not based on evidence obtained in violation of Sixth Amendment, where testimony did not result from examination beyond scope of court's order, defense counsel was aware of psychological examination and prepared defendant for it, defense counsel decided not to be present, doctors warned defendant of his rights, and defendant exercised those rights by refusing to answer some questions during the examination. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

106. —Medical examination, assistance of counsel.

A smear test for gonorrhea, which was conducted after the defendant was arrested for rape, did not constitute a "critical stage" of the criminal proceedings, and therefore the defendant had no right to the presence and advice of counsel under the Sixth Amendment. Ormond v. State, 599 So. 2d 951 (Miss. 1992).

107. —Statements to private persons or informants, assistance of counsel.

Statements made to private individuals do not implicate Sixth Amendment right to counsel. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Defendant's right to counsel was not violated by law enforcement officers' use of defendant's wife as confidential informant, absent showing that wife communicated the substance of defendant's conversations and thereby created a realistic possibility of injury to defendant or benefit to the State. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

An inmate was not interrogated by another inmate, who informed the police about what he had been told, in violation of his Sixth Amendment right to have counsel present during interrogation, where there was no evidence that the police actively solicited any action by the informant or gave him anything in return for information which he provided. Ladner v. State, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

Sixth Amendment right to counsel is not violated where, after accused's arraignment, police informant in same cell listens to and reports accused's incriminating statements without questioning accused directly. Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986), on remand, 800 F.2d 304.

108. — Waiver, assistance of counsel.

There was no Miranda violation when officer approached hospitalized defendant third time for confession, because officer gave adequate warning and because defendant voluntarily and knowingly waived his rights before giving statement. Keller v. State, 138 So. 3d 817 (Miss. 2014).

Circuit court did not err in finding that defendant waived his right under U.S. Const. amend VI and Miss. Const. art. 3, § 26 to the assistance of counsel under Miss. Unif. Cir. & Cty. R. 8.05 where the record was clear that even after the circuit court apprised defendant of his rights, he refused to participate in his trial. Defendant purposefully intended to use his absolute right to counsel to avoid going to trial, a course of action that the Alabama Supreme Court specifically proscribed; additionally, defendant's waiver was knowing and voluntary since he was fully aware of the rights that he would be jeopardizing by proceeding without counsel. Lewis v. State, 131 So. 3d 579 (Miss. Ct. App. 2013), writ of certiorari denied by 132 So. 3d 579, 2014 Miss. LEXIS 94 (Miss. 2014).

Regardless of whether defendant made an official waiver of appellate counsel on the record, he clearly asked that his appellate counsel be withdrawn, knowing that the result of that decision was that he would have to hire counsel himself or proceed pro se. Quite simply, defendant could not request, on the one hand, that his appointed appellate counsel be terminated and claim, on the other hand, that he was denied his Sixth Amendment right to counsel. Sullinger v. State, 935 So. 2d 1067 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 423 (Miss. 2006).

Counsel was not ineffective in failing to object to defendant's conviction of armed carjacking and armed robbery arising out of the same episode on the grounds of double jeopardy where double jeopardy did not apply because the carjacking charge involved a delivery truck and the robbery involved money taken from one of the occupants of the truck; counsel would not be judged ineffective for making a spurious argument. McCline v. State, 856 So. 2d 556 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

Because an officer's informing defendant that his requested counsel would not represent him was not interrogation, defendant's subsequent statement that he wanted to talk was on his own initiative, and since he then executed an express waiver of rights, his confession was voluntary. Bryant v. State, 853 So. 2d 814 (Miss. Ct. App. 2003), writ of certiorari denied by 852 So. 2d 577, 2003 Miss. App. LEXIS 880 (Miss. Ct. App. 2003).

While the Sixth Amendment to the United States Constitution guaranteed defendant a right to the assistance of counsel, defendant was entitled to waive that right and did so, even though he said he should not say anything until he talked to his lawyer, by reinitiating communication with police after he had broken off questioning, especially since the statements he made implicating himself in a murder were not coerced. Grayson v. State, 806 So. 2d 241 (Miss. 2001), writ of certiorari denied by 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329, 2002 U.S. LEXIS 7800, 71 U.S.L.W. 3281 (2002).

The defendant's confession was properly taken without his attorney present where there was no evidence in the record that tended to show that the defendant ever asked for his attorney throughout his entire conversation with the officer to whom he gave his confession, even when given his Miranda rights by the officer and the defendant signed a waiver of his Miranda rights before giving his confession. Marshall v. State, 812 So. 2d 1068 (Miss. Ct. App. 2001).

The interrogation of the defendant by police officers after his initial appearance before a magistrate did not violate the Sixth Amendment as the defendant did not request an attorney or in any way assert his Sixth Amendment right to counsel at his initial appearance or otherwise. Beckum v. State, — So. 2d —, 2000 Miss. App. LEXIS 568 (Miss. Ct. App. Dec. 5, 2000), reversed by, remanded by 786 So. 2d 1060, 2001 Miss. LEXIS 155 (Miss. 2001).

Under a totality of the circumstances, the defendant knowingly, understandingly, freely and voluntarily waived her Miranda rights, particularly the right to counsel, and her statements were admissible; while it certainly would have been permissible, and perhaps desirable, for law enforcement officials to inform the defendant that her parents were in the process of hiring an attorney for her and that an attorney had called to speak with her, they were not under a legal obligation to do so. Wilhite v. State, 791 So. 2d 231 (Miss. Ct. App. 2000).

The defendant waived any right to counsel with regard to the introduction into evidence of oral statements made by the defendant to an inmate where (1) the other inmate was not in any way involved or implicated in the crimes charged against the defendant, and (2) the other inmate approached the state with the information and was not solicited by the state to act as an informant against the defendant. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

The defendant's incriminating statement was not made in violation of his right to counsel where he never requested the presence of his lawyer either prior to or during questioning and where he initiated contact with the police. Genry v. State, 735 So. 2d 186 (Miss. 1999).

The defendant's continued acquiescence in representation by counsel waived his right to proceed pro se where, during trial, he repeatedly renewed his request to proceed pro se, but his requests were conditional and far from unambiguous. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

There was no conflict of interest where defense counsel had previously represented a codefendant in a prior proceeding that also involved the defendant. McCaleb

v. State, 743 So. 2d 409 (Miss. Ct. App. 1999).

Defendant's Sixth Amendment right to counsel was not violated, despite his claim that authorities obtained statement from him after counsel had been appointed for him, where defendant did not request an attorney or in any way assert his Sixth Amendment right to counsel, and he waived his right to counsel before each inculpatory statement was given. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Defendant may generally waive his Sixth Amendment right to counsel when he waives his Fifth Amendment rights. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Decision to waive right to counsel does not require appreciably higher level of mental functioning than decision to waive other constitutional rights. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

Competence that is required of defendant seeking to waive his right to counsel is competence to waive right, not competence to represent himself. Dunn v. State, 693 So. 2d 1333 (Miss. 1997).

An accused's refusal to sign a waiver of rights form does not in and of itself constitute a demand for an attorney. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

Statements made by a defendant's sister in the defendant's presence that she intended to get an attorney were not sufficient to trigger the defendant's right to counsel during police questioning and to preclude any subsequent waiver on his part where the record was devoid of any evidence that the defendant attempted to adopt, or even understood, the statements made by his sister. Lee v. State, 631 So. 2d 824 (Miss. 1994).

A waiver of counsel inquiry was not required before permitting a defendant to represent himself at trial where the defendant requested and was provided with the assistance of counsel throughout the entire trial process in the form of a "hybrid representation." Metcalf v. State, 629 So. 2d 558 (Miss. 1993).

A defendant's waiver of his right to counsel and his right to remain silent when he executed a written waiver prior to confessing could not be found to be voluntary where his confession given immediately thereafter was involuntary due to improper collusion by law enforcement interrogators, since the defendant's waiver of his right and his confession were inextricably bound and were the product of prolonged coercive police interrogation. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

Even if an accused has procured an attorney, the accused may still waive the right to have the lawyer present during any police questioning; nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his or her own, to speak with police in the absence of an attorney. Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

The evidence was sufficient to support a finding that a defendant had knowingly and voluntarily waived his right to assistance of counsel when he made a statement to the police, even though the defendant testified that he had repeatedly requested an attorney and was not provided with one, where the defendant admitted that he understood his rights, and all of his contentions that he had made repeated requests for counsel were specifically refuted by 3 law enforcement officers. Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

If a defendant has not asserted his or her Fifth Amendment right to counsel, the fact that the defendant is appointed counsel to protect his or her Sixth Amendment right does not preclude interrogation on unrelated offenses. As long as the defendant is given the Miranda warning and makes a knowing and voluntary waiver, any statements obtained during the interrogation are admissible. Willie v. State, 585 So. 2d 660 (Miss. 1991).

It is not the duty of law enforcement officers and prosecutors, nor the function of the courts, to insist that a person accused of a crime actually confer with an attorney before talking about the crime nor is there any prescribed procedure or form to be followed in the waiver of the right to such assistance. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A defendant knowingly and intelligently waived the right to counsel, and his subsequent statement was freely and voluntarily given, where the defendant initially invoked his constitutional right to counsel but indicated that he no longer wished to contact an attorney when given the opportunity to call, the defendant then indicated that he was willing to enter into a discussion of the crime, and the defendant was again advised of his Miranda rights, after which he confessed. The defendant "initiated" when he indicated that he no longer wished to telephone his attorneys; one cannot halt an inquiry by first indicating a desire to call an attorney, then declining to do so when offered the opportunity. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

Criminal suspect who, prior to giving confession, is advised of right to counsel and states that he understands right, who makes no mention of desiring attorney and who acknowledges in written waiver of right to counsel that he has not been promised anything, nor had any threats, pressure or coercion used against him has made voluntary waiver of right to have counsel present during confession. Wiley v. State, 465 So. 2d 318 (Miss. 1985).

A writ of error coram nobis was granted and the original judgments against the defendant entered on his pleas of guilty to the crime of burglary were vacated and his case remanded for a new trial where he did not have counsel for his own defense, and had not competently and intelligently waived the right to counsel. Scott v. State, 190 So. 2d 875 (Miss. 1966).

109. —Misinformation from counsel, assistance of counsel.

While defendant alleged that counsel advised him that he was eligible for parole, defendant was unable to meet the second prong of the test for ineffective assistance of counsel because defendant was unable to show how this deficiency prejudiced defendant's case when the defendant entered a guilty plea to the sale of cocaine. Prince v. State, 967 So. 2d 69 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 966 So. 2d 172, 2007 Miss. LEXIS 581 (Miss. 2007).

Court properly denied defendant's motion for post-conviction relief after defendant pled guilty to sexual battery; trial counsel did not provide erroneous advice in advising defendant that the 14-year-old victim's consent was not an issue for the jury to address. Under the plain language of Miss. Code Ann. § 97-3-95(1)(c), the State would not have had to address the issue of consent; State would have only had to show that the victim was between the ages of 14 and 16, that defendant was more than 36 months older than the victim, and that defendant had engaged in sexual penetration with the victim. Bates v. State, 879 So. 2d 519 (Miss. Ct. App. 2004).

Defendant's claim that the assistance received from counsel was ineffective because his attorney had failed to inform him that the sentence would be served without parole and had misinformed him about his eligibility for parole after a certain period of time was time barred; defendant's claim was required by Miss. Code Ann. § 99-39-5(1)(a) to be brought within three years of the guilty plea; the raising of a claim of ineffective assistance of counsel alone was insufficient to overcome the procedural bar where defendant provided as sole evidence his own version of the facts. Austin v. State, 863 So. 2d 59 (Miss. Ct. App. 2003).

Allegation by post-conviction petitioner, who had pleaded guilty to charge of capital murder, that he had received ineffective assistance of counsel on basis that his guilty plea was induced by misrepresentations of his attorney was rebutted by transcript of plea hearing and could be summarily denied without hearing; record indicated that petitioner had remained silent both when given opportunity to inform court of terms of alleged "real plea bargain," and also when accomplice received shorter sentence. Simpson v. State, 678 So. 2d 712 (Miss. 1996).

Defendant was entitled to a hearing on his petition for leave to withdraw his guilty plea, on the asserted basis that he had received incorrect advice from counsel regarding the length of his sentence and the terms of his plea bargain. Tiller v. State, 440 So. 2d 1001 (Miss. 1983).

110. — Conflicts of interest, assistance of counsel.

Defendant wanted counsel's assistance on whether to rest his case, an accused had the a right to be heard by himself, counsel, or both, and the trial court erred in assigning counsel to be advisory while at the same time allowing her to withdraw due to a conflict, and the trial court erred again in requiring counsel to remain as advisory counsel once a conflict arose between her duty to the court and her duty to defendant; defendant's constitutional rights were generally jeopardized. Hill v. State, 134 So. 3d 721 (Miss. 2014).

Defendants were not denied the effective representation of counsel regarding their joint representation because nothing conclusively indicated that defendants had interests that were adverse to each other, or that counsel should have engaged in some course of conduct that would have been adverse to the interests of one or the other. Defendants merely suggested that some of the evidence indicated the possibility of a conflict between the two. Salts v. State, 984 So. 2d 1050 (Miss. Ct. App. 2008), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 334 (Miss. 2008).

By dismissing defendant's former attorney, after defendant gave him counterfeit documents concerning a stolen vehicle for which defendant was being charged, the trial court did not violate defendant's constitutional right to counsel because, as the attorney was going to be called as a witness in defendant's subsequent trial, the conflict of interest between defendant and his former attorney required his removal as counsel. There was no evidence that the conflict was manufactured in order to deprive defendant of his former counsel's services or that he suffered undue prejudice by proceeding with his new counsel. Hayden v. State, 972 So. 2d 525 (Miss. 2007).

Defendant knowingly waived his right to conflict-free counsel and, further, failed to show that the fact that a single attorney represented defendant and his two codefendants on charges of assault of a law enforcement officer prejudiced defendant or rendered defendant's guilty plea involuntary. Blansett v. State, 841 So. 2d 165 (Miss. Ct. App. 2002).

In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest affected his lawyer's performance. Brown v. State, 798 So. 2d 481 (Miss. 2001).

There was no merit to the defendant's claim of ineffective assistance of counsel where the defendant alleged that his attorney was ineffective in that she had a conflict of interest because she was the sister of an attorney working with the district attorney's office where there was no evidence that defense counsel's brother was involved in the case in any fashion. Miller v. State, 788 So. 2d 70 (Miss. Ct. App. 2000).

The defendant failed to establish a violation of his right to effective assistance of counsel based on a conflict of interest where he alleged a conflict of interest based solely on the fact that his attorney represented two defendants and failed to show an actual conflict. Witt v. State, 781 So. 2d 135 (Miss. Ct. App. 2000).

There was no conflict of interest and, therefore, no ineffective assistance of counsel occurred where counsel arranged separate pleas for the defendant and a codefendant at separate terms of court, which resulted in two different sentences, since the defendant claimed primary responsibility for the crimes at issue and was also charged with two other counts. Ingram v. State, 774 So. 2d 467 (Miss. Ct. App. 2000).

The defendant failed to show ineffective assistance of counsel based on a conflict of interest arising from the former representation of a potential witness by defense counsel since the potential witness did not testify; therefore, there was no prejudice. Tyler v. State, — So. 2d —, 2000 Miss. App. LEXIS 188 (Miss. Ct. App. Apr. 25, 2000), opinion withdrawn by, substituted opinion at 784 So. 2d 972, 2001 Miss. App. LEXIS 41 (Miss. Ct. App. 2001).

Effective right of counsel encompasses the right to representation by attorney who does not owe conflicting duties to other defendants, and undivided loyalty of defense counsel is essential to the due process guarantee of the Fifth Amendment. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

There was no actual conflict arising from fact that defense counsel had previously represented government rebuttal witness in unrelated prosecutions, where subject of cross-examination was witness' prior deals with state to provide testimony in exchange for plea agreements. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Defense counsel's representation was not adversely affected by fact that he had previously represented government rebuttal witness in unrelated prosecutions, where counsel was not "suddenly curtailed" in his cross-examination when subject of prior deals with prosecutors arose but, rather, proceeded onward to question witness in detail about his motivation for prior testimony in another case as well as his motivation for testifying against defendant in the present case. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Where no actual conflict of interest is present, defendant must demonstrate prejudice and show reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Defendant was not prejudiced by any adverse performance of defense counsel due to fact that he had previously represented government rebuttal witness in unrelated prosecutions; even assuming that counsel conclusively established that witness's sole motivation in testifying was to receive a reduced sentence pursuant to agreement with the State, there remained the vast amount of evidence presented during state's case in chief. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Right to effective assistance of counsel includes right to representation by attorney who does not owe conflicting duties to other defendants. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Actual conflict of interest, violating defendant's right to effective assistance of counsel, resulted from public defender's representation of both codefendant during plea negotiations and defendant at trial in prosecution originating from simultaneous double sale of drugs. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Prejudice from attorney's conflict of interest is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected attorney's performance. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Prejudice from actual conflict of interest, which existed when public defender provided dual representation to both defendant and codefendant, existed when public defender prematurely terminated cross-examination of codefendant. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Prosecutor and trial court have responsibility to notify defendant concerning potential conflicts of interest by defense counsel. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Mere fact that counsel for capital murder defendant shared office space with prosecutor who prosecuted defendant's preliminary hearing was not sufficient to demonstrate actual conflict of interest causing prejudice to defendant in violation of defendant's right to counsel. Cole v. State, 666 So. 2d 767 (Miss. 1995).

In a prosecution for conspiracy to distribute cocaine, a defendant's constitutional right to the effective assistance of counsel was violated due to an irreparable conflict of interest where the attorney who represented the defendant had also been counsel for the State's main witness in the trial against the witness for the same offense. Littlejohn v. State, 593 So. 2d 20 (Miss. 1992).

The right to effective assistance of counsel encompasses 2 broad principals—minimum competence and loyal assistance. The right to conflict free counsel is attendant to the Sixth Amendment right to effective assistance of counsel. It is incumbent upon courts which confront and which are alerted to possible conflicts of interest to take the necessary steps to ascertain whether the conflict warrants separate counsel. Thus, where a defense attorney represented 2 codefendants during the sentencing phase of the judicial proceedings and it could easily have been anticipated that the attorney would argue that the actions of one of the codefendants should not be attributed to the other or that the attorney would opt to not say or do anything in litigation for fear that to do so would characterize one codefendant as being more culpable than the other, the failure of the trial court to disclose to the codefendants the potential dangers of joint representation by counsel laboring under a conflict resulted in a violation of the right to effective assistance of counsel, and therefore a new sentencing hearing was warranted. Armstrong v. State, 573 So. 2d 1329 (Miss. 1990).

Sixth Amendment test for violation of right to effective assistance of counsel is whether defendant can demonstrate that his attorney actively represented conflicting interest and conflict adversely affected his lawyer's performance; conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to cause of co-defendant whom counsel is also representing. United States v. Holley, 826 F.2d 331 (5th Cir. Miss. 1987), cert. denied, 485 U.S. 960, 108 S. Ct. 1222, 99 L. Ed. 2d 422.

Defendant failed to demonstrate that trial counsel was ineffective due to conflict of interest in representing co-defendants at trial by failing to demonstrate that counsel chose between alternative arguments helpful to one client but harmful to other, where defense was alibi in which all defendants represented by counsel were involved, and attorney told them if they were telling him truth, he had no conflict but if they committed murders he would have conflict. It is incumbent upon defendant to establish actual conflict with specific reference to instances in record which show that counsel's performance was adversely affected, and defendant failed to do this, although attempting to do so by pointing to prosecution's closing argument, which stated that there were many unanswered questions in case and one of biggest ones was "why did every single witness choose" same attorney. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

Defendant had been unable to present facts, and not mere inferences, to show that appellate counsel had actual conflict of interest which rendered him ineffective where counsel on appeal representing defendant had also been retained to represent co-defendant, who was defendant's son, at his own trial; appellate counsel testified that he never consciously decided not to raise any issue in defendant's appeal because he thought it might hurt his son. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

There is nothing in the law of this state which prohibits the partner of a county attorney from representing a defendant in a criminal proceeding outside the county where the county attorney serves, and the denial of defendant's counsel of choice on such grounds was a violation of his Sixth and Fourteenth Amendment rights. Frackman v. Deposit Guar. Nat'l Bank, 296 So. 2d 695 (Miss. 1974).

The fact that the defendant's wife, indicted as an accessory to the burglaries for which he was indicted, had competent counsel who included him in their conferences with his wife, did not satisfy the mandatory constitutional requirement that one charged with a felony is entitled to be represented by counsel; and this was particularly true where the interests of the defendant and his wife were antagonistic, and it would be impossible for her attorneys to defend him with fidelity. Scott v. State, 190 So. 2d 875 (Miss. 1966).

111. — Ineffective counsel generally, assistance of counsel.

In appellant's capital murder case, counsel was not ineffective for failing to adequately investigate and present the motion to transfer venue because counsel filed a motion to change venue and supported that motion with numerous affidavits and all known relevant press documentation. The trial court held a hearing and determined that a fair trial could be held in Union County. Howell v. State, 989 So. 2d 372 (Miss. 2008).

Counsel was not ineffective in failing to inform petitioner of the charges against him because a review of the statements of the children contained in the presentence report and their testimony at the sentencing hearing revealed no inconsistency. The specifics of the crimes were spelled out in the petition seeking approval to enter a guilty plea, and therefore, any claim that petitioner did not know he was pleading guilty to "photographing a child in sexually explicit conduct" failed. Leavitt v. State, 982 So. 2d 981 (Miss. Ct. App. 2008).

Counsel was not ineffective in failing to investigate because petitioner failed to present any competent evidence to establish the last time he took pictures of the girls, the date of his heart surgery, or any facts that would lend credence to his claims of innocence. Additionally, the record contained none. Leavitt v. State, 982 So. 2d 981 (Miss. Ct. App. 2008).

Counsel was not ineffective in failing to request a competency hearing because a report filed by the Mississippi State Hospital stated that it was an expert's opinion that petitioner was not suffering from any major mental disorder at the time of the alleged offenses such that he would not have known the nature, quality, and wrongfulness of his alleged acts at those times. Leavitt v. State, 982 So. 2d 981 (Miss. Ct. App. 2008).

Counsel was not ineffective in failing to challenge the indictment because any error resulting from exclusion of the numerical marker of the specific statute charged was harmless. The indictment put petitioner on notice of the charges against him, and any reference to an incorrect sentence was mere surplusage. Leavitt v. State, 982 So. 2d 981 (Miss. Ct. App. 2008).

Defendant did not show ineffective assistance of counsel where, even if defense counsel had successfully moved to have the charges severed, given the strength of the State's case against defendant, he could not reasonably have expected a different result on the manufacture-of-marijuana charge; defendant's counsel performed a thorough cross examination of the witnesses called by the State; and defendant showed no prejudice in having the trial judge preside over the case. Williams v. State, 971 So. 2d 581 (Miss. 2007).

While the defendant stated that his right to a speedy trial under Miss. Code Ann. § 99-17-1 was violated and that counsel was ineffective in failing to request a speedy trial, defendant however provided no information as to whether good cause was shown for the delay or whether the trial court granted any continuances; thus, he failed to present to any viable argument or any authority in support of his argument that his trial counsel was defective for failing to file a motion for a speedy trial, and therefore his counsel was not ineffective. Golden v. State, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Defendant failed to support his allegations of ineffective assistance of counsel and mainly used the issue to reassert his innocence; therefore, the issue was without merit. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

Denial of the inmate's petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-1 et seq. was appropriate because he failed to show that his attorneys were ineffective in part for requesting that venue be transferred; any prejudice claimed by the inmate was purely hypothetical and was insufficient to demonstrate any ineffectiveness. Turner v. State, 953 So. 2d 1063 (Miss. 2007).

Defendant's trial counsel was not ineffective where the indictment clearly informed defendant of the elements of the crime with which he was charged and there was nothing indicating that trial counsel's decision not to interview defense witnesses was not a valid legal strategy; defendant acknowledged that the trial judge advised him she could impose a minimum sentence of two years at his plea colloquy. Brown v. State, 944 So. 2d

103 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 732 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate because he failed to prove that his counsel was ineffective. The inmate entered an open plea and admitted to the judge that he took full responsibility for the crime he committed; additionally, he was sentenced within the guidelines. Hoskins v. State, 934 So. 2d 326 (Miss. Ct. App. 2006).

Defendant did not show ineffective assistance of counsel where defendant failed to point out anything counsel could have done other than proceed to trial on a theory that a witness may have committed the crimes because he turned in some of the items taken in the robbery; indigent defendants were not entitled to appointed counsel of their choice. Anderson v. State, 943 So. 2d 102 (Miss. Ct. App. 2006).

Dismissal of the inmate's motion for post-conviction relief without a hearing was appropriate because nothing indicated that his counsel was deficient in any way; in fact, the record contained numerous motions filed by counsel in an effort to aid the inmate's defense, and his trial counsel also negotiated to get the original charge of capital murder reduced to murder. Moss v. State, 940 So. 2d 949 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate because his counsel were not ineffective; after appointment, counsel began their defense with a vigorous volley of motions and his attorneys were able to secure a plea bargain that relieved the him of a possible death sentence. Harris v. State, 944 So. 2d 900 (Miss. Ct. App. 2006).

In a capital murder case, an inmate's ineffective assistance of counsel claims were either procedurally barred, or, even if not procedurally barred, were without merit, under the following circumstances: (1) the inmate's counsel did not fail to adequately develop evidence to impeach a witness because counsel conducted a thorough cross-examination of the witness, and pursued a line of questioning attempting to call into doubt whether the witness could really have overheard a conversation in which the inmate stated that he sold the guns on the street; (2) counsel's representation of another witness in a prior action that was completely unrelated to the inmate's case was not a conflict of interest, and counsel conducted a full cross-examination of the witness; (3) counsel produced several witnesses placing the inmate at a nightclub on the night of the murders; (4) counsel did present a case in mitigation for the jury to consider; (5) counsel's closing argument was coherent and not a poor strategic choice; and (6) the prosecutor's arguments using scriptural, religious, or biblical references were proper because the prosecutor was responding to scriptural or religious arguments made by defense counsel. Manning v. State, 929 So. 2d 885 (Miss. 2006).

Court rejected defendant's claim that he received ineffective assistance of counsel in violation of the Sixth Amendment because defendant's counsel did file a motion to exclude evidence admitted as the result of an allegedly illegal search, and a suppression hearing was held as a result of that motion; therefore, defendant failed to meet the two-prong Strickland test that required defendant to show that his counsel's performance was deficient and that he was prejudiced by the deficiency. Passman v. State, 937 So. 2d 17 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 482 (Miss. 2006), writ of certiorari denied by 549 U.S. 1324, 127 S. Ct. 1914, 167 L. Ed. 2d 570, 2007 U.S. LEXIS 3842, 75 U.S.L.W. 3530 (2007).

Inmate failed to establish that he was deprived of effective assistance of counsel due to his counsel's failure to pursue an insanity defense, to have him evaluated or to obtain his records from the United States Army showing he was discharged for reasons related to his mental health, as he did not offer evidence in support of his claims, other than unsubstantiated allegations, sufficient to overcome the strong presumption that his attorney's conduct fell within the wide range of reasonable professional assistance. Thomas v. State, 930 So. 2d 1264 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief was proper where his counsel was not ineffective, in part because it was determined that the inmate failed to demonstrate prejudice regarding the State's scriptural references or parole argument closing argument of the sentencing phase of his trial. Thus, his counsel was not deficient for failing to object. Manning v. State, — So. 2d —, 2005 Miss. LEXIS 464 (Miss. Aug. 4, 2005), opinion withdrawn by, substituted opinion at 929 So. 2d 885, 2006 Miss. LEXIS 109 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief after he had pled guilty to manslaughter was proper because counsel was not ineffective since the inmate had failed to demonstrate that his attorney's advice was not well within the range of competence required to attorneys in criminal cases. Hardiman v. State, 904 So. 2d 1225 (Miss. Ct. App. 2005).

Defendant failed to satisfy his burden of overcoming the strong presumption that an attorney's conduct fell within the wide range of professional assistance where, based on the detailed colloquy between defendant and the trial judge, it was clear that defendant personally understood the nature and consequences of his guilty plea. Beene v. State, 910 So. 2d 1152 (Miss. Ct. App. 2005).

Defendant's claim of ineffective assistance of counsel at trial failed where he did not reveal the nature of the prejudice that resulted from any of the errors he alleged by his defense counsel during his trial for possession of cocaine. Defendant was not guaranteed a "perfect" trial. Magee v. State, 912 So. 2d 1044 (Miss. Ct. App. 2005).

In a capital murder case, defendant did not receive ineffective assistance of counsel because of counsel's failure to use all of the peremptory challenges available since each juror concluded that they could have been fair and impartial if selected to sit on the jury; defendant failed to show that any prejudice resulted from the failure to strike the jurors. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Inmate's trial attorneys were not ineffective because (1) although some of the State's race-neutral reasons for striking jurors were a close call, the trial court allowed the challenges to stand, and the inmate did not show that a different outcome would have resulted had the Batson objections been sustained; (2) his counsel filed numerous pre-trial motions, cross-examined nine out of eleven prosecution witnesses, ultimately did not call a defense witness because he would have corroborated the State's witnesses met with the inmate on numerous occasions and even discussed a plea offer from the State that the inmate rejected; (3) the inmate's accusation that trial counsel had failed to properly investigate was merely an unfounded allegation because the inmate supplied little or nothing of what an effective attorney performing a proper investigation would or should have found by way of mitigating testimony; and (4) trial counsel did not err in failing to raise the issue of the inmate's competency because the inmate presented no evidence that he was currently incompetent or incompetent at the time of his trial. Knox v. State, 901 So. 2d 1257 (Miss. 2005), writ of certiorari denied by 546 U.S. 1063, 126 S. Ct. 797, 163 L. Ed. 2d 630, 2005 U.S. LEXIS 9080, 74 U.S.L.W. 3335 (2005).

Defendant's petition for post-conviction relief from his conviction of sexual battery was properly denied because defendant failed to establish by any convincing evidence that his attorney's performance was deficient where prior to entering his guilty plea, defendant stated that his trial counsel had discussed the charge against him and all possible defenses and that he was satisfied with his attorney's advice. Furthermore, defendant stated that he understood that his sentence could range between zero and thirty years and that he had entered a guilty plea because he had committed the crime charged against him. Myers v. State, 897 So. 2d 198 (Miss. Ct. App. 2004).

Defendant's guilty plea petitions for grand larceny and possession of cocaine indicated that defendant was informed of the possible sentence that defendant could receive and that defendant was satisfied with counsel's representation; hence, there was no merit to defendant's claim of ineffective assistance of counsel and the court properly denied defendant's petition for post-conviction relief. Dockens v. State, 879 So. 2d 1072 (Miss. Ct. App. 2004).

Counsel was not ineffective because he did direct the jury's attention to exculpatory portions of defendant's statement because (1) defense counsel asserted that co-defendant was the person responsible for the murder and that defendant was not present, and (2) counsel used good parts of defendant's bad statement that he was involved in the robbery and capital murder of the victim. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

There was no need to challenge the authentication of the bag and its contents, which included the victim's gun, money, food stamps, and coin wrappers, because the bag was found in co-defendant's yard and only served to reinforce the defense's theory that co-defendant, not defendant, killed the victim. Therefore, one of defendant's attorney's was not ineffective for failing to withdraw from the case as she was not an authenticating witness. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

Although defendant argued that there was no meaningful adversarial testing of prosecutor's case by defense counsel, defendant was represented by competent and zealous counsel and trial counsel challenged the State's evidence at all stages of the case by filing and arguing numerous pre-trial motions, throughout the trial itself, throughout the sentencing hearing, and through post-trial motions; thus, defendant's trial counsel was not ineffective. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

Trial counsel filed several pre-hearing motions, put on several witnesses in each phase of the trial, and zealously represented their client; the witnesses willing to come forward after the trial would have constituted redundant character testimony. Thus, trial counsel was not ineffective for failing to investigate defendant's case and potential witnesses. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

Counsel's performance in not moving for a change of venue was not deficient where all of the jurors stated that they could be fair and impartial and where the record revealed overwhelming evidence of a prisoner's guilt. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

Defendant's counsel was not ineffective under U.S. Const. amend. VI in defendant's criminal trial for capital murder, where: counsel did not investigate mitigation factors after defendant was found guilty, as defendant had explicitly instructed his counsel not to fight the death penalty because defendant preferred that over life imprisonment; failure to submit physical evidence for DNA analysis was a trial strategy; and counsel's performance with respect to a change of venue and a continuance were proper in the circumstances. Grayson v. State, 879 So. 2d 1008 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1593, 73 U.S.L.W. 3495 (2005).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for failing to impeach a material witness with an alleged prior inconsistent statement concerning the inmate's height because (1) there was little room for impeachment in the relative heights of the inmate, co-defendant, and the witness, and (2) it was a matter of trial strategy not to ask the witness additional questions on cross-examination. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for not objecting to the presence of a county sheriff during trial proceedings because (1) the inmate cited no authority to support the claim that the sheriff was able to tailor the sheriff's testimony after hearing other witnesses and (2) there was no abuse of discretion in the trial court's decision to permit the sheriff to remain in the courtroom. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Court found no ineffective assistance of counsel in the failure to object to an inmate being shackled at trial where no juror had stated that the shackling affected the conviction or sentence in any respect. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for not objecting to the trial judge's decision to excuse potential jurors after unrecorded bench conferences because even though the bench conferences should have been recorded, and even if the attorneys were negligent in failing to see that the conferences were recorded, there was no showing of prejudice to the inmate and the reasons for the excusal of the jurors were clearly in the record. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Defendant was not entitled to a free transcript in a post-conviction relief setting because his post-conviction motion could not withstand summary dismissal under Miss. Code Ann. § 99-39-11(2); defendant did not demonstrate ineffective assistance of counsel where he did not allege with any degree of specificity what constituted the mitigating evidence or the manner in which his counsel coerced him, and such naked allegations did not supply the "specificity and detail" required to establish a prima facie showing. McCray v. State, 869 So. 2d 442 (Miss. Ct. App. 2004).

Defendant did not prove ineffective assistance of counsel where the strategy of defendant's counsel was to avoid incarceration, and defendant's attorney negotiated a plea bargain for defendant and she received a suspended sentence, a monetary fine and probation; there was no evidence that a sentence pursuant to the non-adjudication laws was a condition to which the prosecution would have agreed or the trial judge would have accepted, and the record indicated that defendant chose to avoid the risk of such a sentence and sought regular probation instead. Smith v. State, 869 So. 2d 425 (Miss. Ct. App. 2004).

Defendant failed to meet his burden of proof regarding the allegation of ineffective assistance of counsel where his assertion that his attorney put up "no defense" during closing arguments other than to say "my client says he's innocent" was completely false; counsel said more in closing argument than defendant asserted he did, and defendant did not show that counsel's performance was deficient. Armstead v. State, 869 So. 2d 1052 (Miss. Ct. App. 2004).

Where the evidence showed that defendant's trial counsel extensively cross-examined a victim and a detective in a sexual assault case, and voiced objections to evidence when appropriate, there was nothing to support an ineffective assistance of counsel claim. McCoy v. State, 878 So. 2d 167 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 910 (Miss. 2004).

In a burglary case, defendant failed to establish ineffective assistance of counsel where there was nothing to show that defense counsel was unprepared for the trial, defendant was allowed to participate in jury selection, and defense counsel effectively pointed out discrepancies in trial testimony; moreover, the failure to call defendant as a witness and the decision to strike jurors were not grounds for an ineffective assistance of counsel claim. Phinisee v. State, 864 So. 2d 988 (Miss. Ct. App. 2004).

Where the inmate claimed in a post-conviction petition to have been denied effective assistance of counsel under Miss. Const. Art. III, § 26 and U.S. Const. Amend. VI due to defense counsel's failure to request and file complete discovery and to meet more than once with the inmate, the claim failed, as the inmate did not argue that this had resulted in prejudice. Battaya v. State, 861 So. 2d 364 (Miss. Ct. App. 2003).

Defense counsel was not ineffective at trial because (1) counsel was not ineffective for raising a Batson challenge because there was no viable Batson challenge; (2) counsel pursued a coherent defense strategy; (3) counsel was not ineffective for failing to move to have the capital murder charge reduced to manslaughter; and (4) counsel was not ineffective for failing to request lesser-included offense or lesser-offense instructions on murder or manslaughter. Powers v. State, 883 So. 2d 20 (Miss. 2003), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1584, 73 U.S.L.W. 3495 (2005).

Because defendant was unable to show that counsel's performance in a murder trial was so deficient and prejudicial as to warrant a new trial, reversal of a murder conviction was not required. Schuck v. State, 865 So. 2d 1111 (Miss. 2003).

In a case where defendant was convicted of murder for the shooting death of his wife, counsel was not ineffective regarding venue because defendant presented no evidence of alleged pretrial publicity, regarding the admission of a revolver, regarding closing argument, or regarding jury instructions because defendant did not show the outcome of the trial would have been different if an instruction on his suicide theory had been given to the jury. Jones v. State, 857 So. 2d 740 (Miss. 2003).

In a capital murder case, a review of the record, the briefs, and the arguments showed that there were no individual errors that required reversal and that there was no aggregate collection of minor errors that would, as a whole, mandate a reversal of either the inmate's convictions or sentences; thus, the failure by the inmate's attorneys to present issues at the trial or appellate level that the inmate now presented to the Supreme Court in his post-conviction application was not deficient and could not satisfy the first prong of the Strickland test. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to move for recusal of the judge under Miss. Code of Jud. Conduct Canon 3 because the judge's decision to disallow introduction of the sheriff's conviction for impeachment purposes was proper and the judge's comments did not evidence partiality. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to seek a continuance in order to better prepare because there was no indication from the record that the inmate's attorneys were in need of additional time or that their failure to obtain a continuance was deficient; also, the inmate failed to demonstrate how the result of his sentencing trial would have been different had his attorneys obtained a continuance. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to protect the inmate's Fifth Amendment right against self-incrimination and Sixth Amendment rights to counsel and due process when his attorneys allowed him to be interviewed by the State's psychological and psychiatric experts because the inmate answered the doctors' questions with full knowledge of his rights. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

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In a capital murder case, the inmate's counsel were not ineffective for failing (1) to object to the reintroduction of evidence from the guilt phase because the evidence was admissible; (2) to elicit testimony from the inmate's mother that the sheriff and deputy were alone in the inmate's room during their search; or (3) to obtain DNA evidence that could not procedurally be introduced. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Although all of petitioner death row inmate's arguments were procedurally barred either by res judicata or for failure to raise the arguments earlier and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. Jackson v. State, 860 So. 2d 653 (Miss. 2003).

In a burglary trial, defendant did not establish ineffective assistance of counsel because there was no evidence to show that defendant was deprived of a fair trial, and testimony elicited about the use of a stolen car was clearly within the ambit of trial strategy; further, counsel's failure to pursue a post-trial hearing did not amount to ineffective assistance of counsel because there was no new and material evidence. Cheeks v. State, 843 So. 2d 87 (Miss. Ct. App. 2003).

In a prosecution of defendant for the unlawful sale of cocaine, defendant's claims of ineffective assistance of counsel patently failed the first part of the test for claims of ineffective assistance of counsel, because they did not demonstrate a defective performance, much less any prejudice that could arise from such a performance. Martin v. State, 832 So. 2d 611 (Miss. Ct. App. 2002).

In a post-conviction relief case, because appellant's trial counsel's failure to object to separate indictments was wholly reasonable and because appellant suffered no prejudice, appellant failed to demonstrate ineffective assistance of counsel. Brooks v. State, 832 So. 2d 607 (Miss. Ct. App. 2002).

It is inappropriate for an attorney who represents a criminal defendant at trial to represent that same defendant on appeal where the attorney intends to raise an ineffective assistance of counsel claim in that appeal. Hill v. State, 749 So. 2d 1143 (Miss. Ct. App. 1999).

The defendant was entitled to leave to proceed on his claim that his counsel was ineffective when his attorney failed to explain an offered plea bargain. Davis v. State, 743 So. 2d 326 (Miss. 1999).

Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient, but also that he was prejudiced thereby, and that there is a reasonable probability that but for his attorney's errors, he would have received a different result in the trial court. Pearson v. State, 740 So. 2d 346 (Miss. Ct. App. 1999).

The defendant failed to prove that his attorney's performance fell outside the broad spectrum of reasonable professional assistance where the defendant's decision not to testify at trial was a reasonable trial strategy because the identification by the victim and his audio taped confession were very compelling and his attorney tried to discredit the victim's testimony by establishing inconsistencies in her prior statements to the police and her trial testimony. Smith v. State, 737 So. 2d 377 (Miss. Ct. App. 1998).

The defendant was not deprived of effective assistance of counsel when his counsel's paralegal/investigator was hit by a car on the second day of trial, especially as counsel stated that they could continue without the paralegal/investigator. Finley v. State, 725 So. 2d 226 (Miss. 1998).

On claim of ineffective assistance of counsel, court's scrutiny of counsel's performance is highly deferential, and court must make every effort to eliminate distorting effects of hindsight, to reconstruct circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Trial counsel's failure in capital murder prosecution to request funds for blood splatter expert to render opinion as to whether person who wore jeans actually fired fatal shot did not constitute ineffective assistance, where in his argument defendant appeared to assume that he was wearing jeans in question during shooting whereas throughout trial defendant argued that jeans were not his and that he had not worn them day of shooting. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Adversarial process protected by Sixth Amendment requires that accused have counsel acting in the role of an advocate, and the right to effective assistance of counsel is the right of accused to require that prosecution's case survive the crucible of meaningful adversarial testing. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A Louisiana attorney's failure to comply with court rules concerning appearances by foreign attorneys did not, per se, create ineffective assistance of counsel. Hubbard v. State, 628 So. 2d 1386 (Miss. 1993).

It is not per se professionally unreasonable for an attorney to allow a client to talk to the police and give a statement; where the evidence is otherwise overwhelming, confession may be a significant step toward prompt disposition of the case and mitigation of sentence. Thus, a defendant was not denied effective assistance of counsel on the ground that his attorney advised him to talk to the police, even though the attorney advised the defendant by telephone and did not go to the police station or further assist the defendant, where it appeared that the attorney "brought to bear independent scrutiny and judgment" before advising the defendant, and the evidence against the defendant was overwhelming. Riddle v. State, 580 So. 2d 1195 (Miss. 1991).

Ineffectiveness of counsel should not be excused simply because counsel has been privately retained. Therefore, that portion of Bennett v. State 293 So. 2d 1 (Miss. 1974), and any other case, which attempts to draw a relevant distinction between court-appointed and retained counsel where a defendant's right to appeal and effective assistance of counsel is concerned would be expressly overruled. Triplett v. State, 579 So. 2d 555 (Miss. 1991).

A defense attorney's failure to object when a prosecution witness, who was a nurse, was sent into the jury room to attend to a juror who had become ill, did not constitute ineffective assistance of counsel where no allegation or facts were presented as to how the attorney's failure to object resulted in any significant prejudice to the defendant at his trial. Jordan v. State, 577 So. 2d 368 (Miss. 1990).

A trial judge's failure to recess and adjourn at reasonable times did not deny the defendant the effective assistance of counsel where the record failed to reveal any evidence of old age, illness, fatigue or exhaustion that affected the defense counsel's performance. Lanier v. State, 533 So. 2d 473 (Miss. 1988).

Although § 99-15-17 allows for the appointment of 2 attorneys in capital cases, a defense counsel's withdrawal of his motion for the appointment of additional counsel did not constitute ineffective assistance of counsel where the defense counsel withdrew the motion because he had successfully developed the case and the case was not so complex that one attorney could not provide a legally sufficient defense. Marks v. State, 532 So. 2d 976 (Miss. 1988).

A defense counsel's heavy case load and limited resources are, absent specific instances of error, wholly insufficient in themselves to reverse a conviction and sentence on the ground of ineffective assistance of counsel. Cabello v. State, 524 So. 2d 313 (Miss. 1988).

Counsel was not ineffective for failing to move for change of venue before guilt phase of trial because defense counsel is under no duty to make such motion, and thus this would fall into realm of trial strategy. Neither newspaper articles, nor anything else, indicated that, absent change of venue, defendant would lose right to fair trial. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that counsel was ineffective based on opening statement conceding to jury that his client was guilty of crime charged in indictment was rejected because it may have been trial strategy. Candor at guilt phase may help defendant in sentencing phase because attorney who, while sincerely trying to help his client, at same time is open and honest with jury, is more likely to receive sympathetic and open ear in his other arguments. Counsel also argued crime was not capital murder and jurors must therefore return verdict of not guilty. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that trial counsel did not have requisite legal experience to properly try criminal case was rejected as basis for claim of ineffective assistance of counsel where trial counsel had 2 ½ years experience and had tried 5 criminal cases, none of which were capital cases, at time of first trial of defendant. Level of criminal trial experience is one factor to be considered in determining whether there was effective assistance of counsel. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Counsel's failure to obtain services of forensic pathologist was not sufficient to constitute ineffective assistance of counsel where cause of death was important issue at trial because (1) there is no law requiring employment of forensic pathologist as prerequisite to defense counsel being considered constitutionally effective and (2) as practical matter, defense counsel did in fact consult with pathologist and discuss reports of prosecution's pathologist and was advised that pathologist saw nothing which would be of any benefit. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

Refusal of trial court to grant recess requested by criminal defendant, in case in which jury retires to deliberate at 9:30 p.m. and returns with guilty verdict at 11:03 p.m., does not deprive defendant of effective assistance of counsel through exhaustion where attorney for defendant declares himself fit and able and only expresses concern for jury when making motion for recess. Fairley v. State, 483 So. 2d 345 (Miss. 1986).

Defendant convicted of capital murder is not entitled to reversal on basis of refusal of trial court to appoint experienced trial counsel where defendant is unable to point to specific lapses by trial counsel. Johnson v. State, 476 So. 2d 1195 (Miss. 1985).

Defendant, who was convicted of manslaughter after a one-day trial that lasted until almost 11:00 P.M., despite defense counsel's repeated motions for a recess, was denied the effective assistance of counsel, particularly in light of the fact that the aged defense attorney, who had prepared and was selected prior to the trial to making the closing argument, read the state's requested instruction on murder to the jury four successive times and was immediately thereafter taken to a hospital appearing to be in shock. Thornton v. State, 369 So. 2d 505 (Miss. 1979).

112. — Tests of ineffectiveness of counsel, assistance of counsel.

Nothing in the record affirmatively showed constitutional ineffectiveness and defendant failed to show prejudice; thus, defendant failed to meet his Strickland burden. Givens v. State, 967 So. 2d 1 (Miss. 2007).

Since the indictment was not defective, counsel's decision not to challenge it could not amount to ineffective assistance of counsel, as challenging it would not have changed the result of the proceeding; defendant failed to present any evidence that would prove ineffective assistance of counsel. Mosley v. State, 941 So. 2d 877 (Miss. Ct. App. 2006).

Defendant failed to meet the burden required by Strickland where the circuit court judge found defendant's counsel's testimony regarding his representation of defendant to be more credible than defendant's testimony. Hubanks v. State, 952 So. 2d 254 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 171 (Miss. 2007).

Appellate court rejected an inmate's claims of ineffective assistance of counsel because the inmate made only conclusory allegations, and all of evidence indicated that the inmate's counsel acted capably. Berry v. State, 924 So. 2d 624 (Miss. Ct. App. 2006).

Although the counsel who represented the inmate had previously prosecuted him on similar charges, the inmate failed to establish that he was deprived of effective assistance of counsel because the inmate did not prove prejudice. Dobbs v. State, 932 So. 2d 878 (Miss. Ct. App. 2006).

Inmate was not able to establish that his attorney rendered ineffective assistance of counsel prior to entering a guilty plea as his attorney was successful in getting other felony charges dismissed, and the inmate stated at the plea hearing that he was satisfied with his attorney's representation. Majors v. State, 946 So. 2d 369 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 50 (Miss. 2007).

Denial of the inmate's motion for post-conviction relief was proper; his counsel was not ineffective because the inmate's argument that his attorney was not convincing enough since the judge ruled against him did not show deficient performance under Strickland. The inmate had credited his counsel with making the correct arguments before the judge. Jones v. State, 922 So. 2d 31 (Miss. Ct. App. 2006).

Although petitioner claimed that she was denied her right to effective assistance of counsel under the Sixth Amendment and Miss. Const. Art. 3, § 26, due to her counsel's failure to actively pursue a change of venue, generally conduct an investigation of her case, conduct an adequate investigation in preparation for the guilt-innocence phase and the sentencing phase of her trial, and to object and preserve for appeal purposes the prosecutor's improper comments during the guilt phase of the trial, the court had determined each of petitioner's arguments was without merit because, in her efforts to meet the Strickland test criteria, petitioner failed to demonstrate that her trial counsel's actions were deficient and that the deficiency prejudiced the defense of her case. Unless petitioner made both showings, it could not be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. Byrom v. State, 927 So. 2d 709 (Miss. 2006), writ of certiorari denied by 549 U.S. 1056, 127 S. Ct. 662, 166 L. Ed. 2d 520, 2006 U.S. LEXIS 9076, 75 U.S.L.W. 3283 (2006).

Appellate court affirmed defendant's conviction for the sale of a controlled substance and marijuana because even if defendant's counsel's performance was deficient, defendant was not prejudiced by it given that the drug transaction was videotaped and shown to the jury and the confidential informant testified against defendant. Westbrook v. State, 928 So. 2d 186 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 243 (Miss. 2006).

Defendant, to prevail on a claim of ineffective assistance, had to show deficiency of counsel's performance and that the deficiency prejudiced his defense; there was a lack of evidence within the record that there was a reasonable probability of a different outcome, but for counsel's alleged errors. Preuett v. State, 879 So. 2d 1116 (Miss. Ct. App. 2004), writ of certiorari dismissed by 883 So. 2d 1180, 2004 Miss. LEXIS 1337 (Miss. 2004).

Mississippi Supreme Court utilizes the two-prong approach under Strickland when evaluating ineffective assistance of counsel claims, even in death penalty cases. Neither the Mississippi Supreme Court, the United States Court of Appeals for the Fifth Circuit, nor the United States Supreme Court have ever recognized the "super due process" test. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

In a sexual battery case, the inmate's trial counsel was not ineffective for asking for several continuances. When the inmate himself claimed that he was incompetent to proceed at trial, it was frivolous for him to claim that he was prejudiced by postponing his trial so that he could undergo psychiatric evaluations. Calhoun v. State, 849 So. 2d 892 (Miss. 2003).

Strickland ineffective assistance of counsel test applies to guilty pleas. Hodgin v. State, 702 So. 2d 113 (Miss. 1997).

Under Strickland, test to be applied in cases involving alleged ineffectiveness of counsel is (1) whether counsel's overall performance was deficient and (2) whether deficient performance, if any, prejudiced defense. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Claim of ineffective assistance of counsel is judged by whether counsel's performance was deficient, and, if so, whether deficient performance was prejudicial to defendant in sense that court's confidence in correctness of outcome is undermined. Roland v. State, 666 So. 2d 747 (Miss. 1995).

While effective assistance of counsel is not errorless counsel, counsel must perform services that are reasonably adequate. Counsel is ineffective if he fails to investigate sources of evidence which may be helpful to the defense. Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983), rev'd on other grounds, 741 F.2d 805 (5th Cir. 1984), reh'g denied, 747 F.2d 1465 (5th Cir. 1984).

113. —Time at which issue of ineffective counsel raised, assistance of counsel.

Issues of an involuntary guilty plea, ineffective assistance of counsel, a defective and improper indictment, and misconduct on the part of the state officials that were presented by an inmate in a motion for post-conviction relief, were procedurally barred because the inmate waited more than six years after the inmate was convicted to file the motion; furthermore, the trial court found that none of the exceptions to the three-year statute of limitations of Miss. Code Ann. § 99-39-5(2) were applicable, and thus the inmate was not entitled to post-conviction relief. Davis v. State, 958 So. 2d 252 (Miss. Ct. App. 2007).

In a post-conviction proceeding, an inmate's argument that he was denied effective assistance of counsel at his trial for burglary of a dwelling was waived because the issue was procedurally barred, where the inmate had a meaningful opportunity on direct appeal to raise a claimed error by his trial counsel; further, there was no plain error in the inmate's trial counsel's failure to raise the issue of whether a vacant house owned by a nursing home resident was a "dwelling" because there was an intent for it to function as a dwelling. Sheffield v. State, 881 So. 2d 249 (Miss. Ct. App. 2003), writ of certiorari dismissed by 2005 Miss. LEXIS 87 (Miss. Feb. 3, 2005).

Under Mississippi law, failure to raise ineffective assistance of counsel claim on direct review does not constitute procedural bar where litigant was represented by same counsel at trial and on direct appeal. Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

114. —Manner of raising issue of ineffectiveness of counsel, assistance of counsel.

Defendant's ineffective assistance of counsel argument was rebutted by a lack of evidence, as well his own statements, and a prisoner's ineffective assistance of counsel claim was without merit when the only proof offered of the claim was the prisoner's own affidavit. Starks v. State, 992 So. 2d 1245 (Miss. Ct. App. 2008).

Defendant's request for post-conviction relief was denied as the circuit court did not err in holding that defendant adequately waived his right to conflict-free counsel and, under the Sixth Amendment, defendant did not show that, but for his attorney's performance, the trial would have ended in a different result as counsel's conduct was not ineffective. Dupuis v. State, 972 So. 2d 7 (Miss. Ct. App. 2007).

Defendant did not cite any actions by his counsel that supported an argument that the attorney's performance was deficient or to show how his attorney's performance was prejudicial to him. Jones v. State, 904 So. 2d 1107 (Miss. Ct. App. — 2004), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 249 (Miss. 2005).

Defendant's claim that his counsel's failure to make certain objections at trial constituted ineffective assistance was without merit where his claim was insufficient to rebut the presumption that his counsel was competent and conducted trial in a reasonable manner; proper evaluation of defendant's other two contentions required an examination of evidence beyond the record before the appellate court, and for that reason, defendant's entire ineffective assistance claim was better considered in post-conviction relief. Porter v. State, 885 So. 2d 92 (Miss. Ct. App. 2004).

Appellate court declined to consider defendant's ineffective assistance of counsel claim because the issue was not presented to the trial court, nor did defendant cite any authority in support of a claim that defense counsel's failure to object to the prosecutor's closing argument amounted to ineffective assistance of counsel. Stubbs v. State, 878 So. 2d 130 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 936 (Miss. 2004).

Defendant did not prove ineffective assistance of counsel where defendant's assertion that he wanted to go to trial and so advised his attorney was belied by the transcript of the plea hearing which stated that defendant indicated to the trial judge that he did not want to go to trial; defendant was given the opportunity to present his case to the trial court and present any complaints to the trial court regarding his attorney's advice, which he did not do, but rather expressed satisfaction with the representation of his attorney. Hill v. State, 850 So. 2d 223 (Miss. Ct. App. 2003).

Defendant did not receive ineffective assistance of counsel where, although defendant received erroneous advice from his lawyer concerning the length of the sentence he might receive pursuant to his guilty plea, the attorney advised the judge of the misinformation during the hearing; when defendant was asked if he understood what the correct sentence was, he responded that he did. Johnson v. State, 848 So. 2d 906 (Miss. Ct. App. 2003).

The defendant failed to allege ineffective assistance of counsel with sufficient specificity where he alleged that his attorney coerced him into pleading guilty and did not advise him of the correct status of his case, but neither stated the manner in which his attorney coerced him nor detailed in what way he was unaware of the correct status of his case. Ellis v. State, 811 So. 2d 296 (Miss. Ct. App. 2001).

To be entitled to evidentiary hearing on merits of ineffectiveness of counsel claim, defendant must establish prima facie claim on both prongs of Strickland test by alleging with specificity and detail that his counsel's performance was deficient and that the deficient performance prejudiced defense so as to deprive him of fundamentally fair trial. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Defendant who alleges that trial counsel's failure to investigate constituted ineffectiveness must also state with particularity what investigation would have revealed and specify how it would have altered outcome of trial or how such additional investigation would have significantly aided his cause at trial. Cole v. State, 666 So. 2d 767 (Miss. 1995).

115. — Trial strategy rather than ineffectiveness of counsel, assistance of counsel.

Nothing in the record rebutted the presumption that defendant's attorney's decision not to call witnesses was sound trial strategy, and defendant presented no evidence that the victim impact statement was inaccurate; defendant presented no evidence that there was any agreement that the State would not argue for the maximum sentence, and defendant received the agreed recommendation. Martin v. State, 20 So. 3d 734 (Miss. Ct. App. 2009), writ of certiorari dismissed by 24 So. 3d 1038, 2010 Miss. LEXIS 21 (Miss. 2010).

Trial court properly denied defendant's motion for postconviction relief after defendant was convicted of child molestation because it was not evident that, but for counsel's decision to abstain from using defendant's sister or her husband as witnesses, the outcome of the trial would have been different or that counsel's decisions stemmed from anything other than strategy. Didon v. State, 7 So. 3d 978 (Miss. Ct. App. 2009).

In a case involving the sale of cocaine, defendant did not receive ineffective assistance of counsel because it was not ruled out that a cross-examination regarding an informant's previous trips to defendant's house and a stipulation to the conviction of a third party who also sold drugs to the informant were just sound trial strategy. Liddell v. State, 7 So. 3d 217 (Miss. 2009).

Defendant did not demonstrate that trial counsel was ineffective where he did not demonstrate how he was prejudiced by his attorney's failure to object to a witness's testimony, and defendant's crime had not been publicized to a point where a change of venue was needed; trial counsel was not ineffective in not calling a witness to testify on defendant's behalf as there was nothing in the statement that defendant claimed would show another shooter. Lamar v. State, 983 So. 2d 364 (Miss. Ct. App. 2008).

Appellate court presumed that counsel's actions were strategic and therefore within the realm of effective assistance when he elicited harmful testimony from a drug-testing expert during a prisoner's probation revocation hearing; on cross-examination, counsel asked the expert how long marijuana remains in a person's system. In so doing, counsel could have been trying to demonstrate that, given the prisoner's body weight and fat content, marijuana would have remained in his system longer than it would have remained in another person's system; given the presumptions involved, it appeared that counsel was making the only argument possible under the circumstances. Wallace v. State, 982 So. 2d 1027 (Miss. Ct. App. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because his counsel was not ineffective; defendant's prior convictions surfaced as a product of his impeachment regarding his assertions of an ongoing, consensual sexual relationship with the victim, and counsel's decision whether to request a limiting instruction regarding a part of the evidence against defendant might have been part of the trial strategy. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Defense counsel was not ineffective for failing to cross-examine two witnesses concerning DNA evidence as defendant's right to confrontation was not violated by trial counsel's failure to cross-examine those witnesses because the reports they testified about were actually prepared by them, contrary to defendant's arguments; thus, defense counsel's decision not to cross-examine those two witnesses, as well as the other witnesses he chose not to cross-examine, was a tactical decision and could not be said to be unreasonable. Golden v. State, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Trial counsel was not ineffective because he filed a motion in limine to exclude the alleged prior bad acts from the jury, and counsel's decision not to seek an instruction stating that the testimony regarding the charges was to be considered solely to establish defendant's motive for murdering the victim was a strategic one. Jones v. State, 962 So. 2d 1263 (Miss. 2007).

Defendant failed to satisfy the deficiency prong of the Strickland analysis where the shirt and gun were relevant evidence because he wore the shirt and had the gun that night and both were similar to the limited descriptions the victims gave; trial counsel's failure to object in the case was reasonable trial strategy as trial counsel set out to impeach the identifications. Jackson v. State, 969 So. 2d 124 (Miss. Ct. App. 2007).

Defendant failed to show that he received ineffective assistance of counsel when trial counsel did not move for a change of venue in a capital case because the record did not support the allegation regarding pre-trial publicity, and there was no right to change venue to a jurisdiction with certain racial demographics. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

In a murder case, defendant failed to show that he received ineffective assistance of counsel based on a failure to object to certain statements regarding the copying of keys and the failure to call the victim's former girlfriend; defendant failed to show that the statements were relevant, and the choice not to call a witness was merely trial strategy. Sipp v. State, 936 So. 2d 326 (Miss. 2006).

Defendant alleged that his counsel was ineffective because his counsel developed a trial strategy and then did not investigate, secure expert assistance, offer any evidence in support of the theory, or request a jury instruction in support of the theory; however, his ineffective assistance of counsel claim failed because (1) counsel attacked the weakness of the State's case by adducing testimony on cross-examination that a sexual assault kit from the victim testing for any of defendant's DNA in her came back negative; (2) counsel did make a request for a pathologist at state expense for assistance in interpreting the autopsy report, but the trial court exercised its discretion in refusing defense counsel's request for an independent evaluation, and the trial court's actions in denying defendant an expert did not deny him a fair trial; and (3) counsel's decision not to submit lesser offense jury instructions, while it turned out to be unsuccessful (if successful, then defendant would not have been guilty of any offense and a free man), was appropriate trial strategy, and, thus, beyond the realm of serious consideration on a claim of ineffective assistance of counsel. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

Defendant alleged that he was denied his constitutional right to effective assistance of counsel, but the aid given by defendant's trial counsel was effective and presented no basis for reversal on appeal because (1) the testimony at trial clearly indicated that the victim's body had been moved and that any knife which might have been at the crime scene was not found until later; (2) during cross-examination, defendant's counsel strongly questioned law enforcement as to how thorough their search and investigation of the scene was; (3) defendant failed utterly to demonstrate that character witnesses would have changed the outcome in his case, and he presented no evidence indicating that the failure to call character witnesses prejudiced his defense; (4) counsel's decision, not to ask that the jury be allowed to view the crime scene, fell within the ambit of reasonable trial strategy; (5) the decision of trial counsel to not discuss any violent incidents of the victim could very well have been predicated upon the fact that any violent propensities of defendant could then be brought out by the State; and (6) it was unclear from defendant's argument what other evidence he would have had his counsel present regarding his self-defense claim. Sullinger v. State, 935 So. 2d 1067 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 423 (Miss. 2006).

Defendant's counsel did not provide ineffective assistance where, although the actions of defendant's counsel were not error-free, the error of untimely witness disclosure was not so egregious as to undermine the confidence in the outcome; the disallowed alibi testimony was very weak, unpersuasive given the strength of the opposing evidence, and even contradictory; the evidence against defendant was very persuasive. Ransom v. State, 919 So. 2d 887 (Miss. 2005), writ of certiorari denied by 548 U.S. 908, 126 S. Ct. 2931, 165 L. Ed. 2d 958, 2006 U.S. LEXIS 4985, 74 U.S.L.W. 3721 (2006).

Defense counsel was not ineffective for not filing for a change of venue in defendant's arson trial; although only 13 of the 82 jury panelists had not heard about the case, only five of them expressed a fixed opinion on it, and all five were struck for cause. Moreover, a decision on whether or not to file a change of venue motion fell within the purview of trial strategy. McGee v. State, 907 So. 2d 380 (Miss. Ct. App. 2005), writ of certiorari denied by 910 So. 2d 574, 2005 Miss. LEXIS 450 (Miss. 2005).

In a murder case, defendant's trial counsel was not ineffective because (1) counsel's failure to file a motion to suppress a witness from testifying did not require reversal as the State withdrew her as a witness and the trial court instructed the jury to disregard her testimony up to that point and to disregard her State's remarks in its opening statement regarding the witness; (2) defense counsel's opposition to a lesser-included manslaughter jury instruction was appropriate; (3) counsel's failure to object to the State's closing argument statement that the police had done a good job did not merit reversal; (4) trial counsel was not deficient in failing to investigate whose shoes were at the victim's apartment because neither defendant nor any other witness testified that they saw anyone else at the apartment when the victim was shot; and (5) defendant did not show that the failure to reduce her many statements to writing amounted to ineffective assistance of counsel. Reynolds v. State, 913 So. 2d 290 (Miss. 2005).

In defendant's trial for sexual battery of a child, defense counsel was not ineffective for stating during voir dire that defendant could be released on a technicality even though the proof showed defendant guilty. There was no evidence that counsel's actions were anything other than trial strategy. Renfrow v. State, 882 So. 2d 800 (Miss. Ct. App. 2004).

Defendant was not denied the effective assistance of counsel during trial for three counts of statutory rape because there was nothing in defendant's claims that, even accepted as true, would have had the likely effect of changing the outcome of case; decisions that defendant complained of were strategic. Boggan v. State, 894 So. 2d 581 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 162 (Miss. 2005).

Defendant failed to prove claim of ineffective assistance of counsel, because the fact that defendant's attorney did not object when defendant thought he should have objected did not establish that the attorney's performance was ineffective, and an exhibit was offered as proof that this was part of a trial strategy. Irons v. State, 886 So. 2d 726 (Miss. Ct. App. 2004), writ of certiorari denied by 887 So. 2d 183, 2004 Miss. LEXIS 1380 (Miss. 2004).

In a capital murder case, counsel was not ineffective during the penalty phase regarding the evidence, venue, voir dire, jury verdict, competency, security measures, prosecutorial misconduct, mitigating circumstances, manner of execution, investigating, witnesses, experts, opening statement, or closing argument. Russell v. State, 849 So. 2d 95 (Miss. 2003).

In a capital murder case, counsel was not ineffective at trial regarding the evidence, witnesses, Batson challenges, suppression of evidence, attorney-client privilege, voir dire, courtroom security, familiarity with capital cases, investigating, competency hearing, venue, opening statement, or closing argument. Russell v. State, 849 So. 2d 95 (Miss. 2003).

Defense counsel's failure to note the race of the jurors on the jury list did not raise an issue under Batson, nor was it ineffective representation, since it related to a matters of trial strategy. Al-Fatah v. State, 856 So. 2d 494 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 315, 2003 Miss. LEXIS 714 (Miss. 2003).

In defendant's capital murder case, where the trial court did not err in admitting the victim's statement, appellate counsel was not ineffective in failing to raise it on direct appeal. Goodin v. State, 856 So. 2d 267 (Miss. 2003), writ of certiorari denied by 541 U.S. 947, 124 S. Ct. 1681, 158 L. Ed. 2d 375, 2004 U.S. LEXIS 2196, 72 U.S.L.W. 3598 (2004).

Defense counsel was not ineffective as the failure to request a change of venue and the failure to call certain witnesses were matters of strategy, and defendant failed to show that the hiring of a forensic expert would have changed the result of the trial. Roy v. State, 878 So. 2d 84 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 911 (Miss. 2004).

Appellate court properly held that defendant had failed to show what specific evidence a witness would have presented or how that evidence would have been relevant to the defense; therefore, the court would assume the decision not to call the witness was strictly a matter of trial strategy and not ineffective assistance of counsel Sharkey v. State, 856 So. 2d 545 (Miss. Ct. App. 2003), writ of certiorari denied by 859 So. 2d 1017, 2003 Miss. LEXIS 594 (Miss. 2003).

During the sentencing phase in a capital murder case, defense counsel intentionally elicited testimony that petitioner had once been accused of sexually molesting a small child as part of a showing that petitioner's psychological instability was evident at an earlier age; this fell within the realm of trial strategy and did not amount to ineffective assistance of counsel. McGilberry v. State, 843 So. 2d 21 (Miss. 2003), remanded by 2005 Miss. LEXIS 598 (Miss. Sept. 22, 2005).

The defendant failed to establish ineffective assistance of counsel where the two issues he raised both pertained to trial strategy and he failed to show a deficiency in performance by trial counsel or that there was prejudice. Wilson v. State, 775 So. 2d 735 (Miss. Ct. App. 2000).

The assistance rendered by defense counsel to the defendant was not ineffective since the alleged errors enumerated by the defendant were attributable to trial strategy and, therefore, were at his counsel's discretion and, further, as there was no evidence that the defendant would not have been convicted but for the alleged errors of his counsel. Ruttley v. State, 746 So. 2d 872 (Miss. Ct. App. 1998).

The defendant failed to show ineffectiveness of counsel since, while he provided a lengthy listing of alleged errors, the majority of the purported errors were the result of trial strategy, and therefore were at his counsel's discretion and, further, there was no claim by the defendant, much less any factual evidence in the trial court record, that he would not have been convicted but for the alleged errors of his trial counsel. Armstrong v. State, 726 So. 2d 258 (Miss. Ct. App. 1998).

The court rejected the contention that defense counsel was ineffective since the decision by trial counsel to discuss violence or force, although not an element of the crime, could be viewed as a strategic decision to attack the credibility of the victim. Winston v. State, 726 So. 2d 197 (Ct. App. 1998).

The court properly rejected the contention that counsel for the defendant in a murder prosecution was ineffective in failing to investigate whether the victim had powder burns on his hands, which the defendant claimed would support his assertion that he and the victim struggled over a gun and that the gun was fired several times, since there was no factual support in the record to support the defendant's contention and counsel may have chosen not to investigate on the basis that the absence of powder burns would have discredited the defendant's testimony. United States v. Sylvester, 143 F.3d 923 (5th Cir. 1998).

Where the strategy of the defendant in a murder prosecution was to concede guilt and present evidence during the sentencing phase in mitigation of the sentence, the defendant was not denied effective assistance of counsel when his counsel effectively admitted his guilt during voir dire proceedings. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Trial counsel's failure during sentencing phase to present mitigating evidence concerning capital murder defendant's diminished capacity did not constitute ineffective assistance, where omission could be seen as legitimate trial strategy. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Counsel was not deficient in arguing to jury that justice was not justice unless it was complete justice and that defendant was taking all of the blame when it was not all his, as counsel did not explicitly concede guilt and was merely utilizing trial strategy of creating reasonable doubt that defendant did not commit the crime charged because it was done by others. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Counsel was not deficient for arguing to the jury at the penalty phase "if you want to kill him, kill him," as counsel was strategically attempting to argue that such a penalty would not punish or teach a lesson to the people who were primarily responsible for defendant's shortcomings, including his mother, his grandmother, and society. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Counsel for capital murder defendant was not ineffective for failing to investigate and develop fact of defendant's low intelligence quotient, where absence of that evidence did not reasonably undermine confidence in outcome of trial, in that it was merely additional evidence of defendant's mental aptitude, since counsel argued that defendant had very minimal education and deprived childhood. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Strategic decision to pursue less than all plausible lines of defense will rarely, if ever, be deemed ineffective counsel, if counsel first adequately investigated the rejected alternative. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to file certain motions, call certain witnesses, ask certain questions, and make certain objections, where counsel's actions fell within ambit of trial strategy. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to make offer of proof concerning excluded mitigation-of-sentence testimony about defendant's religious convictions and effect on him of death of his stepchild, where the evidence was adequately established via testimony of other witnesses. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Defendant charged with sexual battery and attempted sexual battery was not denied effective assistance of counsel; record was replete with objections lodged by defense counsel, and defendant showed no prejudice from counsel's decision to refrain from making opening statement, from counsel's failure to offer instruction on theory of defense, and from counsel's alleged inadequacy in jury selection. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

In a prosecution for possession of cocaine with intent to distribute, the defendant was denied his constitutional right to effective assistance of counsel where the defense strategy was to admit guilt to the charge of simple possession of cocaine, but to deny any intent to sell or distribute, the defense counsel failed to object to evidence of the defendant's past drug sales, which was the most damaging piece of evidence presented, he failed to preserve any objection relating to the sufficiency of the evidence for trial court or appellate review, and the evidence was insufficient as a matter of law to support the charge. Holland v. State, 656 So. 2d 1192 (Miss. 1995).

A murder defendant's trial counsel was not ineffective for arguing that the case was one of self-defense, even though the prosecution witnesses were consistent in testifying that the defendant initiated the confrontation that lead to the victim's death so that, with the benefit of hindsight, it was apparent that a self-defense argument did not have a strong possibility of success, where the defendant failed to show that his trial counsel's arguments and strategy were deficient as judged from the time offered, and there was no significant probability that the result would have been different but for the alleged errors of trial counsel since the evidence against the defendant was substantial. Brown v. State, 626 So. 2d 114 (Miss. 1993).

An attorney did not render ineffective assistance merely because he did not put the defendant on the witness stand during a hearing on the defendant's motion to suppress his confession, since the attorney's decision to keep the defendant off the stand may have been a deliberate trial strategy. Even if the attorney made a mistake, it did not rise to the level of ineffective assistance of counsel necessary to violate the Sixth Amendment right to counsel; there is a strong presumption that an attorney's performance was within the wide range of reasonable, professional, and acceptable conduct. Mohr v. State, 584 So. 2d 426 (Miss. 1991).

A defense counsel's failure to pursue an alibi defense was not unsound trial strategy, and therefore did not constitute ineffective assistance of counsel, where the defendant had admitted to the offenses but challenged the dates in the indictment as being incorrect. Schmitt v. State, 560 So. 2d 148 (Miss. 1990).

The mere fact that an attorney did not file a motion for discovery is not sufficient to raise an ineffective assistance of counsel claim since the filing of pre-trial motions falls squarely within the ambit of trial strategy. Powell v. State, 536 So. 2d 13 (Miss. 1988).

Ineffective assistance of counsel claim based on allegations concerning failure to investigate for mitigating evidence and failure to perform sufficient research was not borne out where attorney testified he was well aware of defendant's background due to his personal acquaintance with him, co-counsel testified that witnesses had been interviewed, and both attorneys testified that co-counsel had performed necessary legal research. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

Ineffective assistance of counsel was not shown where defendant argued that counsel made decision to pursue defense of lack of intent to kill, but failed to follow up on this strategic choice, where counsel elicited evidence of defendant's having "shot up" to negate argument that defendant intended to kill. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Claim that failure to voir dire pathologists relating to their credentials constituted ineffective assistance of counsel failed where one pathologist's credentials were beyond question and defendant failed to produce any evidence that other pathologist was not qualified; defendant's allegation of ineffective assistance of counsel based on failure to cross-examine on merits on cause-of-death issue also failed because this was trial counsel's decision that there was "nothing to gain" by such cross-examination because it would do nothing but allow reception of facts and bolster damaging testimony in minds of jurors. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

Claim that counsel was ineffective at trial because defendant did not take stand in his own defense was not supported where there was no suggestion that defendant insisted upon taking stand and was precluded from doing so by counsel or court; defendant was advised by his attorney that he should not take stand because he would not be good or effective witness on his own behalf and cross-examination would bring out information that would be highly damaging. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

In prosecution for capital murder committed during robbery, defendant was not subjected to ineffective assistance of counsel during guilt and sentencing stages, where counsel's decisions to emphasize defendant's youth, have defendant make unsworn statement to jury rather than testify and be subjected to cross examination, and forego character witness testimony for purposes of precluding rebuttal were strategic and within range of constitutionally competent representation and, assuming inadequate representation, case's outcome would not have been affected. King v. State, 503 So. 2d 271 (Miss. 1987).

Defense counsel in capital case in which evidence of guilt is overwhelming is not constitutionally inadequate in seeking merely to ameliorate force of prosecution's case rather than vigorously pursuing defense. Caldwell v. State, 481 So. 2d 850 (Miss. 1985), vacated, 107 S. Ct. 1269, 479 U.S. 1075, 94 L. Ed. 2d 130, on remand, 517 So. 2d 1360.

116. — Failure or refusal to present evidence as ineffectiveness of counsel, assistance of counsel.

In appellant's capital murder case, counsel was not ineffective for failing to obtain the State's witness's criminal history because the witness's felony conviction occurred in 1983, almost seventeen years before the crime at issue, and whether impeachment of the witness concerning his seventeen-year-old conviction for burglary would have been admissible was doubtful. Additionally, the witness was examined thoroughly and extensively about his identification of appellant and about the lighting and other visibility factors. Howell v. State, 989 So. 2d 372 (Miss. 2008).

During defendant's murder trial, it was reasonable for defense counsel not to hire an expert witness to discover whether there was evidence of another shooter who might have killed the victim where defendant confessed to shooting the victim three times, which was consistent with evidence presented in the autopsy report and witnesses' testimony. Davis v. State, 980 So. 2d 951 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 205 (Miss. 2008).

In defendant's trial for capital murder, defendant alleged that her trial counsel was ineffective, but defendant's allegations, which were unsupported by evidence, were insufficient to rebut the presumption that counsel's performance was reasonable; defendant claimed that witnesses were available to testify about the deceased child's mother's treatment of the child, but defendant did not provide any supporting affidavits from these witnesses. Berry v. State, 980 So. 2d 936 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

Petitioner was entitled to a post-conviction hearing on the issue of ineffective assistance of counsel as counsel's untimely disclosure of some mitigation witnesses led to their exclusion from the sentencing phase of a capital murder trial, which the trial court even characterized as ineffective assistance of counsel; in addition, counsel failed to pursue petitioner's mental retardation claim and to offer sufficient mitigating evidence. Lynch v. State, 951 So. 2d 549 (Miss. 2007).

Defendant's murder conviction was appropriate where his counsel was not ineffective. Defendant listed approximately 40 instances of leading questions asked by the State of the victim's brother, a child, but defendant failed to state how those leading questions in any way prejudiced defendant. Osborne v. State, 942 So. 2d 193 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 714 (Miss. 2006).

Defendant raised an ineffective assistance of counsel claim where there was evidence of conflicting statements by the victim as to who poured boiling water on him and was enough to raise a reasonable doubt that defendant committed the offense; if defense counsel had investigated and presented evidence of defendant's prior abuse by the victim, and of the abuse that defendant testified had taken place immediately prior to the incident, the inconsistencies in testimony of the victim's mother and sister concerning those events, and the intervening circumstances of the victim's death from respiratory failure, it was reasonable to conclude that the outcome of a jury trial may have been different. Hannah v. State, — So. 2d —, 2006 Miss. LEXIS 365 (Miss. July 20, 2006), opinion withdrawn by, substituted opinion at, remanded by 943 So. 2d 20, 2006 Miss. LEXIS 578 (Miss. 2006).

Defendant did not show ineffective assistance of counsel where trial counsel could not be faulted for failing to present mitigating evidence as to defendant's mental retardation, as it did not exist; defendant's argument as to counsel's failure to challenge the aggravating circumstance was barred by res judicata and his other issues were without merit. Mitchell v. State, 886 So. 2d 704 (Miss. 2004), writ of certiorari denied by 544 U.S. 1022, 125 S. Ct. 1982, 161 L. Ed. 2d 864, 2005 U.S. LEXIS 3824, 73 U.S.L.W. 3649 (2005).

Counsels' performance in failing to investigate and present mitigation evidence was not deficient where the prisoner blocked his counsels' efforts and elected to forego presenting mitigation evidence. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

Trial counsel did not provide ineffective assistance of counsel where although defendant asserted that his counsel failed to obtain and present at trial any evidence that was relevant to whether the rape and sexual battery occurred, he failed to mention what this evidence would have been or who the witnesses would have been that would have testified in his support; counsel provided a sound trial strategy and it was harmless error to admit evidence that defendant provided marijuana and alcohol to the victims, given the unequivocal testimony of the victims. Carle v. State, 864 So. 2d 993 (Miss. Ct. App. 2004).

In a capital murder case, the inmate's counsel were not ineffective for failing (1) to object to the reintroduction of evidence from the guilt phase because the evidence was admissible; (2) to elicit testimony from the inmate's mother that the sheriff and deputy were alone in the inmate's room during their search; or (3) to obtain DNA evidence that could not procedurally be introduced. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to properly develop and present mitigating evidence at trial because the inmate's attorneys did present mitigating evidence to the jury that the inmate's father was an abusive alcoholic; that the inmate's mother and father had marital problems throughout his childhood; that the inmate himself was an alcoholic and drug addict; that that inmate was suffering from extreme mental and emotional disturbances on the night of the murders; and that the inmate's capacity to appreciate the criminality of his conduct on the night of the murders was impaired. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to introduce rebuttal evidence regarding the inmate's interview with a journalist because evidence that the inmate was suicidal and suffered from severe depression might have backfired and might have made it easier for the jury to decide to sentence the inmate to death because he stated that he wanted to die and because counsel reasonably wanted to keep the information that the inmate had been previously sentenced to death from the jury. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to introduce rebuttal evidence regarding the State's experts because the inmate's attorneys did call two doctors to testify on the inmate's behalf and any failure to cross-examine the State's doctors was not deficient because it could have bolstered the State's doctors' testimonies and given the State more ammunition. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

No support existed for the defendant's post-conviction claim that he was denied the effective assistance of counsel due to his counsel's failure to fully investigate the facts of the defendant's case and explore the possibility that various purported witnesses could have provided evidence tending to absolve the defendant from guilt because the defendant failed to show that any witnesses who could exonerate him existed and that the unavailability of potentially favorable witnesses was due to the defense counsel's failure to adequately pursue this avenue of defense. Davidson v. State, 850 So. 2d 158 (Miss. Ct. App. 2003), remanded by 2003 Miss. App. LEXIS 724 (Miss. Ct. App. June 3, 2003).

Petition for postconviction relief was properly denied because an inmate did not receive ineffective assistance of counsel when counsel failed to pursue an insanity defense after a psychiatric report did not reveal any evidence of insanity; moreover, even if counsel improperly told the inmate not to mention medications during the plea process, there was no evidence that the outcome of the case was affected, and any misconception regarding counsel's advice about the inmate's sentence was corrected by the trial court. Daughtery v. State, 847 So. 2d 284 (Miss. Ct. App. 2003).

Defendant had to show a deficiency of counsel's performance sufficient to constitute prejudice to his defense; however, the record was void of evidence to establish a claim of ineffective assistance. Sanders v. State, 847 So. 2d 903 (Miss. Ct. App. 2003).

Court rejected defendant's claim of ineffective assistance of counsel because a review of the record revealed no deficiency in defense counsel's performance, who zealously cross-examined witnesses and properly conducted a defense. Lott v. State, 844 So. 2d 502 (Miss. Ct. App. 2003).

Defense counsel was constitutionally ineffective at the sentencing phase of the defendant's murder trial where he failed to investigate or present evidence of the defendant's mental problems. Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000).

In the light of testimony by the 10 year old victim that the defendant engaged in sexual intercourse with her and testimony by a physician that he found evidence of sexual contact when examining the victim, the failure of defense counsel to present allegedly exculpatory evidence that the victim, but not the defendant, had chlamydia did not constitute ineffective assistance of counsel in the defendant's prosecution for rape. Wiltcher v. State, 724 So. 2d 933 (Ct. App. 1998).

Trial counsel's failure during guilt phase to present evidence concerning capital murder defendant's diminished capacity did not constitute ineffective assistance, where defendant did not raise insanity defense. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to introduce evidence of capital murder defendant's diminished capacity at suppression hearing did not constitute ineffective assistance, where suppression hearing was held prior to order which directed psychologist to examine defendant and date of psychologist's report mentioning defendant's diminished capacity. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure at trial to use psychologist's report, indicating capital murder defendant's diminished capacity, to explain defendant's particular vulnerability to police coercion in effort to avoid admission of defendant's statement to police that when he entered home one victim was already tied up and that he did not participate in ransacking house or killing other victim did not constitute ineffective assistance, where statement was similar to trial testimony, statement's value was primarily to impeach defendant, and trial court was privy to report at time of trial. Chase v. State, 699 So. 2d 521 (Miss. 1997).

A defendant who alleged that he was denied effective assistance of counsel in a capital murder prosecution due to his counsel's refusal to allow him to testify was entitled to an evidentiary hearing on his claim that he was denied the right to take the witness stand and testify on his own behalf. Neal v. State, 525 So. 2d 1279 (Miss. 1987).

Based on case law as it existed at time of trial, counsel's refusal to take chance on waiving objection to wife's testimony by indulging in cross-examination of her did not render his assistance constitutionally inadequate. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

117. — Inadequate preparation for trial as ineffectiveness of counsel, assistance of counsel.

Defendant's claim that counsel was ineffective for not interviewing defendant until the day before the trial was without merit; counsel was able to procure a sentencing deal where defendant would not be sentenced as a habitual offender and arranged for the dismissal of another charge with a potential 60-year sentence. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

Record did not affirmatively show ineffective assistance of counsel of constitutional dimensions where a very thorough motion for pre-trial discovery was in fact made, and defendant failed to identify any witnesses who should have been interviewed or whose testimony would have strengthened his defense; defendant identified no aspect of his attorney's performance that suggested a failure to investigate the circumstances and law surrounding his case, and the sentence defendant received was in accord with the applicable statutes. Wynn v. State, 964 So. 2d 1196 (Miss. Ct. App. 2007).

Defendant's conviction for burglary of a business was appropriate in part because the record was insufficient to resolve defendant's claim that his attorney was ineffective for not reviewing a surveillance video prior to cross-examining any of the prosecution's first three witnesses; the record's state rendered it impossible for the appellate court to examine defendant's allegations. Turner v. State, 962 So. 2d 691 (Miss. Ct. App. 2007), writ of certiorari dismissed by 997 So. 2d 924, 2008 Miss. LEXIS 506 (Miss. 2008).

Defendant's motion for post-conviction relief was properly denied where he failed to provide sufficient evidence demonstrating his attorney's deficiency; defendant admitted in his brief that he could not name the witness that counsel should have interviewed, nor did he disclose the "mitigating information" that counsel allegedly failed to uncover. Jones v. State, 956 So. 2d 310 (Miss. Ct. App. 2006).

Defendant's request for post-conviction relief was denied on the basis of ineffective assistance of counsel due to an alleged failure to investigate in general because that issue was procedurally barred; however, there was no ineffectiveness based on an alleged failure to investigate during the guilt phase of a capital murder trial since counsel would not have been able to determine that testimony would have been perjury, defendant did not have an alibi defense, and decisions regarding the examination of an expert were trial strategy where there was no showing that the expert was not qualified. Even though the failure to call a bite mark expert was ineffective, no prejudice was shown since there was no showing that defendant did not bite the victim. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Federal district court correctly denied state death row inmate's habeas corpus petition because defense counsel was not ineffective for failing to adequately interview the government's pathologist prior to cross-examining him; although the Mississippi Supreme Court erroneously indicated that counsel had interviewed the witness for only 15 minutes, the record clearly showed that counsel had talked to him the evening before cross-examination as well as for 15 minutes prior to that and had affirmatively indicated to the trial court the next morning that he felt he had had sufficient preparation time. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Petition for post-conviction relief was denied without an evidentiary hearing where a plea was entered to armed robbery because, despite counsel's failure to investigate the type of weapon actually used, no prejudice resulted since an inmate failed to show that he would have proceeded to trial. Hinton v. State, 947 So. 2d 979 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 94 (Miss. 2007).

In an aggravated assault case, the court erred in finding that counsel was effective where counsel's failure to investigate the case prejudiced defendant; the testimony of the alibi witnesses, coupled with the fact that there was absolutely no physical evidence to convict defendant, could very well have changed the outcome of the trial. Johns v. State, 926 So. 2d 188 (Miss. 2006).

Court rejected defendant's claim that he was denied a fair and impartial trial because while the court found it troubling that five jurors served on the jury in which the witness testified as a victim and then served on defendant's jury where the witness testified as the State's primary rebuttal witness, the court found no reversible error. In absence of a showing on voir dire that a juror was biased, the mere fact that the witness had testified in the jurors' presence as to another crime did not render the panel incompetent. Burnside v. State, 912 So. 2d 1018 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 679 (Miss. 2005).

Defendant claimed that he received ineffective assistance of counsel because his attorney failed to conduct discovery, file certain pre-trial motions, subpoena certain alibi witnesses, request a continuance, properly instruct the jury, and make the proper arrangements for the processing of his appeal; however, defendant failed to demonstrate the likelihood of a different outcome had counsel performed in a different manner. In fact, the record revealed that the trial court disposed of many of the issues that defendant complained his attorney failed to address, and, although defendant's attorneys were negligent in perfecting his appeal, he still failed to fulfill his obligation of demonstrating prejudice; thus, his ineffective assistance of counsel claim failed. Jackson v. State, 910 So. 2d 658 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

Claims that defense counsel was unprepared because he only had two meetings with defendant were rejected, as counsel filed pretrial motions, conducted voir dire, offered challenges for cause, provided compelling opening and closing statements, objected to the admission of certain evidence, and cross-examined witnesses. Under the Sixth Amendment, defendant was entitled to and received minimum competence and loyal assistance. Rinehart v. State, 883 So. 2d 573 (Miss. 2004).

Record demonstrated that trial counsel's performance was not deficient where trial counsel acted according to defendant's instructions and his efforts to investigate potential mitigation evidence were thwarted by uncooperative witnesses; defendant also failed to prove there was a reasonable probability that the outcome would have been different. Burns v. State, 879 So. 2d 1000 (Miss. 2004).

Court found no merit in an inmate's claim that counsel was ineffective for failing to adequately investigate, develop, and present mitigation evidence at the sentencing phase for capital murder; some of the proposed evidence would have been irrelevant or inadmissible, and most of the proposed testimony was testified to by the inmate's mother, and there was a minimal showing of deficient performance and no assertion of prejudice. Smith v. State, 877 So. 2d 369 (Miss. 2004).

With respect to the claim that counsel failed to investigate, defendant provided no evidence or even assertions of what exactly counsel should have investigated or how such investigation would have impacted his case favorably; in the absence of any coercive behavior, counsel did not act incorrectly in offering an opinion, which in light of the State's agreement to forgo life imprisonment, was based on more than reasonable probability. Garner v. State, 864 So. 2d 1005 (Miss. Ct. App. 2004).

Inmate's post-conviction relief petition was properly denied because the inmate did not produce affidavits to show that defense counsel had failed to investigate two drug charges and to interview witnesses in the case before advising the inmate to plead guilty; moreover, the inmate had given a sworn statement contradicting these complaints at the plea hearing. Steen v. State, 868 So. 2d 1038 (Miss. Ct. App. 2004).

In a murder case, defendant was not denied effective assistance of counsel, because the denial of a continuance did not mean that counsel was unprepared, as counsel filed the necessary pretrial motions, conducted a voir dire examination, offered challenges for cause, provided compelling opening and closing statements, objected to the admission of certain evidence, and cross-examined witnesses. Rinehart v. State, — So. 2d —, 2003 Miss. LEXIS 558 (Miss. Oct. 23, 2003), opinion withdrawn by, substituted opinion at 883 So. 2d 573, 2004 Miss. LEXIS 1228 (Miss. 2004).

Trial counsel was ineffective in failing to investigate, gather, and consider mitigating evidence for purposes of presentation at the defendant's sentencing hearing as most of the mitigating evidence was readily available and would have cost no more than several long distance telephone calls or postage stamps and there was a reasonable probability that a jury would not have been able to agree unanimously to impose the death penalty if this additional evidence had been effectively presented and explained to the sentencing jury; however, the defendant was, nevertheless, not entitled to federal habeas corpus relief because the contrary decision of the Mississippi Supreme Court did not involve an unreasonable application of the law. Neal v. Puckett, 286 F.3d 230 (5th Cir. 2002), writ of certiorari denied by 537 U.S. 1104, 123 S. Ct. 963, 154 L. Ed. 2d 772, 2003 U.S. LEXIS 583, 71 U.S.L.W. 3470 (2003).

Although the court disagreed with the determination of the Mississippi Supreme Court with regard to whether defense counsel was ineffective in failing to thoroughly investigate the defendant's background to uncover evidence of mitigating circumstances that could have been presented to the jury during the sentencing phase of the defendant's murder trial, the defendant was not entitled to federal habeas corpus relief because the court owed deference to the Mississippi Supreme Court and that court's conclusion was not an unreasonable application of Strickland v. Washington. Neal v. Puckett, 239 F.3d 683 (5th Cir. 2001).

The defendant failed to establish that his trial counsel was not prepared to go to trial where, although defense counsel initially claimed to be unprepared, he changed his mind and said he could be prepared if the trial was postponed until that afternoon, and counsel demonstrated readiness for trial through thorough cross-examination and closing arguments. Robinson v. State, 784 So. 2d 966 (Miss. Ct. App. 2000).

Defense counsel did not provide bad advice and/or fail to adequately prepare for trial where (1) prior to his entry of a guilty plea, he and his attorney appeared to have a lengthy discussion, during which his attorney advised him that there was a strong likelihood that he would be convicted should he elect to proceed to trial, and (2) when questioned by the trial court regarding his representation, the defendant stated that he was completely and totally satisfied with his representation. Blanch v. State, 760 So. 2d 820 (Miss. Ct. App. 2000).

The fact that the court did not appoint counsel for the defendant until 10 days before trial did not result in the denial of effective assistance of trial counsel in the absence of any demonstration of prejudice. Johnson v. State, 749 So. 2d 306 (Miss. Ct. App. 1999).

Where defendant's first attorney's alleged lack of effort on his behalf was serious enough to constitute an effective deprivation of the right of representation, there was nothing to suggest that the defendant's second attorney was unable to do the necessary investigation and preparation to mount a meaningful defense at trial because of his predecessor's alleged dilatory conduct. Bell v. State, 733 So. 2d 372 (Miss. Ct. App. 1999).

The defendant was entitled leave to proceed on his claim that his counsel was ineffective in that he failed to move to quash the jury based on improper contact between prospective jurors and the District Attorney's office and the guards at the county jail. Davis v. State, 743 So. 2d 326 (Miss. 1999).

The court properly rejected the contention that the defendant was denied effective assistance of counsel on the basis that his attorney failed to file any pre-trial motions to appoint or obtain funds for an independent investigator, forensic pathologist or odontologist since there was no evidence that the attorney's conduct fell outside the realm of reasonable professional assistance in seeking further expert assistance or that the defendant's case was prejudiced thereby. Walters v. State, 720 So. 2d 856 (Miss. 1998).

Defendant's right to counsel was not violated, although trial judge ordered court-appointed counsel to proceed instead of defendant's hired counsel, since judge made decision based on hired counsel's unpreparedness, and court allowed hired counsel to assist and even participate in trial. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after prosecution called so-called "surprise" witness who subsequently identified defendant, where counsel interviewed witness for 25 minutes during recess called specifically for that purpose, and defendant showed nothing that continuance would have further gained. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A defendant was not denied his right to effective assistance of counsel on the ground that his attorney failed to file any motion for discovery where the defendant provided no evidence to show that the omission was anything other than his attorney's trial strategy, there was no allegation of critical evidence that may have come to light as a result of discovery, the record did not reflect any surprise to the defendant's attorney as a result of the State's case, and the defense attorney was sufficiently familiar with the State's case and its witnesses that a discovery motion would not have elicited any change in the defense. Ivy v. State, 589 So. 2d 1263 (Miss. 1991).

A defendant was denied effective assistance of counsel where his attorney failed to conduct discovery, failed to object to the admissibility of statements made by the defendant after he was questioned by a police officer without being advised of his Miranda rights, failed to inquire into the constitutionality of a warrantless, nonconsensual search of the defendant's automobile, and failed to raise at the trial level the issue of a speedy trial, though the prosecution missed the statutory deadline for a speedy trial by 148 days. Barnes v. State, 577 So. 2d 840 (Miss. 1991).

A defendant's counsel was not ineffective at the guilt phase of a capital murder trial where the defense counsel adequately investigated, filing discovery motions and obtaining the State's entire file, and there was no reasonable probability that the outcome of the trial would have been different had evidence been presented that the defendant's accomplice, rather than the defendant, delivered the fatal injuries, because it was clearly established that the defendant was present at the planning and execution of the murder and was therefore a principal. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

A criminal defendant was denied effective assistance of counsel where his attorney subpoenaed no witnesses until the day of trial, called only one witness, a police officer whom he questioned only briefly, submitted into evidence a police report that only reinforced the testimony of the State's witness, failed to request a pre-trial suppression hearing concerning the "show-up" identification of the defendant, failed to file jury instructions, made absurd demands upon the State to produce at trial evidence that should have been available through discovery, made numerous argumentative outbursts with the bench and refused to follow rules and instructions of the court. Yarbrough v. State, 529 So. 2d 659 (Miss. 1988).

Preparation of witnesses and defendant for their testimony by counsel was sufficient to constitute effective assistance where, because alibi was offered, entire question for injury was witness credibility. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

Ineffective assistance of counsel was not shown where defendant complained that counsel made absolutely no investigation of psychological evidence, while defendant submitted psychological evidence showing, inter alia, functional I.Q. of 73, lower academic I.Q., alcoholism, and genuine remorse for crime; as trial strategy, counsel could have judged that psychological report may have been harmful. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Failure of attorney to investigate background of former wife of defendant, who was important prosecution witness at defendant's murder trial, did not constitute ineffective assistance of counsel where attorney had known defendant's former wife's family for many years and had interviewed her when he represented defendant in divorce action brought by her. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

Charge that counsel failed to interview prosecution witnesses did not constitute ineffective assistance of counsel where counsel attempted to talk with one witness who refused, adequately familiarized himself with report of doctor, and did not talk with another witness who lived out of state but who offered no testimony which surprised defense. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

118. — Failure to file motion for severance as ineffective assistance of counsel, assistance of counsel.

Defendant's trial counsel was not ineffective because: (1) he filed a pre-trial motion to sever the two counts of rape and argued at the hearing that trying two counts together would be highly prejudicial to his client; (2) counsel conducted voir dire, which included instructing the jury as to the state's burden of proof; (3) he objected to one of the state's for-cause strikes, arguing that the potential juror said he could be fair and impartial despite the fact he had known defendant his entire life, with which the trial court agreed; (4) defense counsel cross-examined four of the state's eight witnesses and seemingly made an effort to get some witnesses to contradict their prior testimony; (5) the defense chose not to call any witnesses; (6) defendant was thoroughly advised of his right to testify and he told the trial judge he did not want to testify; and (7) in closing, defense counsel did not rehash the damaging testimony against his client, but merely reminded the jury of the state's heavy burden of proof and defendant's presumption of innocence; given the strength of the state's case against defendant, trial counsel provided reasonable, if not perfect, representation to his client. Golden v. State, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for allowing the inmate to be tried jointly with co-defendant at both the guilt and penalty phases because (1) this issue was substantially addressed on direct appeal, and thus was barred in post-conviction proceedings under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the issue was without merit because the inmate and co-defendant insisted on being tried together. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Trial counsel's failure to file a motion for a severance did not constitute ineffective assistance of counsel where the defendant entered a guilty plea and failed to present any argument that supported his claim that had he gone to trial his defense would have been inconsistent or incompatible with the defenses claimed by his co-defendants. Blanch v. State, 760 So. 2d 820 (Miss. Ct. App. 2000).

119. — Filing motion for severence without permission, assistance of counsel.

Defendant failed to establish ineffective assistance of counsel based on counsel's decision to request a severance without defendant's permission since the decision benefited defendant as a co-defendant's statement only further implicated defendant in the charged crimes; moreover, assistance of counsel was not shown to be insufficient as to failure to object where the record showed that defense counsel attempted to suppress the admission of defendant's statement to police. Perkins v. State, 863 So. 2d 47 (Miss. 2003).

120. — Jury selection as instance of ineffective assistance of counsel, assistance of counsel.

Trial court properly denied defendant's motion for post-conviction relief where defendant was not entitled to a jury of any particular racial composition; therefore, defendant could not show that counsel was deficient in failing to object to an all-white jury. It was impossible to prove that counsel's objection to the jury composition would have created a different result if no original verdict was reached. Shumpert v. State, 983 So. 2d 1074 (Miss. Ct. App. 2008).

Defendant's conviction for aggravated assault was appropriate because his counsel was not ineffective under the Sixth Amendment; his counsel actively participated in exercising peremptory challenges and striking jurors for cause, and further, the supreme court held that the defense was not prejudiced by a witness's failure to appear. Harrell v. State, 947 So. 2d 309 (Miss. 2007).

Defendant's counsel was not ineffective because a trial judge asked if any potential juror would automatically vote for or against the death penalty, and the trial judge requested that the attorneys not be redundant in their voir dire examination, keeping in mind the voir dire the court had conducted; honoring that request, defense counsel's failure to pursue that line of questioning during voir dire did not constitute deficient performance that prejudiced the defense. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

Defendant's claims of ineffective assistance of counsel in his trial for tax evasion lacked merit; defendant failed to cite any authority supporting the claim that his counsel's failure to request a change of venue demanded reversal. Defendant also failed to cite any authority to support his argument that defense counsel rendered ineffective assistance by failing to make a challenge during jury selection. King v. State, 897 So. 2d 981 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 224 (Miss. 2005).

Court found no ineffective assistance of counsel in the failure of attorneys for an inmate to object to the State's use of peremptory strikes in connection with the inmate's capital murder trial because (1) the inmate failed to show any prejudice, and (2) the attorneys could well have thought that the State had adequate race neutral reasons for the State's strikes, and there was no requirement that the attorneys had to make motions that they did not believe would succeed. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Issue raised at trial and on direct appeal from an inmate's capital murder conviction concerning the exclusion of a juror for failing to meet the qualifications of Miss. Code Ann. § 13-5-1 was found to be without merit, and the issue was therefore barred pursuant to Miss. Code Ann. § 99-39-21(2); because the trial court committed no error in excusing this juror and another juror for not meeting the qualifications under Miss. Code Ann. § 13-5-1, then the attorneys were not ineffective for failing to object to the jurors' dismissal, and in any event, the attorneys' decisions regarding the final composition of the jury were generally determined to be matters of trial strategy. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Trial counsel's failure to raise Batson challenges to the prosecution's exercise of peremptory challenges was not ineffective representation of counsel as it was a tactical decision based on the counsel's understanding of the law and the inmate's concurrence that he did not wish to have his selection of the jury challenged. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Trial counsel failed to argue that the trial court erred in denying his request to to allow individually sequestered voir dire; however as the inmate failed to show that the request would have been allowed if the attorney had argued, or that a different jury panel would have resulted, the trial counsel's failures did not constitute ineffective representation. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of effective representation simply because the trial counsel did not ask questions that the inmate believed was necessary to cure the judge's voir dire as the questions the inmate wanted his counsel to ask would have been redundant, and the inmate failed to show how he was prejudiced by his counsel's voir dire. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of effective representation because his trial counsel did not try to rehabilitate jurors who were excused because they stated they could not impose the death penalty due to religious reasons as the inmate failed to prove that the jurors could have been rehabilitated. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of his right to effective representation because his trial counsel failed to excuse eight jury members who had relationships with the victim or his family or the law enforcement community, as mere acquaintance or even family relationships with parties or those related to parties is not sufficient to require that a juror be excused for cause. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Trial counsel's failure to request jury questionnaires was not ineffective representation as the inmate failed to cite any legal authority that not requesting jury questionnaires was ineffective representation. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

In a capital murder case, the inmate did not prove that he was prejudiced in any fashion by his attorneys' decision not to assert a Batson challenge, which might have been sound trial strategy; thus, the inmate's counsel were not ineffective for failing to challenge the State's use of peremptory challenges to exclude African-American venire members. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to rehabilitate a potential juror challenged as opposing the death sentence because the evidence showed that the juror was not excused based on her religious scruples or her views on the death penalty, but because she clearly indicated that she could not sit in judgment on someone if she had not seen the crime committed and that she could not return a verdict. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for removing a request for a special venire under Miss. Code Ann. § 13-5-77 because nothing in the record indicated that the jury panel was insufficient or that a special venire was necessary. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

The record did not support the defendant's contention that the failure of trial counsel to raise a Batson challenge rendered his counsel's performance so ineffective as to merit a mistrial; given that the decision to make or not make a Batson challenge falls within trial counsel's trial strategy and the wide latitude given him to which appellate courts must defer, it was entirely reasonable to presume that trial counsel was comfortable with that jury. Estes v. State, 782 So. 2d 1244 (Miss. Ct. App. 2000).

An agreement between defense counsel and the state that neither will object to the other's exercise of its peremptory challenges, while outrageous and improper, does not constitute per se ineffective assistance of counsel; such conduct will constitute ineffective assistance of counsel only if the record shows that the agreement caused the state clearly and systematically to discriminate in the jury selection process. Wardley v. State, 760 So. 2d 774 (Miss. Ct. App. 1999), writ of certiorari denied by 2000 Miss. LEXIS 270 (Miss. Dec. 6, 2000).

Trial counsel's failure to obtain gender neutral reasons for peremptory strike against female did not constitute ineffective assistance, where trial was held years before United States Supreme Court held that Batson rule applied to gender-based discrimination. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to object to prosecutor's exercise of challenges to jurors for cause and trial court's upholding of these challenges did not constitute ineffective assistance, where Supreme Court, on direct appeal, considered matter on merits and found jurors were properly excused. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to excuse juror, after challenge for cause was denied, with peremptory challenge did not constitute ineffective assistance, where counsel engaged in reasonable trial strategy by using last peremptory challenge on next person on venire, whose daughter may have been enrolled in day care where murder victim's relative worked, whose father was highway patrol and whose uncle was murder victim in unrelated crime. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to object to excusal of prospective jurors outside presence of jury did not constitute ineffective assistance, where capital murder defendant failed to show that he was prejudiced or that confidence in trial would be undermined because of counsel's failure to object. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Defendants were denied effective assistance of counsel where their trial counsel failed to question the jury panel during voir dire, failed to make an opening statement, failed to object to questionable identification testimony, placed into evidence a photograph of the defendants taken at the police station while they were wearing handcuffs, failed to call available alibi defense witnesses, failed to assure that the defendants were aware of their right to testify, admitted during closing argument that he had failed to bring his trial notes to court, and failed to present available mitigation evidence at sentencing. Moody v. State, 644 So. 2d 451 (Miss. 1994).

Trial counsel's conduct did not constitute ineffective assistance of counsel where counsel failed to rehabilitate or object to jurors excluded for cause by prosecution based on their opposition to death penalty, because there was little direct authority for proposition that trial counsel has duty to rehabilitate jurors who have scruples against death penalty. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

There was no merit to defendant's claim of ineffective assistance of counsel based on counsel's failure to object to exclusion of blacks from jury where guilt phase of trial was final before decision in Batson v. Kentucky (1986) 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

121. — Failure to object to indictment as ineffectiveness of counsel, assistance of counsel.

Where indictments charging defendant with the sale of cocaine were not defective, there was no reason for defense counsel to object; hence, counsel was not ineffective. Hunt v. State, 11 So. 3d 764 (Miss. Ct. App. 2009).

Defendant's ineffective assistance claims against a court-appointed attorney failed where he failed to show how his defense was adversely affected by an indictment amendment that changed the date of the alleged burglaries. Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Defense counsel was not ineffective for failing to object to defendant's indictment because the indictment was not fatally defective and during the plea colloquy defendant stated under oath that he was satisfied with counsel's performance and felt that it was effective. Morgan v. State, 966 So. 2d 204 (Miss. Ct. App. 2007).

There was no merit to the defendant's assertion that his trial counsel was ineffective for failing to object to defects contained within the indictment where the defendant failed to identify any such defects and a review of the indictment failed to show any such defects. Blanch v. State, 760 So. 2d 820 (Miss. Ct. App. 2000).

Claims that defendant argued to be defects in the indictment were insufficient to show deficiency in his counsel's performance or prejudice to his case. Westbrook v. State, 953 So. 2d 286 (Miss. Ct. App. 2007), writ of certiorari dismissed by 962 So. 2d 38, 2007 Miss. LEXIS 436 (Miss. 2007).

The indictment as a whole gave the defendant fair notice of the charges against him and was legally sufficient; therefore, the failure of defense counsel to object to the indictment did not constitute ineffective assistance of counsel. Wiltcher v. State, 724 So. 2d 933 (Ct. App. 1998).

Counsel was not ineffective for failing to object to the absence of the word "knowing" in indictment for aggravated assault which charged that defendant wilfully and feloniously caused serious bodily injury. Moore v. State, 676 So. 2d 244 (Miss. 1996).

A defendant's post-conviction claim of ineffective assistance of counsel, which was based on allegations that the defendant's counsel failed to object to allegedly defective indictments and erroneously advised the defendant to plead guilty, was properly dismissed without the benefit of an evidentiary hearing because it was manifestly without merit where the defendant failed to allege with the "specificity and detail" required that his counsel's performance was deficient and that the deficient performance prejudiced the defense, the facts alleged and the brief submitted were not supported by any affidavits other than his own, the indictments were not defective and therefore the defendant's counsel could not be faulted for failing to challenge their validity, and the defendant failed to identify the "deficient and erroneous advice" of his counsel that allegedly resulted in his pleas of guilty. Brooks v. State, 573 So. 2d 1350 (Miss. 1990).

122. — Failure to object to evidence as ineffectiveness of counsel, assistance of counsel.

In a case involving the sale of cocaine, trial counsel was not ineffective for allowing an agent to testify that defendant's voice was on an audio recording because the agent's testimony was not subject to the authentication requirements under Miss. R. Evid. 901, and the failure of the State to lay a predicate for the testimony was harmless error since the agent testified on cross-examination that he had personal knowledge of defendant's voice. Moreover, even assuming that trial counsel's elicitation of the agent's previous dealings with defendant was so deficient as to meet the first prong of the test for ineffective assistance of counsel, plenty of other evidence existed to support the jury's verdict. Liddell v. State, 7 So. 3d 217 (Miss. 2009).

In an armed robbery case, counsel was not ineffective for failing to request a circumstantial-evidence instruction because defendant was pulled over thirty minutes after the robbery, and he was wearing a tan shirt and distinctive white tennis shoes similar to the clothing described by the employees as being worn by the robber. Furthermore, defendant had brown cotton gloves, a blue ski mask, a black duffel bag with rolled coins, various amounts of bills, and store receipts. Johnson v. State, 999 So. 2d 360 (Miss. 2008).

Appellate court rejected a prisoner's claim that counsel provided ineffective assistance by failing to call an expert witness to testify at his probation revocation hearing about the levels of marijuana in the prisoner's system because the prisoner did not show he was prejudiced by counsel's alleged failure. Specifically, the prisoner was unable to demonstrate that the outcome of his probation revocation hearing would have been different, since the circuit court could have found, more likely than not, that the prisoner violated the terms of his probation by continuing to smoke marijuana. Wallace v. State, 982 So. 2d 1027 (Miss. Ct. App. 2008).

Defendant who was found guilty of attempted manufacture of methamphetamine under Miss. Code Ann. § 41-29-313(1)(c) did not show ineffective assistance of counsel because counsel was not deficient in failing to object to a narcotics agent's testimony that he had received complaints concerning defendant's possible manufacture of methamphetamine, or to the agent's description of the predominant method of manufacturing methamphetamine in the area. Myhand v. State, 981 So. 2d 988 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 225 (Miss. 2008).

In a case involving possession of cocaine with intent to distribute, defendants did not receive ineffective assistance of counsel based on a failure to object to testimony regarding the value and packaging of cocaine and the failure to request a balancing under Miss. R. Evid. 403 regarding evidence of an undercover drug sale; a different result would not have likely resulted based upon the evidence against defendants. Dixon v. State, 953 So. 2d 1117 (Miss. Ct. App. 2006), affirmed by 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

Defendant's counsel was not ineffective during defendant's trial for murdering his ex-wife and daughter because despite defendant's contentions, the record showed that counsel did object to the testimony of defendant's six-year-old son and to the introduction of autopsy photographs of the victims. Richardson v. State, 918 So. 2d 760 (Miss. Ct. App. 2005).

Defense counsel was not ineffective for failing to object to defendant's statements that he made to law enforcement being entered into evidence where defendant's statements consisted of his version of an alleged sexual battery incident as well as two prior interactions with the victim; the statements supported defendant's theory of the case, namely that he was looking for a dog on the bed and touched the seven-year-old victim accidentally. McClure v. State, 941 So. 2d 896 (Miss. Ct. App. 2006).

Although defendant claimed that his counsel was deficient because his attorney failed to object to the admission of the cocaine found on defendant, since the officer stated that the cocaine and its packaging all appeared the same as it did on the day he seized it, defendant's counsel did not object; defendant's counsel's decision not to object to the admission of the cocaine into evidence was not ineffective assistance of counsel. Williams v. State, 907 So. 2d 1016 (Miss. Ct. App. 2005).

Where defendant argued that defense counsel engaged in ineffective assistance of counsel under Miss. Const. Art. III, § 26 and U.S. Const. Amend. VI by failing to object to testimony regarding a hearsay statement that powder cocaine had been recovered from defendant when arrested, defendant was not prejudiced, as there was substantial other testimony on this point. Walker v. State, 880 So. 2d 1074 (Miss. Ct. App. 2004).

Defendant's claim that his trial counsel was ineffective failed, as (1) even assuming counsel should have objected to evidence that defendant possessed drug paraphernalia, about which he was not charged, defendant was not prejudiced because the other evidence was sufficient to convict him of cocaine possession; and (2) had counsel sought to suppress cocaine found in defendant's truck, he would have been unsuccessful. McKee v. State, 878 So. 2d 232 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 961 (Miss. 2004).

Defense counsel at the evidence suppression hearing was not ineffective because the defense counsel's performance regarding the admissibility and voluntariness of the defendant's statements and the credibility of the interrogation were not deficient and the defendant was not therefore prejudiced by the defense counsel's actions. Powers v. State, 883 So. 2d 20 (Miss. 2003), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1584, 73 U.S.L.W. 3495 (2005).

Trial counsel's failure to raise meritless objections could not be considered ineffective assistance of counsel because no prejudice could result from such an omission. Simon v. State, 857 So. 2d 668 (Miss. 2003), writ of certiorari denied by 541 U.S. 977, 124 S. Ct. 1885, 158 L. Ed. 2d 475, 2004 U.S. LEXIS 2641, 72 U.S.L.W. 3632 (2004).

In a capital murder case, the inmate's attorneys did attempt to limit the victim impact evidence and asked for a continuing objection to the prosecutor's line of questioning, but the jury was entitled to know who the victim was and what impact her death had on her family; thus, the admission of the victim's family's testimony was proper and the inmate's counsel were not ineffective for failing to limit the State's use of victim impact evidence at trial and during the final argument. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to challenge the testimony of the county sheriff who was in charge of the investigation of the inmate because (1) the trial court's refusal to admit evidence of the sheriff's conviction seven years after his testimony in the inmate's case was not an abuse of discretion under Miss. R. Evid. 609(a)(1); (2) the sheriff's prior testimony was admissible under Miss. R. Evid. 804; (3) the inmate's confrontation clause rights were not violated because he had been present when the testimony was given and was able to confront the sheriff; and (4) evidence from a civil lawsuit involving one of the sheriff's deputies could have done little harm to the sheriff's credibility. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Defense counsel's failure to make a motion to suppress defendant's statement during a murder trial did not amount to ineffective assistance of counsel because it constituted trial strategy. Johnson v. State, 876 So. 2d 387 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

Defense counsel's failure to object to the admission of a pipe as a murder weapon did not amount to ineffective assistance of counsel because a proper predicate was laid for the introduction of the pipe; the evidence showed that defense counsel attempted to discredit the evidence by exploiting the absence of physical and forensic evidence linking the pipe to the murder. Johnson v. State, 876 So. 2d 387 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

Defense counsel's failure to object to the admission of autopsy photographs did not constitute ineffective assistance of counsel; the evidence showed that the pictures were not particularly gruesome, and their probative value outweighed any prejudicial effect that they might have had. Johnson v. State, 876 So. 2d 387 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

Trial counsel was not constitutionally ineffective in questioning the defendant about his prior convictions and in failing to move to suppress them prior to trial where the record showed that the trial judge instructed the defendant that his prior convictions could be brought out for the purpose of impeaching his credibility as a witness; although it was not clear why trial counsel elected to bring out the prior convictions, his strategy might have been to preempt the prosecution from bringing them out and the weight of the evidence was such that the defendant would have nevertheless been convicted. Coleman v. State, 788 So. 2d 788 (Miss. Ct. App. 2000).

Defense counsel's alleged failure to respond appropriately to the introduction of various kinds of evidence that were alleged to be so prejudicial that failure to object revealed inadequacy of representation did not constitute ineffective assistance of counsel. Forbes v. State, 771 So. 2d 942 (Miss. Ct. App. 2000).

The right to a vigorous defense does not include the right to insist that defense counsel pursue facially-invalid objections or file motions having no arguable chance for success. Bell v. State, 733 So. 2d 372 (Miss. Ct. App. 1999).

Defense counsel was not deficient in failing to object to inadmissible evidence, namely money recovered from the defendant and a cash register receipt recovered from his car, since probable cause existed to search both the defendant and his car, the money was never introduced into evidence, and the cash register receipt was introduced into evidence but was properly authenticated when the chief of police testified that he was present when the vehicle was searched, that the receipt was found on the driver's seat of the vehicle, and that the receipt was taken to the victim's house and compared to the groceries she bought. Pickens v. State, — So. 2d —, 1998 Miss. App. LEXIS 919 (Miss. Ct. App. Oct. 27, 1998).

Questions regarding prior instances of sexual intercourse between the defendant and the 10 year old victim were probative and admissible and, therefore, the failure of defense counsel to object to such questions did not constitute ineffective assistance of counsel in the defendant's prosecution for rape. Wiltcher v. State, 724 So. 2d 933 (Ct. App. 1998).

The court properly rejected the contention that the defendant was denied effective assistance of counsel on the basis that his attorney failed to object to hearsay testimony by a detective that the defendant was in a rage and arguing with the victim since it could not be said that a mere objection to that testimony would have changed the outcome of the trial. Walters v. State, 720 So. 2d 856 (Miss. 1998).

Trial counsel's failure to object to evidence of other crimes and eliciting evidence of other crimes did not constitute ineffective assistance, where allowing jury to know that defendant had engaged in some petty thievery was not out of line with strategy of showing that it was not credible to claim that defendant, a petty thief, suddenly became a murderer while codefendant, who was prone to violence, did not. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure during guilt phase to object to introduction of photograph of murder victim's house and of victim did not constitute ineffective assistance; few times Supreme Court has ever reversed due to admission of gruesome photographs revealed that this would have been futile objection. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to object to cross-examination of witness who testified that capital murder defendant grew up in teachings of church did not constitute ineffective assistance, where defendant sought to use religion to bolster his position and defendant's credibility was impeached through witness. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Petitioner's claim that his counsel failed to adequately argue motion to suppress evidence that was obtained in violation of his Fourth Amendment rights or to raise that issue on appeal would be remanded for district court to consider whether counsel was professionally deficient in failing to successfully move to suppress evidence and to determine whether exclusion of that evidence would have had effect on outcome of petitioner's case, so as to establish cause and prejudice for procedural default. Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

In a prosecution for possession of cocaine with intent to distribute, the defendant's trial counsel was not constitutionally ineffective for failing to object to allegedly inadmissible testimony portraying the defendant as a drug dealer where the attorney's failure to object to the testimony in question might reasonably have been trial strategy related to a "personal vendetta" defense since the attorney argued from the time of opening statements that a deputy sheriff had a vendetta against the defendant and there was support for the "vendetta" defense throughout the trial record, the attorney could have concluded that any objections to the testimony in question would have magnified the comments to the detriment of the defendant, and the defendant failed to demonstrate any prejudice as there was eyewitness testimony which was "sufficient to have absolutely sealed his fate with the jury." Edwards v. State, 615 So. 2d 590 (Miss. 1993).

In a prosecution for possession of cocaine with intent to distribute, the defendant's trial counsel was not constitutionally ineffective for failing to object to an admission made by the defendant at the scene of his arrest concerning his involvement in trafficking drugs where the admission was unsolicited, voluntary, and spontaneous, and the defendant's attorney could have reasonably expected any objection to be futile. Edwards v. State, 615 So. 2d 590 (Miss. 1993).

A burglary defendant was not deprived of his constitutional right to effective assistance of counsel on the ground that his trial counsel failed to object to leading questions about the homes that were burglarized where the questions asked by the prosecutor could have been rephrased to elicit the same testimony, and therefore the defendant did not suffer any disadvantage because of the failure to object. Jackson v. State, 614 So. 2d 965 (Miss. 1993).

A defendant was denied his right to effective assistance of counsel by his attorney's failure to object to testimony submitted by the State that his accomplice had been tried and found guilty on the same offense for which the defendant was being tried, since the testimony was highly prejudicial and its admission was reversible error. Johns v. State, 592 So. 2d 86 (Miss. 1991).

In prosecution for possession with intent to distribute marijuana, even though performance at trial by defendant's counsel may have been deficient, in view of, inter alia, failure to object to damaging hearsay testimony and allowing defendant to testify in own behalf and further incriminate himself, there was nevertheless sufficient evidence to support conviction, and therefore allegedly deficient performance did not prejudice defense under Strickland v. Washington (1984) 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, and Leatherwood v. State (1985, Miss.) 473 So. 2d 964. Alexander v. State, 503 So. 2d 235 (Miss. 1987).

123. — Failure to call witnesses as ineffectiveness of counsel, assistance of counsel.

Counsel was not ineffective for allegedly failing to properly consult with a DNA expert, failing to consult a serologist, and failing to adequately investigate DNA testing because a review of the cross-examination of the witness from the facility that performed the DNA testing for the state by defense counsel easily allowed one to draw the conclusion that a defense expert assisted counsel in preparation for cross-examination, and the inmate could not show that counsel was deficient. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

In a death penalty case, counsel was not ineffective for failing to obtain expert testimony to show that the victim's body position was "staged" because it was doubtful that expert testimony regarding the positioning of the body would have likely resulted in a different verdict; the victim was found nude from the waist down with her shorts and underwear bunched at one ankle, as well as with five gunshot wounds to her head. Powers v. State, 945 So. 2d 386 (Miss. 2006), writ of certiorari denied by 551 U.S. 1149, 127 S. Ct. 3006, 168 L. Ed. 2d 733, 2007 U.S. LEXIS 8389, 75 U.S.L.W. 3695 (2007).

Counsel was not ineffective for failing to present evidence in mitigation of the death penalty because an expert testified about the petitioner's mental retardation, the petitioner's mother was also questioned regarding the petitioner's mental retardation, and therefore counsel placed the issue of the petitioner's mental retardation before the jury for purposes of mitigation. Scott v. State, 938 So. 2d 1233 (Miss. 2006).

Counsel was not ineffective for failing to call an expert as a witness because there was no indication that the outcome of defendant's murder trial would have been different; the expert, a psychologist, discussed at length that defendant had a clear understanding of the trial process and knew the difference between right and wrong. Brown v. State, 936 So. 2d 447 (Miss. Ct. App. 2006).

Defendant did not receive ineffective assistance of counsel during his trial for breaking and entering; counsel was not deficient in failing to subpoena two of the State's witnesses who did not even testify at trial against defendant. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Where defendant's counsel clearly presented the defendant's version of events, and a pretrial statement made by defendant to police, which was entered into evidence, allowed the jury to hear his version of the events despite his decision not to testify in his own defense, and defendant did not state what witnesses should have been called, or what additional evidence his counsel could have presented at trial, when viewed in the totality of the circumstances, the actions of defendant's counsel constituted reasonable trial strategy, and defendant did not meet his burden on appeal of showing how his counsel's decision not to call witnesses at trial was deficient performance. Townsend v. State, 933 So. 2d 986 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 982, 2006 Miss. LEXIS 371 (Miss. 2006).

In a capital murder case, defendant did not receive ineffective assistance of counsel because of a failure to present witnesses during sentencing where defendant chose not to testify and failed to present any evidence regarding other witnesses that could have been called; moreover the decision was tactical, since calling defendant's mother would have opened the door to damaging testimony about drugs and gangs. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Under a Strickland analysis, there was a sufficient basis to conclude that defendant's attorney's performance was deficient and that with the alibi witnesses' testimony there was a reasonable probability that the outcome of the trial would have been different if some minimal pretrial investigation had been performed; defendant's attorney's conduct so undermined the proper functioning of the adversarial process that the trial court could not be relied on as having produced a just result. Ransom v. State, 918 So. 2d 710 (Miss. Ct. App. 2004), reversed by 919 So. 2d 887, 2005 Miss. LEXIS 595 (Miss. 2005).

None of the evidence to which the State's expert witnesses testified, including the DNA and blood, co-defendant's clothing, or the wood, directly linked defendant to the victim's murder; thus, there was no need for a DNA expert. Therefore, trial counsel was not ineffective for failing to request a DNA expert to testify. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

Trial counsel's failure to secure a ballistics expert was not ineffective representation as a ballistics expert would not aid in the determination of which bullet proved fatal or who served as the principal in the crime. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Trial counsel's failure to call two potential alibi witnesses was not ineffective representation as the decision not to call the witnesses was trial strategy due to the lack of benefit the witnesses would provide and issues of credibility. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

In a prosecution for distribution of a controlled substance, it was not ineffective assistance of counsel to fail to call the defendant to testify where, in a previous similar prosecution in which the same counsel represented the defendant, the defendant raised the defense of entrapment and testified on his own behalf that he was forced to traffic in marijuana because the only other way he could support his family was to rob a bank. Sayre v. Anderson, 238 F.3d 631 (5th Cir. 2001).

It was impossible to conclude from the record that defense counsel could have been constitutionally ineffective in failing to allow the defendant to testify where there was no evidence in the record that he ever desired to testify at trial and there was nothing noted in the record to doubt the honesty of his attorneys in reporting his choice not to participate in the trial. Chancellor v. State, 745 So. 2d 857 (Miss. Ct. App. 1998).

Trial counsel's failure to subpoena individual for hearing on capital murder defendant's motion for new trial did not constitute ineffective assistance, where individual refused to voluntarily appear and testify and counsel could have made conscious strategic decision not to present individual but to proceed solely with her affidavit. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Defendants' claim of ineffective assistance of counsel based on allegation that if they had known that their attorneys would not call any witnesses, they would have themselves testified, amounted to a sham, and therefore defendants were not entitled to evidentiary hearing to set aside validly imposed sentences based upon this claim, considering that, prior to testimony commencing, trial judge made detailed and lengthy presentation to defendants on subject of their right to testify and defendants affirmatively responded to judge's questions as to whether they understood that they had right to testify regardless of what any other person wished or ordered them to do. King v. State, 679 So. 2d 208 (Miss. 1996).

Defense counsel's failure to place murder defendant on stand to testify did not constitute ineffective assistance of counsel, where defendant personally waived her right to testify and defendant's version of events was already before jury. Rhodes v. State, 676 So. 2d 275 (Miss. 1996).

Viewed as a whole, it was ineffective assistance for defense counsel to fail to subpoena possible witnesses, to fail to seek a continuance until he could interview every possible eyewitness, to fail to seek special venire, to fail to raise Batson, which prohibits peremptory challenges based solely on race, and to fail to seek jury instruction specifically embracing facts that defendant and witness testified occurred, which would have made killing excusable accident. Triplett v. State, 666 So. 2d 1356 (Miss. 1995).

Defense counsel's failure to subpoena possible witnesses, to seek a continuance until he could interview every possible eyewitness, to seek special venire, to raise Batson, which prohibits peremptory challenges based solely on race, and to seek jury instruction specifically embracing facts that defendant and witness testified occurred, which would have made killing excusable accident, was prejudicial to defendant. Triplett v. State, 666 So. 2d 1356 (Miss. 1995).

124. —Failure to object to argument of state as ineffectiveness of counsel, assistance of counsel.

Post-conviction relief was denied because defendant did not receive ineffective assistance of counsel based on a failure to object to a prosecutor's closing argument since references to defendant's possible escape from prison did not compromise his right to a fair trial; moreover, the prosecutor did not "ramble on and on" about his personal experiences. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant failed to show that his trial counsel was ineffective because (1) a circumstantial evidence instruction would not have been proper under the facts of the case, and the failure of trial counsel to request such an instruction was not error; (2) the failure of counsel to object to the prior statement of an alleged accomplice as hearsay was not error because the trial court properly allowed the former statement of the accomplice to be used for impeachment, and any objection to hearsay by trial counsel would not have resulted in any change in the outcome; and (3) trial counsel did not err in not requesting a lesser-included offense instruction of receiving stolen property because his theory and defense were that the State did not prove its case, and an all or nothing — guilty or acquittal — trial strategy was proper. Long v. State, 934 So. 2d 313 (Miss. Ct. App. 2006), writ of certiorari dismissed by 939 So. 2d 805, 2006 Miss. LEXIS 610 (Miss. 2006).

Defendant emphasized his attorney's failure to file motions to dismiss on the grounds of due process and speedy trial violations in arguing his counsel's ineffectiveness. However, he signed the guilty plea petition as evidenced by the exhibit he provided attached to his appellate brief and the latter issue was without merit; in addition, he did not assert any critical evidence that would have been discovered had it not been for counsel's alleged deficiencies, and he failed to object to counsel's representation when given the opportunity. Dearman v. State, 910 So. 2d 708 (Miss. Ct. App. 2005).

Where defense counsel did not object to the prosecutor's reference in closing arguments to defendant's post-arrest silence, defendant's claim of ineffective assistance of counsel under Miss. Const. Art. III, § 26 and U.S. Const. Amend. VI failed; defendant was not prejudiced by the prosecutor's brief mention of defendant's silence, as the statement did not constitute plain error affecting a fundamental right. Walker v. State, 880 So. 2d 1074 (Miss. Ct. App. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for failing to object to certain prosecutorial statements made during closing argument at the guilt phase because (1) the issue was raised on direct appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the comments made were within the wide latitude granted in an attorney's closing argument. Smith v. State, 877 So. 2d 369 (Miss. 2004).

In a capital murder case, the State's invocation of higher biblical law did not violate the inmate's rights under the Eighth and Fourteenth Amendments, or under Miss. Const. Art. 3, § 14, because the prosecutor was responding to the biblical argument made by the inmate's attorney; also, the inmate's ineffective assistance of counsel claim for counsels' failure to object to the State's biblical references had to fail. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Trial counsel's failure to object to portion of state's closing argument during sentencing phase of capital murder prosecution did not constitute ineffective assistance; although state said that victims and surrounding community would be affected by jury's decision, state never used words "send a message" to jury and state never said jury had duty to return verdict of death, but stated that if state failed to prove that defendant was one who fired fatal shot, then jury was required to return life verdict. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to object to portion of state's closing argument during sentencing phase of capital murder prosecution that was allegedly part of victim impact statement did not constitute ineffective assistance; such argument is not prohibited. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to object to prosecutor's expression during voir dire and closing arguments of personal opinion as to defendant's guilt did not constitute ineffective assistance. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to object to prosecutor's closing argument in guilt phase in which prosecutor attempted to connect pair of shoes and pair of jeans with capital murder defendant because blood on them was proof that person wearing them fired fatal shot did not constitute ineffective assistance, where such evidentiary conclusion could by supported by expert testimony or could be within common sense abilities of jury. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's argument during guilt phase of capital murder prosecution that defendant was guilty, but questioning whether he was as guilty as codefendant, did not constitute ineffective assistance, where defendant testified that he helped tie up victim, helped codefendant look for guns and/or money, helped codefendant take rifle out and helped codefendant load stolen guns into vehicle after other victim was shot. Chase v. State, 699 So. 2d 521 (Miss. 1997).

A murder defendant was not denied her Sixth Amendment right to the effective assistance of counsel due to her attorney's failure to object to statements made by the prosecution in their closing argument, referring to the fact that the victim was not present at trial to explain the events surrounding the killing, since it was reasonable for the prosecution to argue that the victim was no longer in existence in a murder trial in which the jury was required to determine whether the killing was justified. Hiter v. State, 660 So. 2d 961 (Miss. 1995).

Claim of ineffective assistance of counsel based on counsel's failure to object to closing argument of prosecutor at sentencing phase was rejected, such failure to object being presumed to be strategic, and presumption having not been rebutted. Additionally, in light of wide range of permissible argument, it was court's opinion that arguments were within proper parameters. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

125. — Failure to object to or request instructions as ineffectiveness of counsel, assistance of counsel.

In a burglary prosecution, defense counsel was not ineffective for failing to request a circumstantial-evidence instruction; because the State produced direct evidence of the gravamen of the offense, defendant had not been entitled to such an instruction. Grayer v. State, — So. 3d —, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), opinion withdrawn by, substituted opinion at, remanded by 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).

Defense counsel was not ineffective for not objecting to a jury instruction, which contained language that differed from the language of the indictment, because the instruction did not accuse defendant of any other separate or distinct crime other than that of the indictment, nor did it refer to facts of which defendant had no notice; the variance was not material. Nix v. State, 8 So. 3d 141 (Miss. 2009).

Defendant's claim of ineffective counsel in a murder trial failed because the jury instructions were proper and requesting a jury instruction on manslaughter that was commonly given on the prosecution's request was permissible trial strategy to try to ensure that the jury knew they were not required to find murder, and that a lesser offense was available when there was strong evidence that defendant shot the victim. Mullen v. State, 986 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

Defendant who was found guilty of attempted manufacture of methamphetamine under Miss. Code Ann. § 41-29-313(1)(c) did not show ineffective assistance of counsel because counsel was not deficient in failing to request a jury instruction as to possession of precursor chemicals because the punishment for that crime was exactly the same as the one for attempted manufacture of methamphetamine. Myhand v. State, 981 So. 2d 988 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 225 (Miss. 2008).

Defendant failed to present a prima facie demonstration of ineffective assistance of counsel where there was no indication that the jury would return a verdict of "not guilty" had the jury instruction contained the cumulative language defendant suggested; the jury understood that it was to remain suspicious of the witness's testimony and to weigh it with care. Dear v. State, 960 So. 2d 542 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 396 (Miss. 2007).

Because defendant denied at trial that he assaulted the deputy in any way, a jury instruction on self-defense was not supported by the record; thus, his trial counsel's performance was not deficient by failing to request a self-defense jury instruction. Burnside v. State, 882 So. 2d 212 (Miss. 2004).

Where defendant asserted that defense counsel was ineffective under Miss. Const. art. III, § 26 and U.S. Const. amend. VI for failing to object to the prosecution's use of leading questions on direct examination, the claim failed; defendant was not prejudiced, as leading questions did not create so distorted an evidentiary presentation as to deny defendant a fair trial. Walker v. State, 880 So. 2d 1074 (Miss. Ct. App. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for failing to make an objection to an instruction that death could be imposed if aggravating and mitigating circumstances were of equal weight because as the direct claim was found to be without merit, there could be no claim that the attorneys were ineffective in failing to object to what was an acceptable instruction. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for not requesting an amendment to sentencing instructions because (1) the issue was raised on direct appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, there was no showing of deficient performance. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Because the jury impaneled for the inmate's resentencing was charged with weighing the aggravating circumstances against any mitigating circumstances in the capital murder trial, the criminal proceeding was not inconsistent with Apprendi and Ring and, thus, the sentencing instructions were not unconstitutional; because the use of those jury instructions was permissible and any objection to them made by defense counsel would likely have been overruled, the inmate's attorneys could not be considered deficient for failing to argue that the use of the instructions was unconstitutional and, thus, any ineffective assistance of counsel claim failed. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

The defendant was not denied effective assistance of counsel when his trial counsel failed to submit a jury instruction on the defendant's theory of mistaken identification since defense counsel's decision to forego a request for an identification instruction may well have been the result of trial strategy as, during closing argument, defense counsel argued lack of identification of the defendant by anyone other than the victim and pointed out what he considered to be discrepancies in her testimony. Thomas v. State, 766 So. 2d 809 (Miss. Ct. App. 2000).

The defendant was entitled leave to proceed on his claim that his counsel was ineffective in the sentencing phase as he failed to investigate the existence of character witnesses and inadequately prepared and examined the ones present. Davis v. State, 743 So. 2d 326 (Miss. 1999).

Although defense counsel improperly failed to object to a jury instruction that had been long condemned by the Mississippi Supreme Court, the defendant failed to show ineffective assistance of counsel since there was substantial evidence that he acted with malice in killing the victim and, therefore, the trial was not rendered fundamentally unfair by his counsel's failure. United States v. Sylvester, 143 F.3d 923 (5th Cir. 1998).

Counsel for capital murder defendant was not ineffective for failing to object to transitional jury instruction stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, where defendant was granted lesser included offense instruction defining crime of murder less than capital, and defendant showed no prejudice flowing from transitional instruction. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to jury instruction that the murder was "especially heinous, atrocious and cruel," where, at time of trial, there was no viable basis under state law for objecting to this instruction. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A murder defendant was not denied her Sixth Amendment right to the effective assistance of counsel by her attorney's refusal of a manslaughter instruction, even though there was a strong evidentiary basis for the submission of such an instruction, where the attorney's decision to refuse a manslaughter instruction coupled with his decision to employ a defense based entirely on self-defense was a calculated trial strategy. Hiter v. State, 660 So. 2d 961 (Miss. 1995).

126. —Sentencing phase procedures as indicative of ineffectiveness of counsel, assistance of counsel.

Defense counsel was not ineffective for failing to object to defendant's sentence because the sentence was within the statutory maximum for the offense in question, and during the plea colloquy defendant stated under oath that he was satisfied with counsel's performance and felt that it was effective. Morgan v. State, 966 So. 2d 204 (Miss. Ct. App. 2007).

On the inmate's petition for post-conviction relief, the court held that counsel was not ineffective for failing to present mitigating evidence at sentencing because it was the inmate's choice not to do so; the inmate was fully apprised of the consequences of his choice and he made an informed and voluntary decision not to present mitigating evidence. Brawner v. State, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

Defendant did not receive ineffective assistance of counsel by the failure to challenged an aggravating circumstance not named in an indictment in a capital murder case because he was not entitled to formal notice of such since an indictment for capital murder put defendant on sufficient notice that the statutory aggravating factor would have been used against him. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Post-conviction relief in a capital murder case based on the argument that the use of the "avoiding or preventing a lawful arrest or effecting an escape from custody" aggravator was inappropriate was denied because it was procedurally barred; however, even if it was not, the argument was meritless since sufficient evidence supported this due to the fact that the victim's telephone line was cut, two fires were set in her home, and defendant had just been released from prison. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Post-conviction relief was denied because defendant's assertion that he received ineffective assistance of counsel during the sentencing phase of a capital murder trial was procedurally barred; however, even if it was not, ineffectiveness was not shown because, despite mitigation evidence that defendant was a great person and had not been violent, the state could have presented evidence of his prior convictions. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

In a case where defendant was found guilty of capital murder — murder during the commission of sexual battery on a six-month old victim, the record revealed that defendant's trial counsel procured testimony from his mother that his father deserted him at a young age and did not play a role in rearing him, and his grandmother testified to her relationship with defendant as a boy and discussed his love for children and that he had planned to marry the victim's mother to care for both of them. Given the testimony provided in mitigation and what it did show the jury about defendant's life and tendencies, counsel did not fail to investigate potential mitigating evidence for purposes of punishment and his performance was not prejudicially deficient. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

In a case where defendant was found guilty of capital murder — murder during the commission of sexual battery on a six-month old victim, while counsel's closing arguments at the sentencing phase of defendant's trial, when viewed with the benefit of hindsight, could have been presented more forcibly, closing argument fell under the ambit of defense counsel's trial strategy. Given the wide latitude and any strategic decisions counsel could have made with regard to his approach to the trial of the case, defendant's counsel was not ineffective. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

Inmate was not deprived of effective assistance of counsel at his plea and sentencing hearing simply because his counsel failed to object to the presence of the victim's family, because they had a right to be present and speak at the hearings. Johnson v. State, 908 So. 2d 900 (Miss. Ct. App. 2005).

Court did not err in denying defendant's motion to supplement his petition for post-conviction relief because his claim that his attorney was ineffective by failing to assure that the sentencing judge was informed of the district attorney's recommended sentence was without merit. Defendant's prior motion for reconsideration of his sentence, which was granted, and the reduction of his sentence by nine years, stated that the recommendation of the district attorney's office was disclosed to the sentencing judge despite the open plea. Sanchez v. State, 913 So. 2d 1024 (Miss. Ct. App. 2005), writ of certiorari dismissed by 920 So. 2d 1008, 2005 Miss. LEXIS 605 (Miss. 2005).

Court found no merit to defendant's contention that counsel was ineffective for leading him to believe that by waiving his right to appeal, the trial judge would show leniency; record showed that prior to waiving his right to appeal, defendant was fully informed by the trial judge that his sentence could not be reduced because of his status as a convicted felon. Coker v. State, 909 So. 2d 1239 (Miss. Ct. App. 2005).

Although counsel's summation conceded the sole aggravating circumstance of pecuniary gain, in viewing the summation as a whole, counsel was attempting to persuade the jury to select life imprisonment over the death penalty. Thus, trial counsel was not ineffective. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

Through the penalty-phase testimony of defendant's father, counsel was able to introduce evidence of defendant's childhood and adolescent life, his activities and interests, as well as his involvement in his family, neighborhood, and community; also, evidence of the statutory mitigating factors were discussed including no significant history of prior criminal history and defendant's age. Thus, trial counsel was not deficient because he did not fail to develop penalty-phase testimony. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

Defense counsel was not ineffective for failing to submit Miss. Code Ann. § 99-19-101(6)(b), (d)-(f) factors during the penalty phase because (1) defendant was not under the influence of extreme mental or emotional disturbance; (2) defendant's participation in the robbery and murder was not relatively minor because he told the police that he played an active role in the robbery and murder; (3) there was no showing of extreme distress or domination either at trial or in the post-trial filings; and (4) defendant had the ability to understand the nature and quality of his alleged acts and to understand the difference between right and wrong at the time. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

Inmate was not deprived of his right to effective representation because his trial counsel failed to request a continuance between the guilt phase and the sentencing phase as the case was not complex, and, pursuant to Miss. Code Ann. § 99-19-101, the sentencing phase was to be conducted by the trial judge before the trial jury as soon as practicable. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of his right to effective representation because his trial counsel failed to give an opening statement during the penalty phase as the prosecutor did not give an opening statement either and the failure to do so could be deemed trial strategy. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of his right to effective representation because his trial counsel failed to present mitigating evidence regarding his age, mental retardation, emotional disturbances and mental illness, disadvantaged and abusive childhood, adaptation to prison conditions, and cultural impacts on his life as his mother testified about his difficulties growing up and evidence was presented regarding his low I.Q., but the inmate did not present any evidence that evidence that he suffered from either emotional or mental problems. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of his right to effective representation because his trial counsel failed to request an instruction that a Tennessee sentence would have on him if a life sentence was imposed instead of the death penalty as the State argued the violent nature of the subject crime as an aggravating factor rather than the inmate's future propensity for violent crime. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Where defense counsel's efforts resulted in a plea agreement in which a murder charge was reduced to manslaughter, and the state recommended a 10-year sentence, counsel did not provide ineffective assistance even though the trial court rejected the sentencing recommendation and sentenced defendant to 20 years. Vance v. State, 799 So. 2d 100 (Miss. Ct. App. 2001).

Trial counsel was not ineffective for failure to present mitigation evidence in sentencing phases of capital murder trials regarding defendant's alleged organic brain damage and Dissociative Identity Disorder; attorney acted reasonably based on strategic decision that any mitigation would be clearly outweighed by harm. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

It was not ineffective assistance of counsel per se for defense counsel not to offer mitigation evidence, except for testimony of defendant's mother, in the punishment phase of capital murder case. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

If counsel's failure to offer mitigation evidence in the punishment phase of capital murder case is based on well informed, strategic decisions, it is well within the range of practical choices not to be second-guessed. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Trial counsel's failure to object to submission of pecuniary gain aggravating circumstance in capital murder prosecution did not constitute ineffective assistance, where Supreme Court case, prospectively holding that in felony murder cases based on robbery pecuniary gain aggravator should not be given, had not been decided when defendant's trial took place. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to object to lack of instruction defining capital murder for pecuniary gain aggravating factor did not constitute ineffective assistance, where Supreme Court case, prospectively holding that in felony murder cases based on robbery pecuniary gain aggravator should not be given, had not been decided when defendant's trial took place and previous case found no reversible error when pecuniary gain aggravator was submitted without limiting instruction. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's submission in capital murder prosecution of instruction, providing you must find mitigating circumstance exits if there is any substantial evidence to support it, did not constitute ineffective assistance, despite contention that instruction should not have included word "substantial," where there was no reasonable likelihood that jury, because of use of word "substantial," refused to consider relevant mitigation evidence. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure in capital murder prosecution to object to language of lesser included offense instruction, providing this section is not designed to relieve you from performance of unpleasant duty but to prevent failure of justice if evidence fails to prove original charge but does justify verdict for lesser crime, did not constitute ineffective assistance, despite contention that language prevented jury from giving effect to instruction, where defendant cited nothing which stated that this language inhibited jurors who may have voted to convict for lesser offense. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Trial counsel's failure to object to submission of avoiding arrest aggravating circumstance in capital murder prosecution did not constitute ineffective assistance, where Supreme Court found claim meritless on direct appeal. Chase v. State, 699 So. 2d 521 (Miss. 1997).

Admission of testimony of psychologist to rebut defendant's presentation of mitigating evidence tending to show that he was extremely emotionally disturbed at time of murders did not violate defendant's Sixth Amendment right to counsel; defendant's attorneys knew of examination and one attorney had met with defendant twice to prepare him, doctors told defendant that anything he said could be used against him during sentencing phase of capital murder trial, and doctors offered to allow defendant to call his attorneys. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Counsel's closing argument at penalty phase of capital murder prosecution in which he told the jurors "if you want to sentence him to death, don't let me persuade you not to. If you don't want to sentence him to death, don't let the District Attorney persuade you to" was reasonable trial strategy encouraging jurors to make up their own minds when determining penalties without being influenced by either party. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Counsel for capital murder defendant was not ineffective for failing to request continuance after State introduced into evidence during sentencing phase 2 prior convictions for manslaughter and attempted rape, where there was no prejudice to defendant, in that the prior convictions were valid and not subject to collateral attack. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to introduction of defendant's prior convictions of grand larceny and simple robbery, where both were relevant to aggravating circumstances set forth under capital sentencing statute, and thus objection would have been futile. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for conducting cross-examination of witness that produced responses which allegedly strongly suggested to jury that defendant could not be rehabilitated, where most of the cross-examination was in abstract and was not related directly to defendant, and defendant had previous convictions for rape, manslaughter, robbery and grand larceny based upon which jury could have easily reached conclusion that there was little hope for defendant's rehabilitation. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A capital murder defendant was denied effective assistance of counsel at the penalty phase where his attorneys presented almost no facts in mitigation upon which the jury could have acted to spare the defendant's life, they failed to make the most of the available evidence in mitigation, and in closing argument one of the defendant's attorneys stated that the only way the jury could spare the defendant's life was on "redeeming love," which was not one of the factors which the jury could have considered under the court's instructions. Woodward v. State, 635 So. 2d 805 (Miss. 1993).

In the sentencing phase of a capital murder prosecution, the introduction of a state psychologist's testimony that it was her opinion that the defendant was not psychotic or mentally ill, did not violate the defendant's Sixth Amendment right to counsel where the defendant's attorney requested the psychiatric examination, the defendant testified that he wanted to have a psychiatric evaluation to determine whether he knew right from wrong, and presumably the defendant had consulted with his attorney about the nature of the psychiatric examination. Willie v. State, 585 So. 2d 660 (Miss. 1991).

A defense counsel's performance at the sentencing phase of a capital murder prosecution constituted ineffective assistance of counsel where the defendant faced a potential death penalty, and the defense counsel failed to conduct any investigation at all in a search for mitigation evidence; the defense counsel conducted little or no investigation into the defendant's background, he spent negligible time interviewing the defendant and preparing a defense, he made no effort to contact or interview any potential character witnesses other than the defendant's mother who was contacted only after the trial had commenced, and the lack of preparation left the defense counsel unable to blunt the prosecution's forceful case. At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case; it is critical that mitigating evidence be presented at capital sentencing proceedings. Psychiatric and psychological evidence is crucial to the defense of a capital murder case, and there is a critical interrelation between expert psychiatric assistance and minimally effective representation. Thus, the defendant's counsel was unreasonable in not pursuing psychological evidence in support of the defense that the defendant was under the domination of his accomplice where evidence was presented in the post-conviction proceeding that the defendant was immature, dependent and easily lead. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

Defendant failed to show ineffective assistance of counsel at probation revocation proceedings where he argued that appointed attorney was ineffective because he did not challenge legality of split sentence for armed robbery. Marshall v. Cabana, 835 F.2d 1101 (5th Cir. 1988).

Argument that counsel was ineffective was without merit where counsel presented proof concerning defendant's absence of criminal record, co-operation in investigation, his being model prisoner, and testimony of victim's wife that defendant was nonviolent. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Failure to present case in mitigation or call witnesses is not per se ineffective assistance of counsel. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

Counsel is not ineffective for following instructions of client concerning how to or whether to present case in mitigation and not presenting such evidence by having family members testify about defendant's family nature, war record, and medical problems, where defendant stated to attorney that he did not want to put his family through that ordeal. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

Failure to request pre-sentence report is not ineffective assistance of counsel because defendant is not automatically entitled to pre-sentence reports under § 47-7-9(3)(a), which clearly states that pre-sentence reports are given only at discretion of circuit judge. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

Ineffective assistance of counsel was not shown concerning investigation of and failure to present mitigating circumstances where there was some mitigation by cross-examination and, strategically, it may be safer to obtain mitigating evidence from state's witnesses than to risk aggravating evidence from witnesses called by defense. Additionally, trial counsel has no absolute duty to present mitigating evidence; strategic choices made after less than complete investigation are reasonable to extent that reasonable professional judgment supports limitations on investigation; court must apply heavy measure of deference to counsel's judgments. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that counsel was ineffective for failing to explain to jury inapplicability and/or insignificance of aggravating circumstances and how to weigh aggravating and mitigating circumstances was rejected where counsel made excellent arguments as to aggravating circumstances, and closing argument contained variety of mitigating evidence. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that counsel should have requested presentence report in light of his failure to investigate mitigating evidence, was rejected as basis for ineffective assistance of counsel claim where question was counsel's competence in not investigating and presenting mitigating evidence; if this was reasonable strategic choice, there was no need for investigation by other means. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

If capital murder defendant shows that failure of trial defense counsel to call favorable, willing witnesses during penalty phase of trial and failure to investigate and present psychological evidence resulted in ineffective assistance of counsel, death penalty will be vacated and new trial set as to sentencing only. Leatherwood v. State, 473 So. 2d 964 (Miss. 1985).

127. —Failure to appeal as ineffectiveness of counsel, assistance of counsel.

Defendant, as a convicted felon, could not quietly enjoy the benefits of an illegally lenient sentence and later attack the sentence when suddenly it was in his interest to do so; because defendant actually benefited from the illegal sentence, he was not denied his fundamental right from an illegal sentence, and there was no ineffective assistance of counsel or other error. Thomas v. State, 861 So. 2d 371 (Miss. Ct. App. 2003).

Defense counsel's failure to file appeal, to advise defendant of 30-day time period in which appeal was required to be filed, and to file motion for out-of-time appeal was not ineffective assistance of counsel in murder case, where defendant had signed statement showing that he had been advised of his right to appeal and did not desire to do so. Osborn v. State, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

A defendant was not deprived of his constitutional right to effective assistance of counsel on the ground that his attorney failed to perfect a timely appeal where his attorney filed for a new trial and J.N.O.V., thereby protecting the defendant's right of appeal to the Supreme Court. Jackson v. State, 614 So. 2d 965 (Miss. 1993).

Crudely handwritten note requesting free copies of documents from the record and a copy of the trial transcript of the purpose of pursuing a "higher cause of action" was sufficient to give notice to the state that petitioner was indigent, unrepresented, and desired to appeal, which required the state to appoint counsel for him. Bennett v. Mississippi, 523 F.2d 802 (5th Cir. Miss. 1975).

128. — Totality of circumstances demonstrating ineffectiveness of counsel, assistance of counsel.

Counsel was not ineffective for failing to investigate the police informant because, had defendant not pleaded guilty and gone to trial, the informant's background would have been relevant only for impeachment purposes, and in his petition to enter a guilty plea, defendant swore that his attorney had counseled him and advised him about the nature of the charge and all possible defenses. Deloach v. State, 937 So. 2d 1010 (Miss. Ct. App. 2006).

Federal district court correctly denied state death row inmate's habeas corpus petition; defense counsel was not ineffective for failing to introduce petitioner's medical records, documenting his history of automobile and hunting accidents as well as a drug overdose, in mitigation at a resentencing hearing because petitioner's family members testified about his dysfunctional and abusive family background, and having the additional medical evidence would not have dissuaded the jury from returning a death sentence. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Defendant was not denied the effective assistance of counsel during trial for the sale of cocaine; defendant merely gave blanket reasons as to why counsel was ineffective. Defendant did not show that counsel's trial strategies were outside the range of professionally competent assistance nor did defendant show that any deficiency on the part of trial counsel resulted in any prejudice to the case. Wilson v. State, 893 So. 2d 1064 (Miss. Ct. App. 2004), writ of certiorari denied by 893 So. 2d 1061, 2005 Miss. LEXIS 124 (Miss. 2005).

In a case where defendant was convicted of two counts of lustful touching of a child and two counts of sexual battery, defendant received effective assistance of counsel, as counsel filed motions before trial, effectively cross-examined the State's witnesses, made many objections throughout the trial and gave a coherent opening statement along with a comprehensive closing argument, and filed post-trial motions, one of which resulted in the dismissal of the first count of defendant's indictment. Broderick v. State, 878 So. 2d 103 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 937 (Miss. 2004).

The defendant failed to establish ineffective assistance of counsel where (1) up until the point where the defendant took over his own defense and counsel assumed an advisory role, counsel conducted voir dire of the jury panel, made a Batson challenge to the state's strikes, and responded to the state's reverse Batson challenges, (2) counsel also conducted the cross-examination of six of the state's witnesses, made numerous objections to the testimony of the state's witnesses, as well as to exhibits offered into evidence, and moved to dismiss because of an alleged discovery violation by the state, and (3) after the defendant took over his own defense and counsel was ordered to remain as his advisor, the record reveals that he conferred with and offered advice to defendant as to how he should proceed. Henley v. State, 729 So. 2d 232 (Miss. 1998).

Supreme Court looks at totality of circumstances to determine whether counsel's efforts were both deficient and prejudicial, when evaluating claim of ineffective assistance of counsel. Osborn v. State, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Adequacy of counsel's performance, as to its deficiency and prejudicial effect, should be measured by totality of circumstances. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

In determining effectiveness of counsel issues, court must consider whether overall performance was deficient and whether defense was prejudiced by any such deficiencies. Moore v. State, 676 So. 2d 244 (Miss. 1996).

Whether counsel's performance was both deficient and prejudicial under Strickland test for ineffectiveness of counsel must be determined from totality of circumstances. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Target of appellate scrutiny in evaluating deficiency and prejudice prongs of Strickland test for ineffectiveness of counsel is counsel's "over-all" performance. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Supreme Court must determine whether counsel's performance was both deficient and prejudicial based upon totality of circumstances. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

A guilty verdict supported by confessions and direct evidence comes out more strongly against a claim of ineffectiveness of counsel. Evans v. State, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

A defendant's Sixth Amendment right to effective assistance of counsel does not entitle defendant to errorless counsel, but rather counsel reasonably likely to render and rendering reasonably effective assistance. The standard required of trial counsel is no higher in capital cases than in noncapital cases. Although Mississippi courts may customarily appoint two lawyers in a capital case, the Constitution dictates no such requirement. The duty imposed on counsel to make an independent investigation of the facts and circumstances in the case is not without limit, and the court must take into account the totality of the circumstances in evaluating whether counsel has been effective. Defendant must demonstrate that his counsel's ineffectiveness has resulted in at least some degree of prejudice to his case. Counsel could not be faulted for his failure to request a simple murder charge not supported by the evidence and his failure to request a definition of the underlying felony was harmless. Accordingly defendant was not denied effective assistance of counsel during the guilt stage of his trial. Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982), cert. denied, 464 U.S. 843, 104 S. Ct. 142, 78 L. Ed. 2d 134 (1983).

129. — Different outcome likely as proof of ineffectiveness of counsel, assistance of counsel.

Defendant's convictions for two counts of capital murder were upheld because while defendant was able to give several examples of what defendant perceived to be counsel's deficiencies, including counsel's failure to fully investigate through discovery motions what information the State had related to the case, defendant was not able to satisfy the second prong of the Strickland test; defendant failed to establish a reasonable probability that but for counsel's error he would have had a better result. Dahl v. State, 989 So. 2d 910 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 993 So. 2d 832, 2008 Miss. LEXIS 412 (Miss. 2008).

Counsel was not ineffective for allegedly failing to investigate the physical evidence to find inconsistencies with the inmate's confession because the record was full of independent evidence that was consistent with and supported the inmate's confession to the kidnapping and murder; therefore, the inmate could not show that his trial would have been different. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Dismissal of the inmate's motion for post-conviction relief was proper in part because he failed to prove that his counsel was ineffective; the inmate failed to demonstrate how the outcome of his case would have been different had his attorney performed the acts that the inmate alleged that the attorney was deficient in failing to perform. Truitt v. State, 958 So. 2d 299 (Miss. Ct. App. 2007).

Petitioner failed to demonstrate that his counsel was ineffective for failing to investigate the background of a police informant where petitioner did not argue that he would not have pled guilty but for the ineffective assistance of his counsel, or that he was prejudiced by his attorney's alleged failure. Elliott v. State, 939 So. 2d 824 (Miss. Ct. App. 2006).

Defendant's conviction for capital murder was appropriate because he failed to prove that his counsel was ineffective; the appellate court failed to see how examining additional photographs would have enabled defendant's counsel to more effectively cross-examine the state's experts to the extent that the trial outcome would have changed. Williams v. State, 937 So. 2d 35 (Miss. Ct. App. 2006).

In an ineffective assistance of counsel claim, defendant pointed to his trial counsel's failure to object to leading questions, failure to object to jury instructions containing assumptions of fact, failure to effectively cross-examine, failure to adequately investigate his case, failure to call witnesses, and numerous other grounds; however, defendant's trial counsel was not ineffective based on the record. Any errors defendant's trial counsel might have committed in the case were not prejudicial to the defense so as to create a reasonable probability of a different outcome in the absence of such errors; thus, defendant's ineffective assistance of counsel claim failed. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

Petition for post-conviction relief based on ineffective assistance of counsel was properly denied because an inmate failed to show that allegedly discoverable evidence would have been exculpatory in light of a co-defendant's statement that implicated the inmate in a murder. Hollingsworth v. State, 852 So. 2d 612 (Miss. Ct. App. 2003), writ of certiorari denied by 852 So. 2d 577, 2003 Miss. App. LEXIS 867 (Miss. Ct. App. 2003).

If, and only if, court adjudges counsel's performance to have been deficient, then it must determine whether there exists reasonable probability that, but for complained-of error, outcome of trial or appeal would have been different, in ruling on claim of ineffective assistance. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Defendant was not entitled to habeas relief based upon his claim of ineffective assistance of his trial counsel where all instances of alleged attorney ineffectiveness failed to meet either deficiency or prejudice prong of *Strickland*; even though trial counsel's performance could have been improved in certain instances, trial counsel sufficiently defended him during guilt and sentencing phases of both capital murder trials, proceedings were fair and reliable, and result and sentences received would not have changed had the alleged instances of deficiency not occurred. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

On claim for habeas corpus relief for ineffective assistance of counsel, an error by counsel, even if professionally unreasonable, does not warrant setting aside judgment of a criminal proceeding if the error had no effect on the judgment, and petitioner must affirmatively plead this resulting prejudice. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Supreme Court will find ineffective representation by counsel only where there is reasonable probability that without counsel's errors, outcome of trial would have been different. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

A defendant's complaints of ineffective assistance of counsel in his post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel were insufficient as a matter of law where the defendant failed to allege that the asserted errors of his attorney proximately resulted in his guilty plea and that, but for these errors, he would not have entered the plea. Garlotte v. State, 597 So. 2d 641 (Miss. 1992).

A defendant was not denied his right to effective assistance of counsel merely because his attorney failed to procure a preliminary hearing where no allegation or facts were presented as to the way in which this matter operated to the defendant's prejudice. Jordan v. State, 577 So. 2d 368 (Miss. 1990).

In case involving clear guilt supported by confessions and direct evidence, claim of ineffective assistance of counsel is less likely to be found because prejudice prong of Strickland test will be difficult to meet. Faraga v. State, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Even if counsel was ineffective at sentencing phase, result would not have been different given overwhelming evidence of defendant's guilt, and therefore claim of ineffective assistance was not substantiated. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

In a prosecution for homicide, where the defendant was unable to show that there was a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different, defendant was not denied effective assistance of counsel in violation of the Sixth Amendment. In re Hill, 460 So. 2d 792 (Miss. 1984).

130. —Presumptions of ineffectiveness of counsel, assistance of counsel.

In determining whether attorney's performance is deficient, for purposes of claim of ineffective assistance of counsel, court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance; that is, defendant must overcome presumption that, under circumstances, challenged action might be considered sound trial strategy. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

In analyzing claim of ineffective assistance of counsel, district court must engage in strong presumption that trial counsel's performance fell within the wide range of professional competence and that the original verdict was reliable. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Trial counsel is presumed to be competent for purposes of ineffective assistance of counsel claim. Ashby v. State, 695 So. 2d 589 (Miss. 1997).

There is strong but rebuttable presumption that counsel's conduct falls within wide range of reasonable professional assistance; only where it is reasonably probable that but for attorney's errors, outcome of trial would have been different, will Supreme Court find that counsel's performance was deficient. Osborn v. State, 695 So. 2d 570 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997).

Prejudice is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected his lawyer's performance. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

There is strong, yet rebuttable, presumption that counsel's conduct falls within wide range of reasonable professional assistance, for purposes of applying Strickland test for ineffectiveness of counsel, as there is presumption that decisions made by defense counsel are strategic. Cole v. State, 666 So. 2d 767 (Miss. 1995).

131. — Burden of proof of ineffectiveness of counsel, assistance of counsel.

Denial of defendant's motion for postconviction relief was proper because he failed to meet his burden of proof under Miss. Code Ann. § 99-39-23(7) in that he failed to show that his guilty plea was not knowing and voluntary and that his counsel was ineffective; the trial court had responsibility to assess defendant's credibility and found no deficiency. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

Denial of the inmate's motion for postconviction relief was proper because, notwithstanding the admissions and concessions contained within the inmate's petition and throughout his hearing, he further failed to offer any affidavits or additional proof in support of his claim of ineffective assistance of counsel other than his own beliefs. Ross v. State, 936 So. 2d 983 (Miss. Ct. App. 2006).

In a capital murder and death penalty case, there were no due process violations under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963); no DNA testing was done, most of the film had been disclosed, but to the extent that it was not, there was no reasonable probability that the outcome would have been different, and the other evidence had been disclosed to defendant. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

To prove counsel was ineffective at trial, a defendant must show the existence of a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. Where a defendant convicted of sexual battery on a child failed to prove the prejudice arm of the ineffective counsel test by failing to show the outcome would have been different based on alleged deficiencies in his counsel's responses to rulings on the admission of evidence, his conviction was affirmed on appeal. Renfrow v. State, 863 So. 2d 1047 (Miss. Ct. App. 2004), opinion withdrawn by, substituted opinion at 882 So. 2d 800, 2004 Miss. App. LEXIS 919 (Miss. Ct. App. 2004).

Petitioner failed to identify any acts or omissions of his counsel in his pro se post-conviction petition, and therefore failed to demonstrate that his counsels' performance during the sentencing phase and/or on appeal was deficient and that the deficiency prejudiced the defense of his case. Woodward v. State, 843 So. 2d 1 (Miss. 2003).

To establish ineffective assistance of counsel, petitioner must show that (1) his counsel's performance was deficient and (2) deficient performance prejudiced his defense. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

To establish "cause" for procedural default, party is required to show that some objective external factor impeded defense counsel's ability to comply with state's procedural rules or to show prior determination of ineffective assistance of counsel. Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

To merit habeas corpus relief on a claim of ineffective assistance of counsel, defendant must demonstrate that his counsel's errors were so egregious that he was deprived of the "counsel" guaranteed by the Sixth Amendment, and to show prejudice from that deficiency, defendant must prove that challenged conduct rendered proceeding fundamentally unfair or unreliable. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

On claim of ineffective assistance of counsel, it is not enough to show that some, or even most, defense lawyers would have handled the case differently. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

To prove a claim of ineffective assistance of counsel, defendant must show (1) deficiency of counsel's performance (2) sufficient to constitute prejudice to the defense. Walker v. State, 703 So. 2d 266 (Miss. 1997).

Burden of proving that both prongs of *Strickland*have been met is on defendant who faces a rebuttable presumption that counsel's performance falls within broad spectrum of reasonable professional assistance. Walker v. State, 703 So. 2d 266 (Miss. 1997).

To establish ineffective assistance of counsel, defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, result would have been different; reasonable probability is probability sufficient to undermine confidence in outcome. Ashby v. State, 695 So. 2d 589 (Miss. 1997).

Before counsel can be deemed to have been ineffective, it must be shown (1) that counsel's performance was deficient, and (2) that defendant was prejudiced by counsel's mistakes. Drennan v. State, 695 So. 2d 581 (Miss. 1997).

Defendant who claims that counsel was ineffective must overcome presumption that counsel's performance falls within range of reasonable professional assistance, and in order to overcome presumption, defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different. Drennan v. State, 695 So. 2d 581 (Miss. 1997).

Burden is on defendant to prove both prongs of ineffective assistance of counsel test. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

To establish prejudice, defendant claiming ineffective assistance of counsel must show that there was reasonable probability that, but for counsel's unprofessional errors, result would have been different. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

Burden is on defendant to show both prongs of the Strickland test for ineffective assistance of counsel or at least to present prima facie claim as to any deficiencies and the prejudice resulting therefrom. Moore v. State, 676 So. 2d 244 (Miss. 1996).

If defendant is to be successful on ineffective assistance of counsel claim, he must prove that counsel's performance was deficient and that deficient performance prejudiced the defense; burden of proving both prongs of the test is on defendant. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Defendant claiming ineffective assistance of counsel must show that there is reasonable probability that, but for the errors, outcome of the case would have been different. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In order to be successful on ineffective assistance claim, defendant must overcome presumption that defense counsel's statements were within the realm of reasonable trial tactics. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Burden is on defendant to demonstrate both deficiency and prejudice prongs of Strickland test for ineffectiveness of counsel. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Under prejudice prong of Strickland test for ineffectiveness of counsel, movant must show that there is reasonable probability that, but for counsel's unprofessional errors, result of proceedings would have been different, with "reasonable probability" being probability sufficient to undermine confidence in outcome. Cole v. State, 666 So. 2d 767 (Miss. 1995).

To successfully claim ineffective assistance of counsel, defendant must show deficiency of counsel's performance sufficient to constitute prejudice to defense. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

Burden to demonstrate ineffective assistance of counsel is on defendant, who faces strong but rebuttable presumption that counsel's performance falls within broad spectrum of reasonable professional assistance. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

In order to prove that he received ineffective assistance of counsel during the guilt phase of a capital murder prosecution, the defendant was required to show deficient performance and that his counsel's errors were so serious as to deprive him of a fair trial with a reliable result; unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

A post-conviction relief petitioner, who is seeking to overturn a conviction or sentence on the grounds of ineffective assistance of counsel, must demonstrate factual proof by a preponderance of the evidence of an identifiable lapse by counsel and of some actual adverse impact on the fairness of the trial resulting from that lapse. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

In order to prevail on the claim that he was denied effective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Perkins v. State, 487 So. 2d 791 (Miss. 1986).

In order to prevail on a claim that counsel's assistance was so defective as to require reversal of conviction or death sentence, defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Evans v. State, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

The burden of proving ineffective assistance of counsel is on the defendant to prove that the counsel's performance was (1) deficient, and (2) that the deficient performance prejudiced the defense, and a reversal of a conviction or sentence is not warranted upon failure to prove either component. Dufour v. State, 483 So. 2d 307 (Miss. 1985), cert. denied, 479 U.S. 891, 107 S. Ct. 292, 93 L. Ed. 2d 266 (1986).

132. — Sufficiency of evidence of ineffectiveness of counsel, assistance of counsel.

Defendant claimed that he received ineffective assistance of counsel because his trial counsel failed to make timely disclosure of two witnesses, which resulted in exclusion of the testimony of the witnesses, but there was nothing to suggest a constitutionally deficient performance. Defendant also contended that defense counsel should have objected to a lesser-included jury instruction, but this could have been counsel's trial strategy; finally, counsel was not deficient for failing to use a peremptory strike against a juror.

McGregory v. State, 979 So. 2d 12 (Miss. Ct. App. 2008).

Defendant's retained counsel was not ineffective in informing the jury that defendant was a habitual offender where that information was included in the indictment. Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Trial court did not err in failing to sua sponte declare a mistrial for ineffective assistance of counsel where defendant failed to show a reasonable probability that he would have received a different result given his taped confession, his presence in the church office on the day of the burglary, and his signature on two checks found in the office. Deloach v. State, 977 So. 2d 400 (Miss. Ct. App. 2008).

Defendant's conviction for armed robbery was proper because he failed to prove that his counsel was ineffective; in part, counsel's failure to object to the introduction of evidence, which was clothing, was not ineffective because the evidence against defendant was overwhelming. Hancock v. State, 964 So. 2d 1167 (Miss. Ct. App. 2007), writ of certiorari denied by 964 So. 2d 508, 2007 Miss. LEXIS 526 (Miss. 2007).

Where a defendant raised ineffective assistance of counsel on direct appeal, and raises it again in a post-conviction proceeding, supported by extraneous materials that were not available on direct appeal, an appellate court's consideration of the issue is not barred by res judicata; where the defendant raises ineffective assistance of counsel at the post-conviction stage, and it is the same issue raised on direct appeal but only rephrased, res judicata will apply. Hodges v. State, 949 So. 2d 706 (Miss. 2006), writ of certiorari denied by 552 U.S. 1061, 128 S. Ct. 705, 169 L. Ed. 2d 552, 2007 U.S. LEXIS 12873, 76 U.S.L.W. 3287 (2007).

Defendant was not entitled to post-conviction relief based on ineffective assistance when res judicata barred some of the claims such as counsel's failure to support a motion to suppress defendant's confession, counsel's failure to properly advise on plea bargains, counsel's failure to introduce victims' impact statement, and failure to properly prepare defendant to give his testimony; and defendant's remaining claims lacked merit. Hodges v. State, 949 So. 2d 706 (Miss. 2006), writ of certiorari denied by 552 U.S. 1061, 128 S. Ct. 705, 169 L. Ed. 2d 552, 2007 U.S. LEXIS 12873, 76 U.S.L.W. 3287 (2007).

Record did not support defendant's allegations that he had been given ineffective assistance by counsel for several alleged deficiencies, where defendant's brief did not list or contain any possible defense witnesses that trial counsel should have called to testify or how that prejudiced his case; defendant failed to show that the defense counsel's decision to forgo cross-examination of some witnesses was not sound trial strategy or that it prejudiced his case, and trial counsel's conduct was within a wide range of reasonable conduct. Torrey v. State, 891 So. 2d 188 (Miss. 2004).

Defendant was not denied effective assistance of counsel where, once the youth court had jurisdiction, it did not lose jurisdiction of defendant after he turned 18, but retained jurisdiction until defendant reached age 20; therefore, defendant's assertion that his counsel was ineffective for failing to challenge the transfer was without merit. Hicks v. State, 870 So. 2d 1238 (Miss. Ct. App. 2004).

Defendant did not prove ineffective assistance of counsel where he signed a petition to enter a plea of guilty in which he stated that his lawyer was competent and defendant was fully satisfied with the advice and help he received; although defendant complained about the lack of pretrial investigation, he failed to tell the trial judge or the appellate court which facts in mitigation a further investigation would have revealed, so that defendant did not demonstrate prejudice, having not alleged anything that would have led to a different result. Hebert v. State, 864 So. 2d 1041 (Miss. Ct. App. 2004).

Defendants did not meet their burden of demonstrating deficient performance by trial counsel and resulting prejudice; counsel placed evidence before the jury that both witnesses had failed to identify a defendant and objected to questionable testimony. Powell v. State, 878 So. 2d 144 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 962 (Miss. 2004).

Defendant failed to present evidence that trial counsel was deficient in (1) failing to investigate and present mitigation evidence; (2) giving inadequate closing arguments by requesting mercy; and (3) failing to object to the two aggravating circumstances submitted by the State. Powers v. State, 883 So. 2d 20 (Miss. 2003), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1584, 73 U.S.L.W. 3495 (2005).

Defendant made no contention as to what efforts counsel could reasonably have been expected to produce in terms of evidence or information helpful to defendant's defense; counsel's failure to insist on further delay was not the deficient performance that would warrant relief and defendant failed to show the basis for the conclusion that any alternate courses of action had a reasonable chance of producing a result more favorable to him. Pickett v. State, 861 So. 2d 1049 (Miss. Ct. App. 2003).

Defendant failed to demonstrate a deficiency in his counsels' overall performance sufficient to undermine the integrity of his trial and conviction; there was testimony that defendant had admitted shooting into the camp cabin and a confession to that effect, but counsel's statements during closing presented an alternative defense theory, namely, that codefendant had put the shotgun to defendant's head and ordered him to fire. Davis v. State, 849 So. 2d 1252 (Miss. 2003).

In accord with Provident Life & Accident Ins. Co. v. Jemison, 153 Miss. 53, 120 So. 180 (1929). Nixon v. Hargett, 194 F. Supp. 2d 501 (S.D. Miss. 2002), affirmed by 405 F.3d 318, 2005 U.S. App. LEXIS 5219 (5th Cir. Miss. 2005).

The court rejected the contention that defense counsel rendered ineffective assistance to the defendant when he stated, while making an objection, that testimony by a witness should be heard outside the presence of the jury because some of the testimony might be damaging; the defendant asserted that the statement about some of the testimony being "damaging" was evidence of ineffective assistance of counsel, but such was not the case as counsel made no references to specific facts that could have prejudiced the jury. Rambus v. State, 804 So. 2d 1052 (Miss. Ct. App. 2001).

The defendant was not denied effective assistance of counsel in connection with his guilty plea, notwithstanding the defendant's assertions that counsel advised him to plead guilty even though counsel knew of witnesses who could have given testimony that could have been used to prove innocence at trial and that the decision to plead guilty was forced on him by counsel, because (1) the circuit judge asked the defendant if his counsel had discussed the petition to plead guilty with him and if he understood everything within the petition, and the defendant answered that he understood, (2) the judge asked if the defendant had fully discussed all the circumstances surrounding the case with his counsel and whether or not his counsel had advised him of all possible defenses that he might have if the case went to trial, and the defendant responded affirmatively, and (3) the defendant was asked if he was satisfied with the advice that his counsel had given him, and he stated that he was. Sherrod v. State, 784 So. 2d 256 (Miss. Ct. App. 2001).

The defendant failed to establish ineffective assistance of counsel because (1) other than making bare allegations of how his counsel was ineffective, the defendant failed to identify specific acts or omissions by his trial counsel that in any way prejudiced his defense, and (2) a thorough review of the record showed that trial counsel more than adequately represented the defendant. Wansley v. State, 798 So. 2d 460 (Miss. 2001).

The defendant was not denied effective assistance of counsel during the guilty plea process, notwithstanding his contention that he was confused as to how much of his sentence he would be required to spend in jail because of the 85 percent law which had just been passed by the legislature in 1995, because (1) the defendant asked about the 85 percent rule, which was under review by the supreme court at the time, since he wanted to know if this rule would apply to him or not, (2) the judge told him he did not know if it would apply because the supreme court had not yet ruled on the issue, and (3) the judge also told him he did not know how the parole board handled parole eligibility, but that he did know the defendant would have to serve at least 10 years of his 20 year sentence. Clay v. State, 792 So. 2d 320 (Miss. Ct. App. 2001).

The defendant was not denied effective assistance of counsel, notwithstanding the 17-year-old defendant's argument that his attorney advised him to plead guilty to charges where the record failed to substantiate his guilt, where (1) the defendant acknowledged that his counsel had met and conferred with him and his family and had discussed the facts of the case fully and completely, (2) he also specifically declared his involvement in the crimes, as well as asserting that he understood the charges against him and their possible sentences, (3) the testimony of defense counsel at the guilty plea hearing revealed that he had not only discussed the crimes with the defendant but had also met with his father numerous times to keep him apprized of the case, and (4) the defendant received a reduction in both counts against him prior to entering his pleas of guilty. Young v. State, 797 So. 2d 239 (Miss. Ct. App. 2001).

The defendant failed to establish ineffective assistance of counsel notwithstanding his assertion that his attorney did not investigate the case, coerced him into pleading guilty, and failed to seek suppression of illegally seized evidence, where (1) the trial court specifically found that the attorney had filed at least 31 motions on behalf of the defendant including motions seeking to have certain evidence suppressed and that the attorney provided effective assistance as counsel, and (2) the defendant failed to demonstrate that but for his attorney's alleged ineffective assistance, a different result would have come from the charges against him. Taylor v. State, 782 So. 2d 166 (Miss. Ct. App. 2000).

In a prosecution for felony driving under the influence, no violation of the defendant's right to effective assistance of counsel occurred when the district attorney, on cross-examination, asked the defendant if he ever told his lawyer who the people were who heard him ask for a breathalyzer test and defense counsel successfully objected to the question; no deficiency of counsel was shown and there was no showing of a hindrance put upon the defendant's attorney-client privilege and, therefore, there was no violation of the defendant's rights. Phillips v. State, 783 So. 2d 731 (Miss. Ct. App. 2000).

The defendant was not denied effective assistance of counsel, notwithstanding his assertion that his trial counsel failed to investigate thoroughly the circumstances of the crime at issue, where (1) at his plea hearing, the judge asked the defendant if his attorney had done everything he believed he should have done to represent him properly, and the defendant said yes, with the exception that he "should have got me a better plea bargain," (2) the court then explained to the defendant that the court did not define its procedures as plea bargaining per se, but that the district attorney would reduce the charge if the defendant pled guilty and accepted a 15 year sentence on each charge, and the defendant accepted that and declined the court's repeated offer to let the case go to trial, and (3) when asked by the court whether anyone, specifically his attorney, had pressured him into pleading guilty, the defendant responded that he had not. Taylor v. State, 766 So. 2d 830 (Miss. Ct. App. 2000).

The defendant was not denied effective assistance of counsel in a prosecution for capital rape of an 11 year-old girl, notwithstanding his assertions that his attorney did not disagree with a continuance filed by the state, inquire about the sexual history of the victim, or inquire as to why the victim did not immediately tell her mother about the incident in question, since the defendant did not present the court with any evidence demonstrating errors made by his counsel that were so serious as to deprive him of a fair trial and failed to demonstrate how such alleged errors prejudiced his defense in any way. Patton v. State, 766 So. 2d 115 (Miss. Ct. App. 2000).

The defendant was not denied effective assistance of counsel, notwithstanding his assertion that he was not informed of the terms of his plea agreement and that he expected a 12 year, rather than 25 year, sentence, where (1) according to the terms of the plea agreement and the petition, the defendant was aware that his guilty plea carried a maximum sentence of 30 years and that he would not be subject to the death penalty, (2) the defendant signed the plea agreement and signed and initialed the petition to enter plea, (3) at the sentencing hearing, the defendant acknowledged that he had completed nine years of school and that he could read and write and identified and verified his signature on the petition to enter plea, (4) when questioned by the court, the defendant indicated that his attorney had explained the entire petition to him, and that he was satisfied with the representation and services he had received from his attorney, and (5) the defendant was given an opportunity to make a statement or ask any questions prior to sentencing. Thomas v. State, 766 So. 2d 96 (Miss. Ct. App. 2000).

There was no merit to the defendant's claim of ineffective assistance of counsel in connection with his guilty plea, notwithstanding the assertion that defense counsel was ineffective in that he made no effort to adequately defend the defendant against the criminal charges at issue, where the record established that defense counsel effectively counseled the defendant and that the defendant had no complaints regarding inadequate assistance of counsel at the time of his guilty plea: Jenkins v. State, 770 So. 2d 568 (Miss. Ct. App. 2000).

In accord with Coleman v. State, 1999 Miss. LEXIS 357, 749 So. 2d 1003 (Miss. 1999). See Lawrence v. State, 780 So. 2d 652 (Miss. Ct. App. 2001).

Trial counsel was not ineffective for failure to request competency hearing, despite defendant's alleged organic brain damage and Dissociative Identity Disorder; court-ordered psychological examination concluded there was no evidence defendant suffered from mental disorder and the finding that defendant was competent to stand trial was not contradicted by defendant's experts, and even if failure to request competency hearing fell below objective standard of reasonableness, defendant failed to prove any resulting prejudice. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

A defendant did not present sufficient evidence to show that he received ineffective assistance of counsel where the defendant simply cited actions of his attorney without explaining or justifying his contention that they should be characterized as deficient and prejudicial, and the defendant made no showing that his attorney's alleged errors affected the outcome of the case. Ahmad v. State, 603 So. 2d 843 (Miss. 1992).

A capital murder defendant was not denied effective assistance of counsel on direct appeal by his attorney's alleged failure to bring to the Supreme Court's attention a plea bargain with an accomplice who testified as a witness, where the Supreme Court was well aware that the accomplice had been permitted to plead guilty to manslaughter and that he had been sentenced to 15 years' imprisonment but had served only 2 ½ years. Culberson v. State, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991).

A defendant was not denied his right to effective assistance of counsel on the ground that his attorney gave the prosecution permission to interview the defense witnesses while allowing the prosecution to disallow the defendant from taking a deposition of the victim, since the defendant had no right to such a pre-trial deposition and the trial court lacked the authority to require the victim to talk with defense counsel where the victim was unwilling to do so; the defendant's counsel could not be faulted as ineffective for failing to secure that which the defendant had no right to obtain. Jordan v. State, 577 So. 2d 368 (Miss. 1990).

Claim that counsel was ineffective because certain issues were procedurally barred due to ineffective assistance of counsel did not have merit because none of issues claimed had merit and thus failure to assert them could not constitute ineffective assistance of counsel. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487

U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Counsel's conduct in failing to request change of venue, to move for continuance, and to object to exhumation of body of victim, was within range of competence demanded of attorneys in criminal cases and therefore did not constitute ineffective assistance of counsel. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

Defendant was not denied effective assistance of counsel at trial where review of record did not reveal any breakdown of adversary process due to assistance rendered by defendant's trial counsel; trial counsel performed well under facts of case where there was overwhelming proof against his client; trial judge had found that allegation by defendant that counsel did not "have his heart" in representing him was incorrect, and that attorney was very diligent in trial preparation, as well as very competent and able. Burney v. State, 515 So. 2d 1154 (Miss. 1987), but see McCarty v. State, 554 So. 2d 909 (Miss. 1989).

Defendant was not deprived of his Sixth Amendment rights by ineffective assistance of counsel where defendant alleged; counsel ineffectively assisted him by not retaining someone else to assist him; counsel failed to insure that pre-trial proceedings were recorded; counsel should have moved for change of venue either before trial or during voir dire; counsel's conduct of voir dire was inadequate and prejudicial; counsel was unprepared for trial; that counsel conceded defendant's client might be guilty of murder but not capital murder; and, counsel failed to present any expert psychological testimony at sentencing phase. Faraga v. State, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Defendant was not victim of ineffective assistance of counsel where trial record indicated defendant was represented by competent counsel dedicated to his defense. Johnson v. State, 511 So. 2d 1333 (Miss. 1987), rev'd, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), on remand, 547 So. 2d 59 (Miss. 1989).

Defendant did not show ineffective assistance of counsel where he could not show requisite prejudice because evidence of his guilt was great, although he had shown that performance of trial counsel was deficient, where little or no effort to conduct independent investigation was made and trial counsel did not speak to client after learning that he was going to be tried as habitual offender. Ferguson v. State, 507 So. 2d 94 (Miss. 1987).

Defendant was denied fair trial where trial judge, after admonishing defense counsel on several occasions about continuing ineffectual and repetitive cross-examination of state's witnesses called for defense and stating that defendant's counsel was providing state with inadmissible evidence to detriment of his client, had threatened defense counsel with jail in the presence of jury. Waldrop v. State, 506 So. 2d 273 (Miss. 1987).

Defendant was denied effective assistance of counsel under Strickland v. Washington (1984) 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, reh. den. 467 U.S. 1267, 82 L. Ed. 2d 864, 104 S. Ct. 3562 and on remand (CA11 Fla.) 737 F.2d 894, habeas corpus proceeding (SD Fla.) 587 F. Supp. 525, affd (CA11 Fla.) 737 F.2d 922 and later proceeding (Fla) 453 So 2d 389, because counsel's efforts were both deficient and prejudicial, where defense counsel did not object to testimony that US Marshals were seeking defendant on parole violation and for escape from such parole, had objected to testimony concerning NCIC report only on ground that witness had testified incorrectly as to it, introduced NCIC into evidence himself, questioned witnesses concerning other alleged crimes of defendant, and made numerous frivolous objections, repeated refusals to follow rulings and instructions from bench, and requested information on how to introduce exhibit. Waldrop v. State, 506 So. 2d 273 (Miss. 1987).

In a prosecution for capital murder resulting from the commission of armed robbery, the petitioner was not subjected to ineffective counsel in violation of his Sixth Amendment right since petitioner failed to prove that the failure to have the preliminary hearing was not a strategic move, since there was no indication that a change of venue could have effected a different result in the trial, since the guilty plea entered by the petitioner was free and voluntary, and since petitioner failed to show systematic exclusion of black jurors. Gilliard v. State, 462 So. 2d 710 (Miss. 1985).

Evidence was insufficient to establish ineffective assistance of counsel. Provident Life & Accident Ins. Co. v. Jemison, 153 Miss. 53, 120 So. 180 (1929), error overruled, 153 Miss. 60, 120 So. 836 (1929).

133. — Post-conviction proceedings, assistance of counsel.

Because there was no merit to petitioner's claims that trial and appellate counsel were ineffective, counsel's failure to raise the claims in the original postconviction relief proceedings did not prejudice petitioner. Grayson v. State, 118 So. 3d 118 (Miss. 2013).

Because the jury in a capital case was informed adequately that a life sentence would be without parole, counsel's failure to raise this claim in the original postconviction relief proceedings did not prejudice petitioner. Grayson v. State, 118 So. 3d 118 (Miss. 2013).

Because the jury in a capital case was not unconstitutionally foreclosed by the jury instructions from considering all mitigating circumstances, counsel's failure to raise this claim in the original postconviction relief proceedings did not prejudice petitioner. Grayson v. State, 118 So. 3d 118 (Miss. 2013).

Because post-conviction relief (PCR) proceedings are a critical stage of the death-penalty appeal process at the state level, PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel. Grayson v. State, 118 So. 3d 118 (Miss. 2013).

Defendant's convictions for murder and aggravated assault were proper where he failed to show that his counsel was ineffective on direct appeal. The court did not find the record to affirmatively show ineffectiveness of constitutional dimensions, nor did the court find any stipulation by the parties regarding the adequacy of the record. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

Where defendant had a post-conviction evidentiary hearing, defendant had no constitutional guarantee to appointed counsel, and as such, without a constitutional right to counsel, there could be no deprivation of effective assistance of counsel, and defendant's attorney was active and effective during trial, and he filed a brief providing the appellate court with logical arguments and the brief resulted in the reversal of one of defendant's convictions; therefore, defendant had not convinced it that but for his counsel's deficiency, a different result would have occurred. Mitchell v. State, 879 So. 2d 1082 (Miss. Ct. App. 2004).

Where an inmate offered no proof that an attorney failed to conduct an investigation, did not file certain motions, and encouraged him to plead guilty to manslaughter, a claim of ineffective assistance of counsel was properly denied in a motion seeking post-conviction relief. Young v. State, 877 So. 2d 552 (Miss. Ct. App. 2004).

In a case related to the sale of cocaine, post-conviction relief was properly denied because appellant was not denied effective assistance of counsel as appellant's claims about his indictment were moot, appellant having responded in the affirmative when the trial judge asked if he was satisfied with counsel; further, the signed guilty plea petition indicated that appellant was informed of the sentence he could receive and he stated he was satisfied with the representation of his counsel. Waites v. State, 872 So. 2d 758 (Miss. Ct. App. 2004).

In his motion for post-conviction relief, the inmate set forth sufficient evidence to undermine confidence in the outcome of the trial because counsel failed to (1) use information that a witness did not live in the apartment complex to impeach and discredit the witness's statement that he saw the inmate leaving the victims' apartment after the murder; (2) use the law enforcement's door-to-door canvas of the apartment complex notes to discredit that witness; (3) discredit the statement that the inmate's stepfather lived at the apartment complex, which provided the State with evidence placing the inmate near the victims at the time of their deaths; (4)

present evidence that a shoe print found at the crime scene did not match his show size; and (5) show that two witnesses identified another suspect leaving the victims' apartments at about the time of the murders. Therefore, the inmate was granted leave to seek post-conviction relief on the ground of ineffective assistance of counsel. Manning v. State, 884 So. 2d 717 (Miss. 2004).

Inmate's request for leave to file an application seeking post-conviction relief was denied because the inmate was unable to show that the imposition of the death penalty was the result of ineffective assistance of counsel since defense counsel objected to the testimony of a pathologist, the admission of certain photographs, and a confession; moreover, the inmate failed to show how the introduction of medical records would have persuaded the jury to exercise leniency, and the inmate failed to show how a government-funded expert would have disputed the finding of the State's expert. Holland v. State, 878 So. 2d 1 (Miss. 2004), writ of certiorari denied by 544 U.S. 906, 125 S. Ct. 1590, 161 L. Ed. 2d 280, 2005 U.S. LEXIS 2273, 73 U.S.L.W. 3529 (2005).

Inmate's request for post-conviction relief was denied because there was no showing of ineffective assistance of counsel in a plea proceeding based on the failure to advise the inmate regarding whether to accept the plea; moreover, there was no deficient performance based on the issue of failing to secure a better plea in a statutory rape case. Kelley v. State, 913 So. 2d 379 (Miss. Ct. App. 2005).

Inmate was not denied effective assistance in a post-conviction proceeding because he had no state or federal right to counsel in the proceeding. Sheffield v. State, 881 So. 2d 249 (Miss. Ct. App. 2003), writ of certiorari dismissed by 2005 Miss. LEXIS 87 (Miss. Feb. 3, 2005).

In a capital murder case, the inmate filed an application for post-conviction relief based on ineffective assistance of counsel; however, several of the inmate's ineffective assistance of counsel claims were procedurally barred because they had been discussed on direct appeal, the inmate failed to meet his burden of providing authority to support his assignment of error, and the unsworn statements of witnesses were insufficient to support the inmate's allegations. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Although defense counsel's failure to request a new trial after a murder conviction amounted to deficient performance, there was no ineffective assistance of counsel because defendant failed to demonstrate a substantial likelihood that the outcome would have been different if the motion had been granted. Johnson v. State, 876 So. 2d 387 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

In a capital murder case, defendant's petition for post-conviction relief was denied as the Supreme Court had already addressed the merits on direct appeal of his underlying ineffectiveness of counsel claims, which were found to be without merit; thus, defendant could not show the requisite deficient performance and resulting prejudice necessary to establish the ineffective assistance claims and they were res judicata. Walker v. State, 863 So. 2d 1 (Miss. 2003), writ of certiorari denied by 543 U.S. 842, 125 S. Ct. 281, 160 L. Ed. 2d 68, 2004 U.S. LEXIS 5982, 73 U.S.L.W. 3208 (2004).

Henderson v. State, 769 So. 2d 210 (Miss. Ct. App. 2000).

A death row inmate is entitled to appointed and compensated counsel to represent him in his state post-conviction efforts. Jackson v. State, 732 So. 2d 187 (Miss. 1999).

There is no right based in United States Constitution to counsel on discretionary successive review of a state appellate court's decision; there being no right to counsel in state discretionary review, there can be no challenge to adequacy of counsel at that stage. Harris v. State, 704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

To merit post-conviction evidentiary hearing on issue of ineffective assistance of counsel, defendant's allegations of counsel's performance must raise sufficient questions of fact on issue of ineffective assistance of counsel. Walker v. State, 703 So. 2d 266 (Miss. 1997).

Post-conviction movant was entitled to evidentiary hearing on claim of ineffective assistance of trial counsel; trial counsel's failure to raise certain objections may have frustrated movant's right to fair trial and trial court's limited analysis of claim fell short of sufficient inquiry to justify dismissing claim on the merits. Hymes v. State, 703 So. 2d 258 (Miss. 1997).

Although ineffective assistance of counsel claim may have been procedurally barred on ground that it was not raised on direct appeal, there was reasonable justification for lifting procedural bar in post-conviction relief proceeding, where record showed that counsel on appeal had submitted exceedingly incoherent brief. Hymes v. State, 703 So. 2d 258 (Miss. 1997).

After Court of Appeals granted state's petition for rehearing and affirmed conviction which it had originally reversed, defendant showed good cause for extraordinary relief from rule prohibiting losing party from filing further petition for rehearing; defendant had no occasion to address Court of Appeals' disposition of his ineffective assistance issues and filing motion for rehearing with Court of Appeals was prerequisite to seeking further relief in Supreme Court. Shaw v. State, 702 So. 2d 386 (Miss. 1997).

Defendant's merely raising ineffective assistance of counsel claim was insufficient to surmount procedural bar to his untimely post-conviction petition. Bevill v. State, 669 So. 2d 14 (Miss. 1996).

Prima facie claim must be stated by defendant in post-conviction petition to lower court in order to obtain evidentiary hearing on merits of ineffective assistance of counsel issue. Robertson v. State, 669 So. 2d 11 (Miss. 1996).

A trial court did not err in failing to sua sponte appoint counsel for a post-conviction relief petitioner at the evidentiary hearing, in spite of the petitioner's contention that it was clear that he lacked knowledge and understanding of the proceedings being conducted by the court. A criminal defendant has neither a state nor federal constitutional right to appointed counsel in post-conviction proceedings. Additionally, the appointment of counsel at an evidentiary hearing is discretionary with the trial judge by virtue of § 99-39-23(1). Moore v. State, 587 So. 2d 1193 (Miss. 1991).

Claim that confession was taken in violation of defendant's right to counsel was procedurally barred because it had not been raised in any previous court pleading, nor had defendant shown sufficient legal cause to excuse his failure to timely raise claim. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

Claim of ineffective assistance of counsel is not procedurally viable where defendant waived issue when he declined to assert that point in his error coram nobis pleading; defendant had not shown sufficient cause to excuse this waiver where record reflected that trial counsel exited state court proceedings at conclusion of direct appeal and did not participate in presentation of error coram nobis pleading. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

The application of the procedural bar of Mississippi Code § 99-39-21(1) would be inappropriate to a defendant who had had no earlier meaningful opportunity to present issue of denial of effective assistance of counsel. Perkins v. State, 487 So. 2d 791 (Miss. 1986).

Petitioner who, although he had had opportunity to do so, had not earlier raised the issue of ineffectiveness of counsel did not meet the requirement of "cause" in Mississippi Code § 99-39-21(4). Evans v. State, 485 So. 2d 276 (Miss. 1986), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986).

In a prosecution for possession with intent to deliver a controlled substance, in violation of §§ 41-29-115, 41-29-117, and 41-29-119, the record failed affirmatively to establish denial of defendants' right to effective assistance of counsel; nevertheless, affirmance of the judgment of conviction would not preclude defendants from litigating the issue via proper post-conviction proceedings. Read v. State, 430 So. 2d 832 (Miss. 1983).

Sixth and Fourteenth Amendments' right of counsel to an accused no longer applies after conviction upon appeal. Neal v. State, 422 So. 2d 747 (Miss. 1982).

All defendants, whether indigent or not, have a constitutional right to legal counsel in any criminal proceeding filed against them, and any conviction obtained by fraud, perjury or other corrupt means may be corrected by proper post-conviction remedies. Therefore, it is not unreasonable to require a plaintiff to show that a criminal proceeding terminated in his favor before allowing recovery in a malicious prosecution action based on such criminal proceeding. Pugh v. Easterling, 367 So. 2d 935 (Miss. 1979).

134. — Failure to file motion for reconsideration as ineffective assistance of counsel, assistance of counsel.

Appellate court rejected a prisoner's claim that counsel provide ineffective assistance by failing to file a timely motion for reconsideration; the record did not contain a motion for reconsideration or an order finding that such a motion was untimely. In any event, assuming counsel had filed a timely motion for reconsideration, there was no reason to assume that there was a sufficient probability that the circuit court would have reversed itself. Wallace v. State, 982 So. 2d 1027 (Miss. Ct. App. 2008).

135. Change of venue.

Post-conviction relief was properly denied where trial counsel's failure to seek a change of venue because of pretrial publicity was not error, as most of the venire was largely unaware of the case, and those who were unaware of it assured counsel and the trial court that they could be impartial. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

On the inmate's petition for post-conviction relief, the court held that defense counsel's decision not to seek a change of venue based on pretrial publicity was beyond its review. Brawner v. State, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

Federal district court correctly denied state death row inmate's habeas corpus petition; the venue chosen for petitioner's resentencing hearing was proper, even though it was in the county in which the crimes occurred, and even though the trial venue had been changed to a different county due to excessive pretrial publicity, because years had passed since petitioner had been found guilty, and although two of selected resentencing jurors had some knowledge of the case, petitioner failed to prove that the resentencing jury was tainted. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

In an indecent exposure, reckless driving, and malicious mischief case, defendant did not receive inadequate notice of the nature and cause of the accusations against him as all three affidavits quoted the relevant language of the applicable statutes and there was no requirement that the formal name or statutory section be listed. As a result, all three of the affidavits were facially sufficient. Johnson v. State, 879 So. 2d 1057 (Miss. Ct. App. 2004).

In a capital murder case, the trial court did not err in denying defendant's request for a change of venue as no evidence was offered of any threatened violence toward defendant, nor was there an inordinate amount of media coverage, the testimony of the State's witnesses demonstrated that defendant could receive a fair trial, defendant offered no additional evidence to rebut the State's witnesses, and defendant did not present any evidence that he could not receive or had not received a fair trial from the jurors who heard his case. Howell v. State, 860 So. 2d 704 (Miss. 2003), writ of certiorari dismissed by 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371, 18 Fla. L. Weekly Fed. S 105 (2005).

136. Leading questions.

Defendant was not denied the effective assistance of counsel during his trial for the sale of marijuana; although there were instances of leading questions asked by the State without objection from defendant's counsel, the court found no prejudice to defendant. Anderson v. State, 904 So. 2d 973 (Miss. 2004).

137. Miscellaneous reports and records.

In a grand larceny case, the self-authenticating pen-packs were not inadmissible as a violation of the Confrontation Clause as the certificate on the pen-packs indicated that the custodian of records swore that the documents were true and correct copies, not that defendant actually committed any act. Accordingly, the "matter asserted" was that the pen-packs were accurate copies of official records, not that defendant was, in fact, a habitual offender, making the pen-packs admissible. Frazier v. State, 907 So. 2d 985 (Miss. Ct. App. 2005).

138. Other particular homicides.

Even if defendant's trial counsel was deficient in allegedly failing to make numerous potential objections to hearsay and other improper evidence, there was no reasonable probability that the proceeding would have been different given the plethora of evidence against defendant, including his confession that he had "killed the bitch." While trial counsel's performance may have been less than perfect, there was nothing in the record that proved that trial counsel's performance was not within the "wide range of reasonable professional assistance." Gibson v. State, 895 So. 2d 185 (Miss. Ct. App. 2004).

139. — Other particular circumstances.

Circuit court did not err in allowing defendant to represent himself because the circuit court abided by the law and the requirements of Miss. Unif. Cir. & Cty. R. 8.05; defendant made a knowing and intelligent waiver of his Sixth Amendment right to assistance of counsel, defendant knew that he had a right to counsel because counsel had been appointed to represent him, and defendant knew that his court-appointed counsel was representing him both before and after he elected to manage his own defense since he expressly agreed to counsel's continued assistance. Bradley v. State, 58 So. 3d 1166 (Miss. 2011).

On the inmate's petition for post-conviction relief, the court held that the inmate was not prejudiced by counsel's failure to transcribe the full record because the inmate did not claim any specific error arising from the non-transcribed sections of the record. Brawner v. State, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

Defendant, who entered a guilty plea pursuant to a plea agreement, contended in his post-conviction action that he received ineffective assistance of counsel since his counsel failed to file a motion for discovery. However, defendant provided no assertion of critical evidence that would have been discovered had it not been for counsel's alleged deficiency; moreover, the record was clear that on two separate occasions, defendant answered the trial court that he was satisfied with trial counsel's performance, and therefore, defendant did not meet his burden of proof that counsel was ineffective. Moore v. State, 906 So. 2d 793 (Miss. Ct. App. 2004).

140. Lineup.

After the detective informed defendant that he was not required to participate in a lineup without counsel, the trial court erroneously concluded that defendant's silence was an intelligent waiver of his right to counsel. Brooks v. State, 903 So. 2d 691 (Miss. 2005).

RESEARCH REFERENCES

ALR. Duty to advise accused as to right to assistance of counsel. 3 A.L.R.2d 1003.

Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction. 9 A.L.R.2d 661.

Waiver or loss of accused's right to speedy trial. 57 A.L.R.2d 302.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution. 93 A.L.R.2d 747.

What constitutes compliance with knock-and-announce rule in search of private premises§tate cases. 70 A.L.R.3d 217.

Propriety of exclusion of press or other media representatives from civil trial. 79 A.L.R.3d 401.

Accused's right to represent himself in state criminal proceeding—modern state cases. 98 A.L.R.3d 13.

Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case, as ground of complaint by accused. 99 A.L.R.3d 1261.

Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial. 3 A.L.R.4th 601.

Adequacy of defense counsel's representation of criminal client regarding plea bargaining. 8 A.L.R.4th 660.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense. 8 A.L.R.4th 1160.

Adequacy of defense counsel's representation of criminal client regarding hypnosis and truth tests. 9 A.L.R.4th 354.

Adequacy of defense counsel's representation of criminal client regarding guilty plea. 10 A.L.R.4th 8.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues. 12 A.L.R.4th 318.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies. 13 A.L.R.4th 533.

Adequacy of defense counsel's representation of criminal client regarding prior conviction. 14 A.L.R.4th 227.

Adequacy of defense counsel's representation of criminal client regarding appellate and post-conviction remedies. 15 A.L.R.4th 582.

Continuances at instance of state public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial. 16 A.L.R.4th 1283.

Denial of accused's request for initial contact with attorney—drunk driving cases. 18 A.L.R.4th 705.

Denial of accused's request for initial contact with attorney—cases involving offenses other than drunk driving. 18 A.L.R.4th 743.

Conditions interfering with accused's view of witness as violation of right of confrontation. 19 A.L.R.4th 1286.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury. 37 A.L.R.4th 304.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness. 54 A.L.R.4th 1156.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant. 55 A.L.R.4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness. 55 A.L.R.4th 1196.

Closed-circuit television witness examination. 61 A.L.R.4th 1155.

Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time. 70 A.L.R.4th 632.

Small claims; jury trial rights in, and on appeal from, small claims court proceeding. 70 A.L.R.4th 1119.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed. 75 A.L.R.4th 91.

Right of indigent defendant in state criminal case to assistance of investigators. 81 A.L.R.4th 259.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 A.L.R.4th 443.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 A.L.R.4th 19.

Adequacy of defense counsel's representation of criminal client — issues of mental matters concerning persons, other than counsel's client, who are involved in criminal case. 80 A.L.R.5th 55.

Examination and challenge of state case jurors on basis of attitudes toward homosexuality. 80 A.L.R.5th 469.

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Denial of, or interference with, accused's right to have attorney initially contact accused. 96 A.L.R.5th 327.

Denial of accused's request for initial contact with attorney — drunk driving cases. 109 A.L.R.5th 611.

Validity and application of computerized jury selection practice or procedure. 110 A.L.R.5th 329.

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Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving-Cases focusing on presence of inculpatory statements. 124 A.L.R.5th 1.

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Accused's right, under 28 USCS § 1654, and similar predecessor statutes, to represent himself in federal criminal proceeding. 27 A.L.R. Fed. 485.

Excludable periods of delay under Speedy Trial Act (18 USCS § 3161(h)). 46 A.L.R. Fed. 358.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—federal cases. 53 A.L.R. Fed. 140.

Effect on federal criminal proceeding of unavailability to defendant of alien witness through deportation or other government action. 56 A.L.R. Fed. 698.

Waiver of right to trial by jury as affecting right to trial by jury on subsequent trial of same case in federal court. 66 A.L.R. Fed. 859.

Appealability of federal court order denying motion for appointment of counsel for indigent party. 67 A.L.R. Fed. 925.

Effect upon accused's Sixth Amendment right to impartial jury of jurors having served on jury hearing matter arising out of same transaction or series of transactions. 68 A.L.R. Fed. 919.

Appointment of counsel, in civil rights action, under forma pauperis provisions (28 U.S.C.S. § 1915(d)). 69 A.L.R. Fed. 666.

Propriety of federal court's exclusion of public from criminal or civil trial in order to protect trade secrets. 69 A.L.R. Fed. 892.

Sufficiency of demand for jury trial under Rule 38(b) of Federal Rules of Civil Procedure. 73 A.L.R. Fed. 698.

Necessity that Miranda warnings include express reference to right to have attorney present during interrogation. 77 A.L.R. Fed. 123.

What constitutes assertion of right to counsel following Miranda warnings—federal cases. 80 A.L.R. Fed. 622.

Trial court's order that accused and his attorney not communicate during recess in trial as reversible error under Sixth Amendment guaranty of right to counsel. 95 A.L.R. Fed. 601.

When may dismissal for violation of Speedy Trial Act (18 USCS §§ 3161-3174) be with prejudice to government's right to reinstate action. 98 A.L.R. Fed. 660.

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Accused's constitutional right to public trial held applicable to suppression hearing. 81 L. Ed. 2d 31.

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AMENDMENT VII

CIVIL TRIALS

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Cross References — Right to jury trial in criminal cases, see USCS Const Art III, § 2, cl. 3.

JUDICIAL DECISIONS

1. In general.

Chancellor erred by failing to transfer a dispute over contractual obligations to a circuit court because a former member did not bring most of the claims derivatively under Miss. Code Ann. § 79-4-7.40 since he was seeking a personal recovery, and the proper procedures were not followed; moreover, the parties would have been deprived of the right to a jury trial if transfer was not obtained. ERA Franchise Sys. v. Mathis, 931 So. 2d 1278 (Miss. 2006).

While limited nature of court's resources is not legitimate reason for it to deny party the right to jury trial, if jury is indeed mandated by the Seventh Amendment, such policy concerns should not be overlooked. Gordon v. Friedman's, Inc., 209 B.R. 414 (Bankr. N.D. Miss. 1997).

Chapter 13 debtor was not entitled to jury trial on her damages claims against creditor for its alleged intentional infliction of emotional distress, negligent infliction of emotional distress, and slander in connection with its postpetition efforts to collect prepetition debt, though jury trial would have been available to debtor on such claims absent her bankruptcy filing; debtor's claims, which arose from creditor's alleged violation of automatic stay, involved adjustment of debtor-creditor relationship and implicated public rights, particularly where creditor had filed proof of claim. Gordon v. Friedman's, Inc., 209 B.R. 414 (Bankr. N.D. Miss. 1997).

Claimants who were asserting uninsured motorists claims were not entitled to a jury trial in chancery court or to have the case transferred to circuit court in order to provide them with a jury trial in an interpleader action brought by the insurer where the facts of the case were not disputed and only the law applicable to those facts was questioned by the parties. Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879 (Miss. 1989).

A child who brought an action to establish heirship had no right to a trial by jury. Estate of Robinson ex rel. Jennings v. Gusta ex rel. Gusta, 540 So. 2d 30 (Miss. 1989).

State courts are not controlled by this provision, even in cases arising under Federal statutes, and so on appeal may render final judgment contrary to the verdict, where the trial court should have directed a verdict. Gulf & S.I.R.R. v. Hales, 140 Miss. 829, 105 So. 458 (1925).

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Right to jury trial in child neglect, child abuse, or termination of parental rights proceedings. 102 A.L.R.5th 227.

Complexity of civil action as affecting Seventh Amendment right to trial by jury. 54 A.L.R. Fed. 733.

Waiver of right to trial by jury as affecting right to trial by jury on subsequent trial of same case in federal court. 66 A.L.R. Fed. 859.

Sufficiency of demand for jury trial under Rule 38(b) of Federal Rules of Civil Procedure. 73 A.L.R. Fed. 698.

Right to jury trial on issue of damages in copyright infringement actions under 17 U.S.C.S. § 504. 163 A.L.R. Fed. 467.

Right of enemy combatant to counsel. 184 A.L.R. Fed. 527.

CJS. C.J.S. Juries §§ 26, 28 to 32.

AMENDMENT VIII

EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

JUDICIAL DECISIONS

1. Construction and application.
2. Constitutionality.
3. Construction with Amendment XIV.
4. Competency of person to be executed.
5. Statutes and court rules.
6. Educational institutions.
7. Jury exemption.
8. Conduct of trial.
9. Sanity determinations.
10. Mental retardation.
11. Injury to inmate.
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13. Capital sentencing procedures — In general.
14. — Aggravating and mitigating circumstances, capital sentencing procedures.
15. — Juror qualification, capital sentencing procedures.
16. — Arguments of counsel, capital sentencing procedures.
17. — Instructions, capital sentencing procedures.
18. Cruel and unusual punishment — In general.
19. — Age of defendant, cruel and unusual punishment.
20. — Termination of parental rights, cruel and unusual punishment.
21. — Sentences within statutory limit, cruel and unusual punishment.
22. — Disproportionate sentence, cruel and unusual punishment.
23. — Capital prosecution of juveniles, cruel and unusual punishment.
24. — Capital punishment, cruel and unusual punishment.
25. Lethal injection, cruel and unusual punishment.
26. — Juvenile detention, cruel and unusual punishment.
27. — Confinement conditions for inmates, cruel and unusual punishment.
28. Medical care of inmates.
29. — Solitary confinement, cruel and unusual punishment.
30. — Habitual offenders, cruel and unusual punishment.
31. Murder and manslaughter.
32. Robbery.
33. Competency of person to be executed.
34. Batson Challenge.
35. Sentence appropriate.

1. Construction and application.

In a capital murder case, the State's invocation of higher biblical law did not violate the inmate's rights under the Eighth and Fourteenth Amendments, or under Miss. Const. Art. 3, § 14, because the prosecutor was responding to the biblical argument made by the inmate's attorney; also, the inmate's ineffective assistance of counsel claim for counsels' failure to object to the State's biblical references had to fail. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Although all of petitioner death row inmate's arguments were procedurally barred either by res judicata or for failure to raise the arguments earlier, and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. Jackson v. State, 860 So. 2d 653 (Miss. 2003).

The Eighth Amendment does not apply to the fact of incarceration, but rather to its conditions. Jones v. City of Jackson, 203 F.3d 875 (5th Cir. 2000).

The Eighth Amendment imposes a duty upon responsible prison officials to protect prisoners from violence at the hands of other prisoners. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

In a capital murder prosecution, the prosecutor's references to a second victim did not violate the Eighth and Fourteenth Amendments, since these references were necessary to tell the complete story of the crime where both victims were killed in the same mobile home with the same gun. Ladner v. State, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

2. Constitutionality.

Defendant's sentence of death by lethal injection for the crime of capital murder with the underlying felony of robbery was not unconstitutional because defendant's due process rights were not violated as the indictment and jury instructions were sufficient, the aggravating circumstances supported the sentence, and Mississippi's lethal-injection protocol did not constitute cruel and unusual punishment. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Defendant's enhanced sentence of 60 years, a two million dollar fine, and fifty dollars in restitution, pursuant to Miss. Code Ann. § 41-29-152, for possession of methamphetamine with intent to distribute and possession of a firearm while intending to distribute, was not disproportionate to the crime committed and did not amount to cruel and unusual punishment in violation of the Eighth Amendment because his sentence did not exceed the statutory limits. Even though defendant was a first time offender and possessed a small amount of methamphetamine, the trial judge had discretion under Miss. Code Ann. § 41-29-149 to reduce the statutory sentence for first time offenders; however, the trial court was not required to take into account the first time offender status when sentencing. Passman v. State, 937 So. 2d 17 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 482 (Miss. 2006), writ of certiorari denied by 549 U.S. 1324, 127 S. Ct. 1914, 167 L. Ed. 2d 570, 2007 U.S. LEXIS 3842, 75 U.S.L.W. 3530 (2007).

Defendant's capital murder conviction in violation of Miss. Code Ann. § 97-3-19(2)(a) was proper where the statute did not violate U.S. Const. amends. VIII and XIV. The fact that Mississippi's capital murder scheme made the death penalty a possible punishment for felony murder where there was no requirement to prove an intent to kill did not make the Mississippi capital murder statute unconstitutional. Davis v. State, 914 So. 2d 200 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 746 (Miss. 2005), writ of certiorari denied by 549 U.S. 856, 127 S. Ct. 133, 166 L. Ed. 2d 98, 2006 U.S. LEXIS 6743, 75 U.S.L.W. 3167 (2006).

3. Construction with Amendment XIV.

Pretrial detainees are protected from harm by virtue of the Due Process clause of the Fourteenth Amendment, while convicted inmates are protected from harm by the Eighth Amendment's prohibition against cruel and unusual punishment. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

Where parolee is incarcerated, both Fourteenth Amendment due process concerns and the Eighth Amendment's prohibition against cruel and unusual punishment are implicated, but the presumptive intent to punish derived from the *Bell* test does not arise in such a case involving conditions of confinement; rather, detained parolee may establish a Fourteenth Amendment due process claim for the conditions of his confinement only where he can present direct evidence of an expressed intent to punish him for the crime for which he has been charged but not yet convicted, but even without the availability of the *Bell* test, he may still utilize the Eighth Amendment to pursue a separate claim regarding conditions of confinement. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

Parolee detained pending the resolution of new charges against him, without evidence that he was "punished" because of the new, pending charges against him, could not avail himself of *Bell* test and its inference of intent for claims arising under the Fourteenth Amendment, based on attack by other inmates, but he could pursue a "failure to protect" claim under the Eighth Amendment. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

4. Competency of person to be executed.

In defendant's postconviction relief action, defendant submitted to the Mississippi Supreme Court an affidavit of an expert who testified that defendant had received intelligence quotient (IQ) scores of below 75 percent, and who opined to a reasonable degree of psychological certainty that defendant was mentally retarded. While the Mississippi Supreme Court's decision in Chase v. State governed the determination of the case, and under Chase, there were other factors that defendant had to present to the trial court in order to prove mental retardation so as to avoid the death penalty, defendant minimally met defendant's burden of production so as to be entitled to an evidentiary hearing. Snow v. State, 875 So. 2d 188 (Miss. 2004).

In defendant's capital murder case, the death sentence did not violate defendant's Eight Amendment rights where defendant's expert witness did not offer the opinion that defendant was mentally retarded; instead, he testified that defendant functioned in the range of borderline retardation which described an IQ range higher than that for mental retardation Thus, defendant did not establish that he was entitled to a Chase hearing. Scott v. State, 878 So. 2d 933 (Miss. 2004).

5. Statutes and court rules.

Section 99-19-57 does not unconstitutionally restrict rights of defendants, as it is harmonious with the import of the Eighth Amendment prohibition against cruel and unusual punishment as interpreted in Ford v Wainwright (1985, US) 91 L Ed 2d 335, 106 S Ct 2595. Billiot v. State, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

The time limitations provisions of the Mississippi Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) do not work an unconstitutional suspension of the writ of habeas corpus. Cole v. State, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

Section 63-11-30, which imposes a maximum 5-year penalty for the operation of a vehicle in violation of the implied consent law coupled with negligently causing the death or mutilation of another, is not arbitrary and does not constitute cruel and unusual punishment. Banks v. State, 525 So. 2d 399 (Miss. 1988).

The capital murder statute (§ 99-19-101) does not impose cruel and unusual punishment. Coleman v. State, 378 So. 2d 640 (Miss. 1979).

Discretion of prosecutor and his power to plea bargain did not render capital murder law unconstitutional, since both practices are necessary to the system of justice, nor did imposition of the mandatory death penalty pursuant to the statute constitute cruel and unusual punishment, especially since there was no showing that it was discriminatorily applied. Stevenson v. State, 325 So. 2d 113 (Miss. 1975), overruled on other grounds, Jackson v. State, 337 So. 2d 1242 (Miss. 1976).

A statute authorizing the continued detention of a convicted person after expiration of the term for which he was sentenced, in default of payment by him of the costs of prosecution, does not impose unusual punishment where in no event can such detention continue for longer than two years. Ex parte McInnis, 98 Miss. 773, 54 So. 260 (1911).

6. Educational institutions.

Suit alleging that school official grabbed arm of student did not show type of action calculated to cause serious injury, nor did not such act evince malice or intention to cause injury, and even if serious injuries may have resulted, nature of contact suggested that any injuries were unintended rather than calculated and that if force used was in fact excessive, it came from carelessness or excess of zeal rather than malice. Whether physical harm by state officer rises to level of constitutional deprivation depends on extent of injury inflicted, degree of force used in proportion to amount necessary under circumstances, and motives of official; bottom-line inquiry is whether official's conduct amounted to abuse of official power that shocks conscience. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

7. Jury exemption.

Mississippi's exemption of jurors who are illiterate or under 21 years of age, pursuant to § 13-5-1, or over 65 years of age, pursuant to § 13-5-25, did not violate the defendant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Turner v. State, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

8. Conduct of trial.

In a capital murder case, a jury instruction cautioning not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling was properly given and did not violate defendant's Eight Amendment right, because it did not inform the jury that it had to disregard in toto sympathy. Flowers v. State, 842 So. 2d 531 (Miss. 2003), remanded by 2006 Miss. LEXIS 356 (Miss. June 29, 2006).

In a murder prosecution involving a victim who died of smoke inhalation after receiving a blow to the head, the admission of facts concerning the murder of another victim who died from shotgun wounds did not violate the defendant's rights under the Eighth Amendment to the federal constitution or the due process clauses of the Mississippi Constitution and the federal constitution, where the revelation that a second person was missing was necessary in putting together the pieces of the case, evidence that the investigating officers discovered 2 bodies in the trunk of the victim's car was unavoidable, and the testimony of the other victim's mother was necessary in that she was the only witness who could testify to seeing the defendant near the victim's house, she was able to discuss what the victim was doing on the day he was killed, and she was able to give some important time frames. Mackbee v. State, 575 So. 2d 16 (Miss. 1990).

There is no discovery violation as to an officer's notes, taken in the presence of witnesses and destroyed in good faith. Thus, the destruction of original handwritten notes of a defendant's statement, which were transcribed into a typed statement, and admission of the typed statement into evidence, did not deprive the defendant of his rights to a fair and impartial trial and adequate defense as provided by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Woodward v. State, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

9. Sanity determinations.

A trial court's denial of a capital murder defendant's request for a private mental examination did not violate the Eighth and Fourteenth Amendments, where the defendant did not attempt to use an insanity defense, the State did not produce psychiatric testimony against him, and he did not demonstrate that sanity was to be a significant factor at trial. Ladner v. State, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

A defendant was not improperly denied the assistance of an independent privately employed psychiatrist in violation of his Sixth, Eighth and Fourteenth Amendment rights where the defendant requested and received a psychiatric examination and evaluation to determine his mental condition, resulting in the unanimous determination of 5 medical professionals that the defendant was sane at the time of the charged offense and was competent to aid in his defense. Lanier v. State, 533 So. 2d 473 (Miss. 1988).

Defendant was entitled to in-court opportunity to prove his claims of present insanity where he had presented allegations under oath which, if true, brought into serious question legality of execution under both state and federal law; defendant had presented court with application for relief backed by affidavits of 3 mental health professionals. Billiot v. State, 515 So. 2d 1234 (Miss. 1987).

10. Mental retardation.

In a capital murder case, the trial court's refusal to grant defendant's motion for funds to obtain mental health expert's assistance to determine if he was exempt from execution under the Eighth Amendment because of his mental retardation was properly denied and did not constitute a violation of his due process rights because defendant did not show a substantial need for an independent expert because: (1) based on his intelligence quotient tests, one doctor already determined that defendant was mentally retarded; and (2) a second doctor stated in her affidavit that she thought defendant was mentally retarded, and that further testing and a complete social history was necessary to accurately ascertain whether defendant was in fact mentally retarded. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Execution of mentally retarded inmates constituted cruel and unusual punishment in violation of the Eighth Amendment; the trial court did not err in finding that defendant was not mentally retarded because: (1) although two doctor's opined that defendant was mentally retarded based on his intelligence quotient tests, a second doctor testified that he found defendant to be below average intelligence but not mentally retarded; (2) a doctor who opined that defendant was mentally retarded was asked if a person who was mentally retarded could write documents that an officer stated that defendant wrote and he stated that it would be highly unlikely; (3) the officer saw defendant create the documents in his room without assistance, saw him use the law library on several occasions, and noticed that he had legal books in his cell; and (4) a psychiatrist at the Mississippi department of corrections stated that her diagnostic impression was that mental retardation could be ruled out. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Petitioner was entitled to a postconviction hearing on whether he was mentally retarded, and therefore not competent to be executed based on the Eighth Amendment; petitioner's intelligence quotient fell within the mildly retarded range, and further testing was required. Lynch v. State, 951 So. 2d 549 (Miss. 2007).

Supreme Court properly granted the inmate's application for leave to file petition for postconviction relief in part because the inmate was entitled constitutionally to present his possible mental retardation to the trial court. Carr v. State, 873 So. 2d 991 (Miss. 2004).

11. Injury to inmate.

Summary judgment for jail supervisor on prisoner's claim of deliberate indifference to serious medical need was precluded by genuine issues of material fact on whether jail supervisor acted reasonably in not calling paramedics or taking prisoner to emergency room immediately upon learning that he had suffered eye injury three hours earlier and in not following up on his own orders, thereby allowing prisoner to go without proper medical treatment for at least another three hours. Davis v. City of Greenville, 974 F. Supp. 884 (N.D. Miss. 1997).

In asserting Eighth Amendment claim against municipality or county for injury to inmate, it is important to distinguish between the "state of mind" required to establish a violation of a constitutional right and the culpability standard required to impose 42 U.S.C.S. § 1983 liability upon a municipality or county; while the governmental entity may only need be shown to be objectively deliberately indifferent to the known or obvious consequences of a custom or policy which does not itself violate federal law, it cannot be held liable unless the plaintiff shows that a constitutional violation has in fact occurred, which requires that a prison official must know that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

In civil rights action against county under the Eighth Amendment arising from beating of detained parolee by other inmates at county jail, there were genuine issues of material fact, precluding summary judgment, as to existence of subjective knowledge of risk on part of jailer and sheriff, as well as actual or imputed knowledge of county itself. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

In instances where inmate's "failure to protect" claim arises out of an episodic act or omission on the part of a jail official, the appropriate standard to be applied is identical regardless of the inmate's custodial status as pretrial detainee or convicted inmate, requiring demonstration of subjective knowledge of a substantial risk of serious harm and the failure to take reasonable measures to abate it, but where a pretrial detainee challenges a general condition of confinement, the court presumes intent on the part of prison officials and looks to whether the challenged condition of confinement is reasonably related to a legitimate governmental objective. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

An underlying principle of the Eighth Amendment's prohibition against cruel and unusual punishment is that it only prohibits unnecessary and wanton inflictions of pain; consequently, Eighth Amendment liability only attaches when a responsible official has a sufficiently culpable state of mind: knowing that inmates face a substantial risk of serious harm and disregarding that risk by failing to take reasonable measures to abate it. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

A complaint that a physician has been negligent in diagnosing or treating a prisoner's medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment. McFadden v. State, 542 So. 2d 871 (Miss. 1989).

12. Pleadings.

In order to state a cognizable Eighth Amendment claim against prison officials, a prisoner must allege causative acts or omissions demonstrating "subjective recklessness" by the defendants. Bilbo v. Thigpen, 647 So. 2d 678 (Miss. 1994).

13. Capital sentencing procedures — In general.

Defendant was entitled to a hearing on whether he was mentally retarded as he had presented expert testimony that he was in the borderline mentally retarded range and that he qualified, in terms of intellectual impairment, for a diagnosis of mental retardation. Doss v. State, 882 So. 2d 176 (Miss. 2004), writ of certiorari denied by 544 U.S. 1062, 125 S. Ct. 2513, 161 L. Ed. 2d 1113, 2005 U.S. LEXIS 4399, 73 U.S.L.W. 3693 (2005).

Petitioner's argument that the sentence imposed was disproportionate to the sentences imposed on similarly situated defendants within the same circuit court district was rejected where petitioner's sentence for manslaughter was within the applicable statutory guidelines; the fact that other criminal defendants in the same county circuit court who pled guilty to manslaughter received shorter sentences than petitioner had no decisive bearing on whether or not petitioner's sentence was disproportionate. Jones v. State, 885 So. 2d 83 (Miss. Ct. App. 2004), writ of certiorari denied by 883 So. 2d 1180, 2004 Miss. LEXIS 1334 (Miss. 2004).

In a capital murder case where defendant was indicted separately for each of four murders, submission of the "great risk of death to many persons" aggravator did not violate defendant's Eighth Amendment rights, as evidence regarding the other three killings was relevant in the case at bar during sentencing. Flowers v. State, 842 So. 2d 531 (Miss. 2003), remanded by 2006 Miss. LEXIS 356 (Miss. June 29, 2006).

A capital defendant is not entitled to a sympathy instruction because, like a mercy instruction, it results in a verdict based on "whim and caprice." Turner v. State, 732 So. 2d 937 (Miss. 1999), writ of certiorari denied by 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319, 1999 U.S. LEXIS 7156, 68 U.S.L.W. 3290 (1999).

Capital sentencing scheme in which prosecutor has discretion as to which murders he can try as capital offenses did not grant unfettered discretion to prosecutor and did not violate constitutional protections, where discretion was statutorily limited, manslaughter instruction had to be given if warranted by facts, and imposition of death penalty was channelled through weighing of aggravating and mitigating circumstances. Berry v. State, 703 So. 2d 269 (Miss. 1997).

Admission of evidence in habitual offender capital murder case that defendant's habitual offender status makes him ineligible for parole is founded upon theory that Eighth and Fourteenth Amendments require that sentencer not be precluded from considering, as mitigating factors, aspects of defendant's character or record proffered as a basis for sentence less than death. Blue v. State, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Trial court did not abuse its discretion in capital murder case in allowing into evidence photographs depicting victim's gunshot wounds; photographs served to clarify and supplement coroner's testimony and described cause of victim's death. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

14. — Aggravating and mitigating circumstances, capital sentencing procedures.

With respect to a charge of capital murder committed during the course of a robbery, the use of the underlying felony as an aggravating sentencing factor did not constitute impermissible double prejudice. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

In a resentencing trial in a capital murder case, under the Eighth Amendment defendant was permitted to introduce mitigating evidence; however, he was not permitted to introduce evidence that he was not the victim's killer because that issue was procedurally barred from further consideration under the doctrine of res judicata. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

In a capital murder case, the trial court did not err in granting the state's in limine motion to prevent defendant's family from testifying to the impact a death sentence would have on the family; such evidence did not qualify as "relevant mitigating evidence" because it did not address defendant's character, record, or the circumstances of the offense. Ross v. State, 954 So. 2d 968 (Miss. 2007).

In defendant's capital murder case, a court did not err in instructing the jury that it could not consider sympathy where the language used by the trial court to instruct the jury was well recognized as within the acceptable parameters designated in prior cited case law and the jury also had a catch-all instruction in which it could consider any other matter. Scott v. State, 878 So. 2d 933 (Miss. 2004).

Proof in the record did not support a prisoner's claim of being mentally retarded as requiring remand to the trial court for an Atkins hearing where the prisoner only supported his claim with copies of school records and affidavits of family members. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

Given case law, the court could not constitutionally deny an inmate the opportunity to present the issue of the inmate's possible mental retardation to the trial court in connection with the inmate's death sentence for capital murder. Smith v. State, 877 So. 2d 369 (Miss. 2004).

With one exception, no defendant may be granted a hearing on the issue of Eighth Amendment protection from execution due to alleged mental retardation unless, prior to the expiration of the deadline set by the trial court for filing motions, the defendant shall have filed with the trial court a motion, seeking such a hearing, and the defendant must attach to the motion an affidavit from at least one expert who opines, to a reasonable degree of certainty, that: (1) the defendant has a combined Intelligence Quotient (IQ) of 75 or below, and (2) in the opinion of the expert, there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded, and defendants with an IQ of 76 or above do not qualify for Eighth Amendment protection; the court further holds that, for defendants whose trials were held prior to publication of this opinion, the affidavit as described above shall be attached to the defendant's application for postconviction relief, and such application shall then be considered pursuant to the provisions of Miss. Code Ann. § 99-39-1 et seq. Chase v. State, 873 So. 2d 1013 (Miss. 2004), remanded by 112 So. 3d 421, 2013 Miss. LEXIS 5 (Miss. 2013).

Although the court was not without the authority to decide the merits of an inmate's application pursuant to Miss. Code Ann. § 99-39-27(7), the court found that due process required the court to allow the inmate's motion to be filed in the trial court for the consideration of mental retardation evidence as a defense to the death penalty as cruel and unusual punishment under U.S. Const. amend. VIII. Chase v. State, 873 So. 2d 1013 (Miss. 2004), remanded by 112 So. 3d 421, 2013 Miss. LEXIS 5 (Miss. 2013).

No defendant may be adjudged mentally retarded unless such defendant produces an expert who expresses an opinion that defendant is mentally retarded and defendant has completed certain tests, after which defendant may present other evidence, after which the State may offer evidence, after which the trial court must determine if defendant is mentally retarded. Chase v. State, 873 So. 2d 1013 (Miss. 2004), remanded by 112 So. 3d 421, 2013 Miss. LEXIS 5 (Miss. 2013).

The absence of mental retardation is not an aggravating factor necessary for imposition of the death penalty, and the Ring standard, which requires a finding of aggravating circumstances for imposition of the death penalty by a jury, has no application to an Atkins v. Virginia determination, prohibiting the execution of mentally retarded offenders. Russell v. State, 849 So. 2d 95 (Miss. 2003).

In determining whether a state court's application of its constitutionally adequate aggravating factor was so erroneous as to raise an independent due process or Eighth Amendment violation for habeas corpus purposes, even though it is issue of law, habeas corpus court must afford a presumption of correctness to any factual findings made by state court in its determination of whether the facts were sufficient to support the challenged aggravating circumstance; however, habeas court is not necessarily bound by such factual findings. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Defendant was entitled to habeas relief on issue of state court's application of especially heinous, atrocious, or cruel aggravating circumstance, and to vacated death sentence with new sentencing hearing, where state Supreme Court failed to make any factual findings concerning the death of murder victim and failed to set forth any facts on which to base such an opinion; given lack of any factual basis to support court's conclusion, no reasonable factfinder could conclude that the crime was conscienceless or pitiless and unnecessarily torturous where victim was shot immediately with little or no warning upon opening front door to defendant. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Jury executed process for narrowing class of persons eligible for death penalty by finding that defendant intended to kill and actually killed victim while contemplating that lethal force would be used in her murder, and, thus, felony murder aggravating circumstance was not constitutionally infirm and penalty was not disproportionate to crime. Berry v. State, 703 So. 2d 269 (Miss. 1997).

In order to uphold mentally retarded defendant's Eighth Amendment protection against cruel and unusual punishment, jury must be provided vehicle with which to consider and give effect to mitigating evidence of defendant's mental retardation in rendering its sentence. Wells v. State, 698 So. 2d 497 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997), cert. denied, 522 U.S. 1122, 118 S. Ct. 1065, 140 L. Ed. 2d 125 (1998).

Felony-murder aggravator is not disproportionate within meaning of Eighth Amendment, although unintentional felony murder is punishable by death, while premeditated murder, standing alone, is not; not every defendant eligible for death penalty will have committed murder while in course of robbery or kidnapping or other statutorily enumerated felonies, and thus, felony-murder aggravator genuinely narrows class of defendants eligible for death penalty. Wilcher v. State, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S.

Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Use of underlying felony as aggravating circumstance supporting death penalty does not violate Eighth Amendment on theory that it does not genuinely narrow class of death-eligible defendants. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Claim that use of underlying felony as aggravating circumstance violates Eighth Amendment was procedurally barred where defendant did not raise issue at trial. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Aggravating factor of murder committed during course of robbery is constitutional. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

The "specially heinous" aggravator does not violate Eighth Amendment. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Considering underlying crime of felonious abuse as aggravating factor during sentencing of capital murder defendant did not fail to narrow class of defendants eligible for death penalty, in violation of Eighth Amendment; fact that aggravating circumstance duplicates element of crime does not make death sentence constitutionally infirm. Jackson v. State, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Submission of "robbery" aggravating circumstance during penalty phase of capital murder case did not violate constitutional prohibition against cruel and unusual punishment, although defendant was charged with murder while in commission of armed robbery. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

"Avoiding arrest" aggravating factor was properly submitted to jury in penalty phase of capital murder case, even though defendant claimed that arrest avoidance was inherent in every murder, as it by definition eliminated one of the possible witnesses and that further limiting instruction was required to channel jury's focus on situations in which there is specific evidence demonstrating that one of the purposes beyond the killing was desire to avoid detection and apprehension for underlying crime. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Sexual battery could be used as underlying felony, to elevate murder to level of capital murder, and could be used again for sentencing purposes as an aggravator to support imposition of death penalty, without violating prohibition against cruel and unusual punishment. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Use of robbery as both aggravating factor in sentencing and as essential element of crime of capital murder did not unconstitutionally fail to narrow class of death eligible offenders; required narrowing had been done legislatively. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In the sentencing phase of a capital robbery/murder prosecution, convictions for armed robberies committed by the defendant after the robbery/murder were admissible as aggravating circumstances. Turner v. State, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character, record, or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. West v. State, 519 So. 2d 418 (Miss. 1988).

New sentencing hearing was required where trial court had excluded relevant mitigating evidence about method for generating electricity from alternative energy source, defendant had been in contact with Tennessee Valley Authority over this invention, had entered into agreement with them about it, and witness was familiar with all details and would testify about them. Jordan v. State, 518 So. 2d 1186 (Miss. 1987), cert. denied, 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35 (1988).

Premising death penalty upon aggravating circumstance that duplicates element of crime does not violate Eighth Amendment. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

15. — Juror qualification, capital sentencing procedures.

Although record in capital murder case indicated that veniremember who was excused for cause stated during voir dire that he could impose death penalty if circumstances warranted, and that another veniremember with similar name, who was not excused, indicated he could not impose death penalty under any circumstances, trial court did not err, where defense counsel's failure to differentiate between the 2 veniremembers during questioning and parties' subsequent arguments led to conclusion that court reporter mistakenly transposed veniremembers' names. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Even if veniremember who gave conflicting statements as to whether he could impose death penalty was erroneously stricken for cause in capital murder case, defendant's right to impartial jury was not violated, where, because veniremember was panel member number 35, defense would have had to use all 12 peremptory challenges and prosecution would have had to use at least 11 of its peremptory challenges to enable veniremember to serve on jury, and defendant did not claim that any of the 12 jurors who did serve were not impartial. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Juror was properly challenged for cause where he stated that he did not believe in death penalty and could not put aside strong, moral and religious beliefs about death penalty and follow instructions given by court. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Jurors were correctly excused where they stated they could not under any conditions impose death penalty regardless of what evidence showed, despite contention that the word "automatically" was not used by trial judge in voir dire and that failure to do so constituted error. Jones v. State, 517 So. 2d 1295 (Miss. 1987), vacated 108 S. Ct. 2891, 487 U.S. 1230, 101 L.Ed.2d 925, on remand 602 So. 2d 1170.

The issue of whether a capital murder conviction should be reversed because the prosecutor improperly used all of his peremptory challenges to exclude all blacks from the jury was not preserved for review, where the record did not reflect the race of the jurors who had been peremptorily challenged by the prosecutor. Booker v. State, 449 So. 2d 209 (Miss.

1984), cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984), vacated, 472 U.S. 1023, 105 S. Ct. 3493, 87 L. Ed. 2d 626 (1985), on remand, 511 So. 2d 1329 (Miss. 1987).

16. — Arguments of counsel, capital sentencing procedures.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (2010).

For district court to grant habeas relief based upon remarks by the prosecutor, district court must find more than that prosecutor's comments were undesirable or even universally condemned, and relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process, and in the context of a death penalty case, the comments must have been such as to render the sentencing fundamentally unfair. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Eighth Amendment does not bar victim impact evidence in prosecutorial argument during penalty phase of capital murder trial. Wells v. State, 698 So. 2d 497 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997), cert. denied, 522 U.S. 1122, 118 S. Ct. 1065, 140 L. Ed. 2d 125 (1998).

Trial court did not unconstitutionally limit closing argument at guilt phase of capital murder case by denying defendant full 5 minutes of additional time requested after original 60 minutes had expired; 60-minute period had been requested by defendant's counsel, and after 5 minute extension request was refused counsel was allowed to place remaining 4 minutes into record, and case was not so complex as to require more time. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present ring on her finger," and asking the jury not to forget the victim "because she deserves justice" did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim's family is not prohibited, as such evidence may be relevant to the jury's decision as to whether the death penalty should be imposed. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital case, the defense counsel's single objection which was directed at the prosecutor's argument regarding the possibility of parole but did not specifically address the prosecutor's mention of appellate review, properly preserved both errors where the argument regarding appellate review and the possibility of parole were interwoven. The Eighth Amendment required that the Supreme Court consider the prosecutor's argument concerning appellate review on the merits. Williams v. State, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

17. — Instructions, capital sentencing procedures.

There was no violation of the Eighth Amendment to the United States Constitution when the trial court instructed the jury that the procedure it was to follow was not a mere counting process of a certain number of aggravating circumstances versus the number of mitigating circumstances, but that it was required to apply reasoned judgment as to whether the situation called for life imprisonment without parole, life imprisonment, or whether it required the imposition of death, in light of the totality of the circumstances present; such instruction did not permit the jury to substitute its own judgment in place of the statutory scheme or to ignore the elements of aggravation and mitigation or to set them aside in favor of their own subjective feelings about the proper sentence. Goodin v. State, 787 So. 2d 639 (Miss. 2001), writ of certiorari denied by 535 U.S. 996, 122 S. Ct. 1558, 152 L. Ed. 2d 481, 2002 U.S. LEXIS 2500, 70 U.S.L.W. 3640 (2002), remanded by 2009 Miss. LEXIS 405 (Miss. Aug. 27, 2009), remanded by 102 So. 3d 1102, 2012 Miss. LEXIS 616 (Miss. 2012).

Instruction given in capital murder trials contained proper limiting definition of the especially heinous, atrocious or cruel aggravating factor; court defined especially heinous, atrocious or cruel as a conscienceless or pitiless crime which is unnecessarily torturous to the victim, and state Supreme Court determined that such language properly channeled jury's discretion during sentencing phase. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Instructing jury that defendant could be sentenced to life in prison precluded claim that overlapping statutes for felonious child abuse and manslaughter, one which permitted death penalty and another that did not, gave prosecutors and juries unfettered discretion to impose the death penalty, in violation of Eighth Amendment rights. Jackson v. State, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Trial court did not violate Eighth Amendment rights of capital murder defendant by refusing to give sentencing phase instruction that court was obligated to consider mitigating factors which in fairness, sympathy and mercy to defendant extenuate or reduce degree of blame or punishment. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Mistrial was not required in capital murder case after victim's grandmother "became emotional" when asked to look at pictures identifying victim during guilt phase; defendant had not made contemporary objection, thus precluding court from giving curative instruction which jury would have presumably followed, and as incident occurred after defendant had been officially found guilty he could not be heard to complain about an emotional state which he had brought on through his own actions. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Submission to jury of "especially heinous, atrocious or cruel" aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. Cole v. State, 666 So. 2d 767 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily tortuous to the victim." Hansen v. State, 649 So. 2d 1256 (Miss. 1994), reh'g denied, cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant's argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances must be unanimous because "everything else" required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word "unanimous" or "unanimously," and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

The imposition of the death penalty against a mentally retarded defendant with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in §§ 99-19-101(6)(b), (f) and (g) and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. Jones v. State, 602 So. 2d 1170 (Miss. 1992).

Instructions at penalty phase of trial did not deprive defendant of his constitutional rights by failing adequately to inform jury of their option to recommend life sentence, where court clearly instructed jury that it should weigh mitigating circumstances against aggravating circumstances and if former outweighed latter, then it should return sentence of life imprisonment. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

A jury instruction at the sentence phase of a murder prosecution that it should consider as an aggravating circumstance that the capital offense was committed for pecuniary gain and while the defendant was engaged in the commission of robbery did not violate defendant's Eighth Amendment rights, since the evidence supported both "robbery" and "pecuniary gain" instructions as aggravating circumstances in that the robbery was committed for pecuniary gain during the course of which the homicide occurred. In re Hill, 460 So. 2d 792 (Miss. 1984).

Contention of defendant that trial court's failure to instruct jury on intent and that mitigating circumstances need not be proven beyond reasonable doubt violated his rights as secured by Eighth and Fourteenth Amendments was rejected; mitigating circumstances instruction would not have affected outcome, in light of absence of closing argument on mitigating circumstances; refusal of intent instruction, which traced language of Enmund v Florida(1982) 458 US 782, 73 L Ed 2d 1140, 102 S Ct 3368, on remand (Fla) 439 So 2d 1383, later app (Fla App D2) 459 So 2d 1160, 9 FLW 2506, quashed, ctfd ques ans (Fla) 476 So 2d 165, 10 FLW 441 and (diverged from Tison v Arizona (US) 95 L Ed 2d 127, 107 5 Ct 1676) as stated in Smith v Dugger (CAll Fla) 840 F2d 787, was not raised on direct appeal and was therefore procedurally barred. Even if it were not procedurally barred, there is no requirement that jury find existence of intent factors; in Cabana v Bullock (1986) 474 US 376, 88 L Ed 2d 704, 106 S Ct 689, on remand (CA5 Miss) 784 F2d 187 and (diverged from, on other grounds Rose v Clark, 478 US 570, 92 L Ed 2d 460, 106 S Ct 3101 (disagreed with by multiple cases as stated in State v Seward (La) 509 So 2d 413) and on remand (CA6) 822 F2d 596 and (not followed Re Mercer, 108 Wash 2d 714, 741 P2d 559)) as stated in Pope v Illinois (US) 95 L Ed 2d 439, 107 S Ct 1918, 14 Media L R 1001, later proceeding (2d Dist) 162 Ill App 3d 299, 113 Ill Dec 547, 515 NE2d 356, app den (Ill) 117 Ill Dec 229, 520 NE2d 390 and (not followed State v Kam (Hawaii) 748 P2d 372) and (not followed People v Lee, 43 Cal 3d 666, 238 Cal Rptr 406, 738 P2d 752. The United States Supreme Court stated that intent findings could be made by jury, trial judge, or Appellate Court, and Mississippi Supreme Court had made equivalent of required findings in its opinion on direct appeal. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

A capital murder defendant's sentence of death would not be set aside for failure to grant a proper limiting instruction regarding the "especially heinous, atrocious and cruel" aggravating factor as required by the Eighth and Fourteenth Amendments to the United States Constitution where the jury was given an instruction defining the "especially heinous" aggravating factor which tracked the language in Coleman v State (1979, Miss) 378 So 2d 640 (criticized by Cantrell v State (Miss) 507 So 2d 325) as stated in Jenkins v Forrest County General Hospital (Miss) 538 So 2d 1162, corrected, reh den (Miss) 542 So 2d 1180, reh den (Miss) 1989 Miss LEXIS 283@, and therefore the jury was properly instructed on the "especially heinous" aggravating factor. Lockett v. State, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994).

18. Cruel and unusual punishment — In general.

Defendant's life sentence for possession of cocaine and possession of marijuana was not cruel and unusual punishment because he met the requirements of the habitual offender statute under Miss. Code Ann. § 99-19-83 in that he was also convicted of two separate prior felonies, one of which was a violent crime, and he served more than a year for each. Furthermore, U.S. Const. Amend. VIII did not contain a proportionality guarantee. Jenkins v. State, 997 So. 2d 207 (Miss. Ct. App. 2008).

Defendant's sentence for 15 years after pleading guilty to manslaughter under Miss Code Ann. § 97-3-47 was not cruel and unusual punishment and did not violate U.S. Const. Amend. VIII because Miss. Code Ann. § 97-3-25 provided that the sentencing range was two to 20 years. Henderson v. State, 929 So. 2d 391 (Miss. Ct. App. 2006).

Sentence imposed on defendant for the convictions of possession of a controlled substance and possession of precursor chemicals with intent to manufacture a controlled substance was not unduly harsh, given that defendant, not the girlfriend, was the driving force behind the drug activity at the couple's place of residence. Pipkins v. State, 878 So. 2d 119 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 946 (Miss. 2004).

There was no precedent to support a postconviction petitioner's contention that his right against cruel and unusual punishment had been violated where he had been kept in maximum confinement on death row under conditions including lock-down and isolation for at least 23 hours of the day and where he had been subjected to numerous execution dates over a 20-year period. Wilcher v. State, 863 So. 2d 719 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

On appeal, defendant alleged that the trial court's sentence for his first offense constituted cruel and unusual punishment in violation of the Eighth Amendment, but consideration of first time offender status was not the trial judge's only consideration in sentencing defendant to the maximum sentence available; defendant's sentence was not grossly disproportionate to the crime of possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance for which he already had been convicted; thus, the trial judge did not abuse his discretion in sentencing defendant to the maximum penalty available within the statute, Miss. Code Ann. § 41-29-313. Burchfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 660 (Miss. Ct. App. July 22, 2003), opinion withdrawn by, substituted opinion at 892 So. 2d 248, 2004 Miss. App. LEXIS 538 (Miss. Ct. App. 2004).

A sentence of twenty years for selling cocaine was not cruel and unusual. Rather, the sentence was well within the statutory maximum of Miss. Code Ann. § 41-29-139(b)(1), and a threshold comparison of the crime to the sentence yielded no inference of gross disproportionality. Triplett v. State, 840 So. 2d 727 (Miss. Ct. App. 2002).

The defendant's sentence of three years' imprisonment for possession of cocaine did not constitute cruel and unusual punishment, notwithstanding that the defendant was initially placed in the general inmate population in the state penitentiary and remained there for approximately six months until the trial court entered an amended order and he was transferred into a Regimented Inmate Discipline Program. Franklin v. State, 773 So. 2d 970 (Miss. Ct. App. 2000).

5 U.S.C.S. § 8148(a), which concerns disability benefit eligibility, does not implicate the ex post facto clause or violate the Eighth Amendment. Garner v. United States DOL, 221 F.3d 822 (5th Cir. 2000), writ of certiorari denied by 532 U.S. 906, 121 S. Ct. 1230, 149 L. Ed. 2d 140, 2001 U.S. LEXIS 2025, 69 U.S.L.W. 3592 (2001).

In an action challenging the plaintiff's incarceration for nine months in a Madison County jail as a result of a Hinds County detainer, without hearing or court appearance, the plaintiff failed to establish a violation of his Eighth Amendment rights where he complained about the fact of his incarceration, rather than its conditions. Jones v. City of Jackson, 203 F.3d 875 (5th Cir. 2000).

The court rejected the contention that the defendant's sentence violated the Eighth Amendment prohibiting cruel and unusual punishment because the sentence was grossly disproportionate to others in similar situations; a proportionality analysis was not required based on a threshold comparison of the crime for which the defendant was found guilty to the sentence imposed by the trial court. Desalvo v. State, 776 So. 2d 704 (Miss. Ct. App. 2000).

The defendant's sentence was not so lengthy that the constitutional protection afforded an individual against cruel and unusual punishment was violated where he was originally indicted for 10 felonies in six separate indictments, one indictment was dismissed, he pleaded guilty to the burglary charges in the other five indictments, and he received a combined sentence of 75 years. Henderson v. State, 769 So. 2d 210 (Miss. Ct. App. 2000).

A sentence of 16 years' imprisonment for possession of cocaine did not constitute cruel and unusual punishment where the defendant was 36 years old and had two prior felony convictions. Lee v. State, 767 So. 2d 1025 (Miss. Ct. App. 2000).

The sentence imposed on a 14 year old for manslaughter after he shot and killed an older neighborhood bully was not excessive where it was within the statutory limits. Jackson v. State, 740 So. 2d 832 (Miss. 1999).

Even as to those circumstances for which the statutes provide mandatory sentences, the punishment must be weighed against the prohibition imposed in the Eighth Amendment to the United States Constitution against cruel and unusual punishment. Davis v. State, 724 So. 2d 342 (Miss. 1998).

Racial protest demonstrators, incarcerated only to assure their presence at trial, with male prisoners required to strip naked and remain in such state for up to 32 hours, who were detained in cells with inadequate hygienic facilities and no bedding, and with female prisoners required to strip to their undergarments and permitted to have no personal belongings including medicine or sanitary napkins, and who were given quantities of laxatives, were subjected to cruel and unusual punishment in violation of the Eighth Amendment. Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), modified on other grounds, 456 F.2d 835 (5th Cir. 1972), cert. denied, 409 U.S. 848, 93 S. Ct. 53, 34 L. Ed. 2d 89 (1972).

The imprisonment of an indigent for failure to pay a fine did not constitute cruel and unusual punishment, where the indigent after pleading guilty to a misdemeanor charge was sentenced to a jail term and to pay a fine, and after serving her jail term was unable to pay the fine because she was indigent, in view of Code 1942 § 7899 which limits the time of confinement for failure to pay a fine for any one offense to 2 years. Wade v. Carsley, 221 So. 2d 725 (Miss. 1969).

19. — Age of defendant, cruel and unusual punishment.

Where a juvenile convicted of murder receives a life sentence, conditional release does not satisfy the mandate of Miller v. Alabama, 2012 U.S. LEXIS 4873, because conditional release is more akin to clemency, which is different from parole despite some surface similarities, and conditional release would not be determined by the sentencing authority at the time of sentencing based on age and other characteristics, as Miller mandates. Parker v. State, 119 So. 3d 987 (Miss. 2013).

Miss. Code Ann. § 47-7-3(1)(h) can constitutionally be applied to juveniles provided that the sentencing authority considers the factors of Miller v. Alabama, 2012 U.S. LEXIS 4873, in imposing the sentence. Parker v. State, 119 So. 3d 987 (Miss. 2013).

As defendant was 15 at the time of the murder and pursuant to Miss. Code Ann § 47-7-3(1)(h) was not eligible for parole, and as Miller v. Alabama, 2012 U.S. LEXIS 4873, was decided while his appeal was pending, his life sentence was vacated and the case was remanded so the trial court could consider the Miller factors before determining sentence. Parker v. State, 119 So. 3d 987 (Miss. 2013).

Because the record was clear that defendant was six days past his 18th birthday at the time of the capital murder, he was over the age of 18, and was therefore eligible for the death penalty. Scott v. State, 938 So. 2d 1233 (Miss. 2006).

Supreme Court of Mississippi vacated the death sentence imposed on a defendant convicted of capital murder. The death sentence violated the Eighth and Fourteenth Amendments to the United States Constitution, because defendant was only 17 years old when he committed the crime. Dycus v. State, — So. 2d —, 2005 Miss. LEXIS 594 (Miss. Sept. 15, 2005).

Defendant, convicted of murder, argued that, because of his young age, under Miss. Code Ann. § 47-5-139(1)(a)(1), he was subjected to greater punishment for his crime than others sentenced to life imprisonment at age 50 or older. However, the appellate court rejected his argument that the age distinction in the statute subjected a younger individual to a longer punishment which was cruel and unusual, since his life sentence fell within the statutory limits designated by the Mississippi Legislature. Knox v. State, 912 So. 2d 1004 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 686 (Miss. 2005).

Defendant's sentence of five years for possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance did not constitute cruel and unusual punishment even though he was only 23 and had never been convicted of a felony, as the sentence was within the statutory range, and there was no gross disproportionality between the crime committed and the sentence imposed Burchfield v. State, 892 So. 2d 248 (Miss. Ct. App. 2004), affirmed by 892 So. 2d 191, 2004 Miss. LEXIS 1346 (Miss. 2004).

The fact that the defendant in a murder prosecution was 62 years of age at the time of the slaying did not make his sentence of life imprisonment violative of the Eighth Amendment. Ratliff v. State (Miss. 1984) 459 So.2d 805. Ratliff v. State, 515 So. 2d 877 (Miss. 1987).

A sentence of life imprisonment without eligibility for parole, imposed on a 16-year-old male convicted of armed robbery, was not cruel and unusual punishment where, of the three perpetrators, defendant was the one who actually poked a pistol into the victim's ribs and threatened her with death, and where he was also the one who actually robbed her at gunpoint of $21. White v. State, 374 So. 2d 225 (Miss. 1979).

20. — Termination of parental rights, cruel and unusual punishment.

The termination of a mother's parental rights, in part because of her criminal acts and resulting imprisonment, did not amount to cruel and unusual punishment since the termination of her parental rights was a separate matter from that of her criminal conviction, and the action for termination of parental rights was not brought to further punish the mother, but was a reasonable exercise of the State's legitimate interest in providing for the welfare of the children. Vance v. Lincoln County Dep't of Pub. Welfare ex rel. Weathers, 582 So. 2d 414 (Miss. 1991).

21. — Sentences within statutory limit, cruel and unusual punishment.

In a sale of cocaine case, defendant's 60-year sentence was not excessive because it was well within the statutorily proscribed limits, the trial judge noted that defendant had sold cocaine to a buyer over 100 times, and the gas station at which defendant sold cocaine was within walking distance of a school. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

Defendant's sentence as a habitual offender after he was convicted of the possession of cocaine and the possession of hydromorphone was constitutional because he was sentenced to 108 years under Miss. Code Ann. § 41-29-147, and that sentence was within the statutory limits. Roach v. State, 7 So. 3d 932 (Miss. Ct. App. 2007), reversed by 7 So. 3d 911, 2009 Miss. LEXIS 199 (Miss. 2009).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Defendant's sentence of 20 years in prison, with 10 years to be suspended and five years of post-release probation, for one count of burglary of an occupied dwelling was not grossly disproportionate where he had been involved in other domestic disturbances prior to the one in question; thus, the 20-year sentence was within the statutory guidelines. Edge v. State, 945 So. 2d 1004 (Miss. Ct. App. 2007).

Defendant's sentence of life in prison without the possibility of parole after he was convicted of grand larceny did not violate the Eighth Amendment to the U.S. Constitution where he was sentenced within the mandatory statutory limits set out in Miss. Code Ann. § 99-19-83 for habitual offenders; his sentence was not grossly disproportionate. Kelly v. State, 947 So. 2d 1002 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 89 (Miss. 2007).

Circuit court had the authority to impose a life sentence for defendant's conviction of capital rape because the legislature used words indicating judicial discretion would be the determination for crimes of statutory rape in Miss. Code Ann. § 97-3-65 (2)(c). Foley v. State, 914 So. 2d 677 (Miss. 2005).

In a statutory rape case, defendant's Eighth Amendment rights were not violated by the imposition of a 40-year sentence for three convictions because the sentence imposed was within the range provided in Miss. Code Ann. § 97-3-65(2). Price v. State, 898 So. 2d 641 (Miss. 2005).

Rather than having 32 years of his 40-year sentence suspended, had the trial court been aware of his previous felony, the inmate would have received the entire sentence pursuant to Miss. Code Ann. § 47-7-33(1). The inmate received one-fifth of the sentence that should have been imposed; this could hardly be said to constitute cruel and unusual punishment. Black v. State, 902 So. 2d 612 (Miss. Ct. App. 2004), writ of certiorari denied by 901 So. 2d 1273, 2005 Miss. LEXIS 333 (Miss. 2005).

In an assault case, defendant's sentence did not constitute cruel and unusual punishment as the maximum sentence for aggravated assault was 20 years and defendant's 15-year sentence was not excessive or disproportionate to the crime. Lewis v. State, 897 So. 2d 994 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 225 (Miss. 2005).

Two consecutive 20-year sentences for defendant's convictions for manslaughter and aggravated assault where he shot and killed his wife's boyfriend and shot his wife in the neck did not constitute cruel and unusual punishment as the sentences imposed were within the statutory range for Miss. Code Ann. § 97-3-25 and Miss. Code Ann. § 97-3-7(2), and the trial judge articulated his reasoning for the sentences imposed. Lewis v. State, 905 So. 2d 729 (Miss. Ct. App. Nov. 16, 2004).

Consecutive sentences of 30 and 45 years for armed carjacking and armed robbery were within the statutory limits for those offenses and were not excessive despite the length of the sentences and regardless of the fact that defendant chose to go to trial rather than accept a plea bargain for 10 years on each count as his codefendants elected to do. McCline v. State, 856 So. 2d 556 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

On appeal, defendant alleged that the trial court's sentence for his first offense constituted cruel and unusual punishment in violation of the Eighth Amendment, but consideration of first time offender status was not the trial judge's only consideration in sentencing defendant to the maximum sentence available; defendant's sentence was not grossly disproportionate to the crime of possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance for which he already had been convicted; thus, the trial judge did not abuse his discretion in sentencing defendant to the maximum penalty available within the statute, Miss. Code Ann. § 41-29-313. Burchfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 660 (Miss. Ct. App. July 22, 2003), opinion withdrawn by, substituted opinion at 892 So. 2d 248, 2004 Miss. App. LEXIS 538 (Miss. Ct. App. 2004).

After a guilty plea to cocaine possession, an inmate's suspended eight-year sentence with probation was not excessive because it was well within the maximum sentence authorized by law. Gunter v. State, 841 So. 2d 195 (Miss. Ct. App. 2003).

Where defendant's 20-year sentence with only 14 years actually to serve was within the statutory parameters and was not grossly disproportionate to the crime, defendant failed to show that his sentence was disproportionately harsh for the crime charges, and therefore was cruel and unusual. Alston v. State, 841 So. 2d 215 (Miss. Ct. App. 2003).

Where appellant had pleaded guilty to six counts of sale of cocaine, his sentence of 30 years on each count to run concurrently, with 10 years suspended and five years' probation, was within the statutory scheme and, hence, was not cruel and unusual punishment. Falconer v. State, 832 So. 2d 622 (Miss. Ct. App. 2002).

The appellate court rejected defendant's argument that his 12-year sentence for possession of cocaine was cruel and unusual because it was disproportionately harsh due to the fact that possession of cocaine was a victimless crime which constituted no danger to the community. Jefferson v. State, 832 So. 2d 1270 (Miss. Ct. App. 2002).

Evidence that defendant pointed a gun at two store clerks, demanded money, and took money from the cash register drawer and the clerks' purses, supported the imposition of consecutive 30-year and 10-year sentences against a defendant convicted of two counts of armed robbery; sentences were within the maximum range set forth in Miss. Code Ann. § 97-3-79 and were not cruel or unusual punishment under either the Eighth Amendment to the Constitution of the United States or Miss. Const. art. 3, § 28, nor were the sentences disproportionate to the offenses committed. Womack v. State, 827 So. 2d 55 (Miss. Ct. App. 2002).

Where sentence does not exceed statutory limits, it does not constitute cruel and inhuman treatment. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

A 10-year sentence imposed upon a defendant pursuant to § 63-11-30(4) for a DUI maiming conviction did not constitute cruel or unusual punishment, as it was within the statutory limits. Holloman v. State, 656 So. 2d 1134 (Miss. 1995).

A sentence of 15 years imprisonment and a $9,000 fine for conviction of sale of cocaine was within the provisions of the statute and within the sound discretion of the trial judge, and did not constitute cruel and inhuman punishment. Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

The imposition of a sentence by the trial judge does not constitute cruel and inhuman punishment and is not an abuse of discretion if it is within the statutory limits. Byrd v. State, 522 So. 2d 756 (Miss. 1988).

Sentence of 20 years on each of 2 counts of manslaughter, to run concurrently, did not amount to cruel and unusual punishment because sentence was permitted by statute, and therefore was within sound discretion of trial judge. Whitley v. State, 511 So. 2d 929 (Miss. 1987).

Sentence of 30 years in prison without probation or parole, maximum term of imprisonment prescribed for offense of sexual battery, did not violate either United States Constitution or Mississippi Constitution; under standards set forth in Solem v Helm (1983) 463 US 277, 77 L Ed 2d 637, 103 S Ct 3001 (superseded by statute as stated in Re Petition of Lauer (CA8) 788 F2d 135) found that sentence was not grossly disproportionate to crime of sexual battery where harshness of penalty was justified by gravity of offense, non-habitual offenders convicted under § 97-3-95 could be sentenced to up to 30 years in prison, and sentence was not so dissimilar to sentences for same crime in other states as to make it a disproportionate penalty. Davis v. State, 510 So. 2d 794 (Miss. 1987).

Sentence of life imprisonment for armed robbery was not cruel or unusual where statute under which defendant was charged imposed penalty of life imprisonment upon conviction, and conviction was based on testimony of accomplice who received only 5 years suspended sentence, because accomplice's description of events on night in question was corroborated by others. Reed v. State, 506 So. 2d 277 (Miss. 1987).

The mandatory life sentence meted out to defendant, who was convicted of murder, did not violate the Eighth and Fourteenth Amendments, even though the sentencing statute did not provide for individual consideration of the offense and the offender, since no such procedure is required for a charge less than a capital charge. Taylor v. State, 452 So. 2d 441 (Miss. 1984), but see May v. State, 524 So. 2d 957 (Miss. 1988).

Sentence of 10 years following conviction of selling marijuana was a sentence within the limits of the statute and was not cruel or unusual punishment. Clanton v. State, 279 So. 2d 599 (Miss. 1973).

22. — Disproportionate sentence, cruel and unusual punishment.

Defendant's 30-year prison sentence for the statutory rape of his 11-year-old daughter was not disproportionate because under Miss. Code Ann. § 97-3-65(3)(c), the statutory rape of a child by an adult carried with it a maximum penalty of life imprisonment, as well as a minimum sentence of 20 years in prison, irrespective of whether it was one's first offense. Powell v. State, 49 So. 3d 166 (Miss. Ct. App. 2010).

Circuit court sentenced appellant to eight years, which clearly was within the statutory authority and not disproportionate to the crime; although appellant claimed she was a first-time offender, she was previously charged three times for driving under the influence and she was addicted to marijuana and alcohol. Field v. State, 28 So. 3d 697 (Miss. Ct. App. 2010).

Defendant's sentence conformed to the requirements of the habitual offender statute and the circuit court considered defendant's sentence in light of the facts and her previous criminal history; accordingly, she did not receive a grossly disproportionate sentence. Brown v. State, 37 So. 3d 1205 (Miss. Ct. App. 2009), writ of certiorari denied by 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510, 79 U.S.L.W. 3269 (U.S. 2010).

Defendant's 15-year prison sentence for strong arm robbery was not disproportionate to the crime because the sentence was consistent with the State's recommendation, which defendant acknowledged prior to entering a guilty plea; the sentence was also within the statutory limits. Beamon v. State, 9 So. 3d 376 (Miss. 2009).

Defendant offered no cases supporting his argument that consecutive sentences for serious drug offenses that fell within the statutory limits were grossly disproportionate; therefore, the circuit judge did not abuse his discretion or violate defendant's constitutional right to be free from cruel and unusual punishment when he sentenced defendant. Parker v. State, 5 So. 3d 458 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 131 (Miss. 2009).

Defendant's sentence after she was convicted of aggravated assault was appropriate because it was not grossly disproportionate to the crime committed; the trial court noted that aggravated assault was a serious crime and the trial court considered the fact that defendant had a relatively clean record and that she had been consistently employed. White v. State, 958 So. 2d 290 (Miss. Ct. App. 2007).

In a case where defendant was convicted of three counts of fondling the 15-year-old victim under Miss. Code Ann. § 97-5-23, defendant's three 10-year consecutive sentences under Miss. Code Ann. § 99-19-21 were not disproportionate to defendant's crimes, were within the limits set by statute, and did not violate the Eighth Amendment. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

Death sentence for capital murder of four-year-old child was not excessive or disproportionate under Miss. Code Ann. § 99-19-105(3)(c) and the Eighth and Fourteenth Amendments where evidence of strangulation and other factors was sufficient to support the jury's finding of statutory aggravating circumstances, the sentence was not excessive or disproportionate when compared to other factually similar cases where the death penalty was imposed, the sentence was not imposed under the influence of passion, prejudice, or any other factor, and the jury did not consider any invalid aggravating circumstances. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Defendant's sentence fell within the statutory guidelines and as such did not constitute cruel and unusual punishment; there was no constitutional right to a plea bargain and had a plea bargain been entered, the trial judge would not have been bound to accept the recommended sentence. Davis v. State, 910 So. 2d 1228 (Miss. Ct. App. 2005).

Defendant's sentence was not grossly disproportionate as it fell within the limits set by the legislature for the offense; the judge determined that the circumstances of the offense supported a penalty on the high end and the finding was not an abuse of discretion. Grimes v. State, 909 So. 2d 1184 (Miss. Ct. App. 2005), writ of certiorari denied by 901 So. 2d 1273, 2005 Miss. LEXIS 338 (Miss. 2005).

Court rejected defendant's claim that the enhanced 10-year sentence imposed pursuant to Miss. Code Ann. § 41-29-142 upon his conviction for selling cocaine within 1,500 feet of a church in violation of Miss. Code Ann. § 41-29-139 was excessive. A pre-sentencing report was included in the record and the 10-year sentence was considerably less than the 30-year maximum provided in § 41-29-139, and defendant's sentence was well within the enhancement guidelines provided in Miss. Code Ann. § 41-29-142, which allowed a sentence of up to three times the sentence imposed under Miss. Code Ann. § 41-29-139. Moore v. State, 909 So. 2d 77 (Miss. Ct. App. 2005).

Death sentence for an aider and abettor who provided a gun that was used in a murder was not excessive or disproportionate under Miss. Code Ann. § 99-19-105(3)(c)and state and federal constitutional law because, when the jury returned the death sentence, it specifically found that defendant had intended to kill the victim and contemplated that lethal force would be used. Lynch v. State, 877 So. 2d 1254 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1299, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1592, 73 U.S.L.W. 3495 (2005).

Trial court's decision not to give defendant a "volume discount" but to impose 30- and 20-year consecutive sentences in two separate drug sale cases was proper, as the sentences were within the legal limits and did not violate the Eight Amendment by being grossly disproportionate. Heatherly v. State, 864 So. 2d 1036 (Miss. Ct. App. 2004).

Where appellant's sentences for several counts of armed robbery did not exceed the sentence set forth in Miss. Code Ann. § 97-3-75, it was not disproportionate; moreover, appellant was not entitled to receive a sentence proportionate to that imposed upon an accomplice. Booker v. State, 840 So. 2d 801 (Miss. Ct. App. 2003).

Sentence imposed for the sale of marijuana was not excessive or disproportionate because the sentence was within the limits set forth by Miss. Code Ann. § 41-29-147; Miss Code Ann. § 41-29-139 did not apply because defendant was a second or subsequent offender. Fields v. State, 840 So. 2d 796 (Miss. Ct. App. 2003).

Defendant was entitled to a remand for review of his sentence by the trial judge where he was a first time offender and was sentenced to the maximum sentence allowed by law: 30 years imprisonment for the sale of cocaine; defendant contended that his sentence was disproportionate to the crime and was in violation of the U.S. Const. amend. VIII. Towner v. State, 837 So. 2d 221 (Miss. Ct. App. 2003).

A sentence of 30 years, day for day, without the possibility of parole, for the crime of sexual battery of a child under the age of 14 years, was not excessive, did not constitute cruel and unusual punishment, and was not disproportionate to the crime committed. Bell v. State, 797 So. 2d 945 (Miss. 2001).

Defendant's sentence of eight years for manslaughter was not cruel and unusual punishment. Wade v. State, 802 So. 2d 1023 (Miss. 2001).

A sentence of life imprisonment for voyeurism was not disproportionate to the crime where the indictment returned against the defendant properly charged that he was an habitual offender and he had been convicted previously of the crimes of attempted rape, burglary, and voyeurism. Coleman v. State, 788 So. 2d 788 (Miss. Ct. App. 2000).

A 40-year sentence on two counts of aggravated assault did not constitute cruel and unusual punishment and was not disproportionate to the offense where the statutory maximum sentence for each assault was 20 years and the defendant assaulted two individuals with a loaded firearm by firing at and missing one of those individuals and striking and seriously injuring the other. Williams v. State, 784 So. 2d 230 (Miss. Ct. App. 2000).

A threshold comparison of the crime to which the defendant admitted his guilt in the form of a guilty plea, manslaughter, to the 20-year sentence imposed by the trial court, did not give rise to an inference of gross disproportionality and, therefore, a proportionality analysis was not necessary. Holt v. State, 757 So. 2d 1088 (Miss. Ct. App. 2000).

The defendant's sentence to 66 years imprisonment for delivery and possession of cocaine was not disproportionate where he was convicted of delivering a large quantity of cocaine (45 rocks) and of possession of a small amount of residue. Jones v. State, 740 So. 2d 904 (Miss. 1999).

A 60 year sentence for the sale of cocaine within 1,500 feet of a school was not disproportionate where (1) the crime was not the defendant's first offense, and (2) the trial court asked the defendant if there was anything he wanted to say before sentencing, but the defendant declined. Taylor v. State, 741 So. 2d 960 (Miss. Ct. App. 1999).

In a prosecution for unlawful sale of cocaine within 1,500 feet of a church, based on a first-time offense arising from the sale of a small amount of cocaine, a sentence of 60 years imprisonment was grossly disproportionate. White v. State, 742 So. 2d 1126 (Miss. 1999).

A sentence of 20 years for aggravated assault and 5 years for grand larceny was not excessive or grossly disproportionate where the sentence was the maximum allowable under the statutes violated by the defendant who struck a 65-year-old man in the head with a hammer 9 times and stole his car. Young v. State, 731 So. 2d 1120 (Miss. 1999).

The imposition of a 30 year sentence and accompanying $10,000 fine for the sale of cocaine in violation of § 41-29-139 was not unconstitutionally disproportionate where the sentence was less than the maximum allowable under the statute, notwithstanding the defendant's previously clean criminal record and the meager amount of cocaine involved. Cook v. State, 728 So. 2d 117 (Miss. Ct. App. 1998).

The sentence the defendant received was not manifestly disproportionate to the crime committed and did not require extended proportionality analysis under the 8th Amendment where the sentence imposed was within the limits prescribed by the statute violated by the defendant. Wilkerson v. State, 731 So. 2d 1173 (Miss. 1998).

A life sentence without parole was not disproportionate where the defendant was convicted of possession of a controlled substance and was found to be a habitual offender on the basis of prior convictions for robbery and aggravated robbery. Wall v. State, 718 So. 2d 1107 (Miss. 1998).

The court properly rejected the contention that the robbery aggravating circumstance does not genuinely narrow the class of persons on whom the death penalty is imposed because robbery-murder standing alone, is not a crime for which the death penalty is proportionate punishment, and that, therefore, it violates the Eighth Amendment and Article 3, Section 28 of the Mississippi Constitution. Doss v. State, 709 So. 2d 369 (Miss. 1996), cert. denied, 523 U.S. 1111, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Under *Gregg* v. Georgia, death sentence must not be excessive in relation to crime for which it is imposed, and death sentences must be imposed with reasonable consistency. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Sentencing scheme permitting imposition of death penalty for certain felony murders without a finding of intent to kill, but not for simple premeditated murder committed in atrocious manner, does not violate requirements of Eighth Amendment that death sentence not be excessive in relation to crime for which it was imposed and that death sentences be imposed with reasonable consistency. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Felony-murder aggravator is not disproportionate within meaning of Eighth Amendment even though unintentional felony-murder is punishable by death while premeditated murder, standing alone, is not, as not every defendant eligible for death penalty will have committed murder while in the course of statutorily enumerated felonies, so that felony-murder aggravator genuinely narrows class of defendants eligible for the death penalty. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Claim that use of underlying felony as aggravating circumstance violates Eighth Amendment was procedurally barred where defendant did not raise issue at trial. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

A defendant's sentence was not disproportionate to the crime and did not amount to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution where he was convicted of possession of marijuana with intent to deliver or distribute and was sentenced to serve 20 years in the custody of the Mississippi Department of Corrections and ordered to pay a $250,000 fine, since the sentence was less than the maximum 30 years imprisonment and one million dollar fine authorized by § 41-29-139(b)(1). Hart v. State, 639 So. 2d 1313 (Miss. 1994).

A 60-year sentence for a conviction of sale of cocaine did not violate the Eighth Amendment's prohibition against cruel and unusual punishment, even though the defendant was convicted of selling only a small amount of cocaine, where the defendant was given a 30-year sentence pursuant to § 41-29-139(b)(1) for his conviction and the sentence was then doubled pursuant to § 41-29-147 because the defendant had previously been convicted of possession of marijuana, since the sentence was within the statutory guidelines and the legislature has called for stiff penalties for drug offenders as a matter of public policy. Campbell v. Campbell, 618 So. 2d 116 (Miss. 1993).

The imposition of a 25-year sentence for the crime of possession of 5.7 grams of cocaine with intent to distribute did not constitute a denial of the defendant's constitutional rights on the ground that it was excessive and disproportionate where the defendant did not produce facts concerning sentences imposed on other criminals, the sentence was within the limits fixed by § 41-29-139(b), and the sentence was not "grossly disproportionate" or "shockingly excessive." Edwards v. State, 615 So. 2d 590 (Miss. 1993).

A 14-year sentence for forging and publishing a $40 check, a 2-year consecutive sentence for forging a $50 check, and 2 14-year sentences for forging and publishing checks in the amounts of $54 and $62, though severe, were not so "grossly disproportionate" as to violate the Eighth Amendment to the United States Constitution. Wallace v. State, 607 So. 2d 1184 (Miss. 1992).

The sentencing of a defendant under § 99-19-81, the habitual offender statute, to the 20-year maximum term for aggravated assault as set forth in § 97-3-7(2) was not disproportionate to the crime charged and did not violate the Eighth Amendment where the defendant was convicted of severely bludgeoning the victim with an iron pipe; the statutory maximum penalty for aggravated assault is not grossly out of line with the maximum terms allowed for the commission of other violent crimes in Mississippi, and the maximum penalties imposed for aggravated assault in neighboring states are not profoundly different from those in Mississippi. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

Sentence of life imprisonment without parole was not unconstitutionally disproportionate for defendant sentenced as habitual offender on record of convictions for burglary, armed robbery, and prison escape, and was not cruel and unusual punishment under Eighth Amendment. Even though final conviction was for auto burglary, a concededly less offense than earlier offenses, earlier record was of convictions for armed robbery, burglary, escape, and armed robbery, at least two of which were crimes of violence per se. McGruder v. Puckett, 954 F.2d 313 (5th Cir. 1992), cert. denied, 506 U.S. 849, 113 S. Ct. 146, 121 L. Ed. 2d 98 (1992).

An extended proportionality analysis is not required by the Eighth Amendment when a sentence is alleged to constitute cruel and unusual punishment, except in the context of a sentence of life in prison without the possibility of parole, or a sentence which is manifestly disproportionate to the crime committed. Barnwell v. State, 567 So. 2d 215 (Miss. 1990).

Death sentence imposed upon defendant was not disproportionate and not consequence of emotion and caprice where review of past death penalty cases indicated that death penalty, if no constitutional error were found in defendant's trial, was not disproportionate. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d

559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Death sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor, nor was it excessive or disproportionate to penalty imposed in cases since 1976, considering crime, manner in which it was committed, and defendant; sentencing phase followed in trial provided meaningful basis for distinguishing the few cases in which death penalty is imposed and the many cases in which it is not imposed. Jones v. State, 517 So. 2d 1295 (Miss. 1987), vacated 108 S. Ct. 2891, 487 U.S. 1230, 101 L.Ed.2d 925, on remand 602 So. 2d 1170.

A sentence of life imprisonment for the rape of a 10-year-old female did not violate the constitutional prohibition against cruel and unusual punishment. Horton v. State, 374 So. 2d 764 (Miss. 1979).

Twenty-five year sentence for an attempted robbery by a defendant who was 16 years of age at the time the offense was committed did not constitute cruel or unusual punishment. Howard v. State, 319 So. 2d 219 (Miss. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Imposing twenty-year sentence on defendant convicted of manslaughter for driving truck while drunk and colliding with another car causing death of passenger in other car was not cruel and unusual punishment. Lester v. State, 209 Miss. 171, 46 So. 2d 109 (1950).

23. — Capital prosecution of juveniles, cruel and unusual punishment.

Defendant was not under the age of 18 when he committed the crime of capital murder, therefore the imposition of the death penalty on defendant does not violate the Eighth and Fourteenth Amendments. Hodges v. State, 912 So. 2d 730 (Miss. 2005), writ of certiorari denied by 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670, 74 U.S.L.W. 3322 (2005), remanded by 2006 Miss. LEXIS 214 (Miss. Apr. 20, 2006).

Imposition of capital punishment upon a defendant who committed murder at 17 years of age did not offend the prohibition of the Eighth Amendment, U.S. Const. Amend. VIII, against cruel and unusual punishment, nor did it offend the similar provision in Miss. Const. Art. 3, § 28. Dycus v. State, 875 So. 2d 140 (Miss. 2004), vacated by, remanded by 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212, 73 U.S.L.W. 3528 (2005).

Imposition of the death penalty on a petitioner who was 16 at the time he committed four murders presented no per se case of cruel and unusual punishment, under precedents of both the United States Supreme Court and the Mississippi Supreme Court. McGilberry v. State, 843 So. 2d 21 (Miss. 2003), remanded by 2005 Miss. LEXIS 598 (Miss. Sept. 22, 2005).

Defendant could not assert that death penalty violated Eighth Amendment because statutes did not set a minimum age below which child may not be transferred from youth court to circuit court for crimes punishable by death where defendant committed his crime at age 17, an age where it is sufficiently clear that no national consensus forbids imposition of capital punishment. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by vesting original jurisdiction in the circuit court when a person under 18 years of age is charged with a capital offense, rather than requiring a certification proceeding in youth court for transfer to the circuit court; Mississippi law allows a capital murder defendant who is under the age of 18 years to request a special hearing to consider his or her age, lack of prior offenses, likelihood of successful rehabilitation and other factors which favor sending the case to the youth court rather than continuing in circuit court. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d

1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by its failure to explicitly state a minimum age that a person may be subject to the death penalty, since the age at which one may receive a death sentence for the crime of capital murder is implied; no one under 13 years of age may receive the death penalty because a child under the age of 13 cannot even be charged with a felony. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A sentence of death was not improperly based on "vengeance and sympathy," in spite of the defendant's argument that the jury's sentencing determination was improperly predicated on the personal characteristics of the victim, where in response to the defendant's parents' request to the jury not to sentence their son to death the prosecutor merely noted that the defendant's parents were not the only ones who had suffered and grieved and that their "tears might be outweighed by the fact of the victim's murder," and he reminded the jury that the victim's parents had also suffered a loss and that they must not forget the "cold, calculated killing" of the victim. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A death sentence for a conviction of murder was disproportionate to the penalty imposed in similar capital cases, considering both the crime and the defendant, where the defendant was 18 years old at the time of the crime, he suffered some mental illness and mental retardation, the murder was committed by another person, and the defendant did nothing physically to assist the other person in the assault. Reddix v. State, 547 So. 2d 792 (Miss. 1989).

Stay of execution not granted where alleged basis was that imposition of death sentence upon person too young to sit on jury violated Eighth Amendment proscription against cruel and unusual punishment, because it had never been raised before in this case and was therefore barred, and point had been summarily denied in prior cases. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

24. — Capital punishment, cruel and unusual punishment.

On the inmate's claim that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he was mentally retarded, he was entitled to and did not receive an Atkins hearing because the inmate met the requirements of Chase and its progeny; the inmate's claim was not procedurally barred under Miss. Code Ann. § 99-39-21(1) because he could not have raised the claim before the trial court, as the Atkins decision was decided 12 days after the inmate was sentenced to death. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Serving 25 years on death row did not constitute cruel and unusual punishment under the Eighth Amendment; defendant's argument that serving an excessive period on death row constituted cruel and unusual punishment in violation of his constitutional rights failed. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Post-conviction relief was denied on the issue of whether defendant's death sentence was unconstitutionally excessive in capital murder case based on the fact that it was felony murder because the issue was procedurally barred; even if it was not, the issue was meritless since this argument had been previously rejected, and the jury found all four factors under Miss. Code Ann. § 99-19-101. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

In a capital case where three victims were beaten to death during a robbery, a death sentence imposed was not disporportionate to other similar crimes; the evidence supported a finding of the aggravating circumstance of robbery under Miss. Code Ann. § 99-19-105, and there was no evidence that the jury was under the influence of passion, prejudice, or any other arbitrary factor. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

In a capital murder case, defendant's assertion that Miss. Code Ann. § 99-19-101 was unconstitutional under the Eighth Amendment was rejected because reckless disregard for human life was not an aspect of Mississippi's capital sentencing scheme; the State was not required to prove intent to kill, and the jury determined that defendant's conduct in participating in three homicides satisfied the four elements in Miss. Code Ann. § 99-19-107(a)-(d). Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Petitioner's application for leave to file a motion to vacate death sentence on the ground of mental retardation was denied; petitioner was a normal, productive citizen who was never characterized as "mentally retarded" until such time as being mentally retarded became critically important in the realm of postconviction relief. Wiley v. State, 890 So. 2d 892 (Miss. 2004).

Defendant presented no evidence to suggest that he was mentally retarded and that the death penalty was therefore cruel and unusual punishment; defendant produce no expert opinion to show that he possessed an IQ of 75 or below or that a reasonable basis existed to believe that further testing would show defendant to be mentally retarded. Mitchell v. State, 886 So. 2d 704 (Miss. 2004), writ of certiorari denied by 544 U.S. 1022, 125 S. Ct. 1982, 161 L. Ed. 2d 864, 2005 U.S. LEXIS 3824, 73 U.S.L.W. 3649 (2005).

At the time of his mental retardation evaluation, defendant (1) was appropriately groomed and properly maintained personal hygiene, (2) possessed a driver's license, (3) was responsible for buying clothing, groceries, and personal items, (4) had completed school through the ninth grade and attended GED classes, and (5) was employed; thus, defendant did not show that he was mentally retarded. Therefore, defendant's execution was not prohibited by the Eighth and the Fourteenth Amendment. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

Imposition of death penalty was not cruel and unusual punishment where the prisoner was an active participant in the victim's murder, he knew that the kidnapping was committed in order to teach the victim a lesson, he held the victim down while another man hit the victim in the head with a hammer, and he chased the victim and brought him back for the beating to continue. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

Prisoner's involvement was sufficient to justify the death sentence, even if the actual killer did not receive the death sentence, where the prisoner took an active role in the killing. The prisoner chased the victim and brought him back after the victim had been hit in the head with a hammer for the first time, and the prisoner held the victim as he was being struck by the killer. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

Where the issue of whether imposition of the death penalty on defendant for his crime was excessive or disproportionate was decided against defendant on direct appeal; the claim was procedurally barred and could not be relitigated in defendant's postconviction petition for relief under Miss. Code Ann. § 99-39-21(3); further, it had previously been determined that the death penalty for one who committed felony murder did not violate defendant's rights under U.S. Const. amend. VIII.

Grayson v. State, 879 So. 2d 1008 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1593, 73 U.S.L.W. 3495 (2005).

Court concludes that the United States Supreme Court case law granted Eighth Amendment protection from execution to all mentally retarded persons, and the definitions approved and adopted in case law provide a clear standard to be used in Mississippi by the trial court in determining, for Eighth Amendment purposes, whether a criminal defendant was mentally retarded, and a trial judge will make such determination by a preponderance of the evidence, after receiving evidence presented by defendant and State. Chase v. State, 873 So. 2d 1013 (Miss. 2004), remanded by 112 So. 3d 421, 2013 Miss. LEXIS 5 (Miss. 2013).

The execution of the defendant would not constitute cruel and inhuman punishment, notwithstanding that he had been incarcerated on death row for 22 years while various appeals were pursued and his contention that he had suffered psychological trauma waiting for his execution and that there was nothing gained by the state from 22 years of needless infliction of pain and suffering. Jordan v. State, 786 So. 2d 987 (Miss. 2001), writ of certiorari denied by 534 U.S. 1085, 122 S. Ct. 823, 151 L. Ed. 2d 705, 2002 U.S. LEXIS 318 (2002).

Subsection (d) of § 99-19-101(5) does not violate the Eighth or Fourteenth Amendments to the United States Constitution. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Sentencing scheme permitting imposition of death penalty for certain felony murders without a finding of intent to kill, but not for simple premeditated murder committed in atrocious manner, does not violate equal protection or due process; legislature could have rationally decided that one class of murders either presented a different problem from the other or that the death penalty would be more effective deterrent to felony murders than to atrocious simple murders. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Eighth Amendment does not categorically prohibit execution of mentally retarded persons. Wells v. State, 698 So. 2d 497 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997), cert. denied, 522 U.S. 1122, 118 S. Ct. 1065, 140 L. Ed. 2d 125 (1998).

Imposition of death sentence on mentally retarded defendant convicted of fatally stabbing 13-year-old child was not excessive or disproportionate to penalty imposed in similar cases. Wells v. State, 698 So. 2d 497 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997), cert. denied, 522 U.S. 1122, 118 S. Ct. 1065, 140 L. Ed. 2d 125 (1998).

The court properly rejected the contention that the robbery aggravating circumstance does not genuinely narrow the class of persons on whom the death penalty is imposed because robbery-murder standing alone, is not a crime for which the death penalty is proportionate punishment, and that, therefore, it violates the Eighth Amendment and Article 3, Section 28 of the Mississippi Constitution. Doss v. State, 709 So. 2d 369 (Miss. 1996), cert. denied, 523 U.S. 1111, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Sentencing 17-year-old defendant to death was not prohibited merely because state statute did not explicitly state that 16 or 17-year-old defendant could be punished with execution for capital crime. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Death penalty could be imposed on 17-year-old defendant without particularized findings as to his maturity and moral responsibility. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

The execution of a defendant who had been repeatedly diagnosed as a chronic paranoid schizophrenic did not constitute cruel and unusual punishment, since every expert who testified stated that one could be a paranoid schizophrenic and still be competent to be executed under § 99-19-57. Billiot v. State, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

Death penalty is permissible where one of following four conditions is found: (1) defendant actually killed victim (2) defendant attempted to kill victim (3) defendant intended killing of victim take place (4) defendant contemplated lethal force would be employed. Argument that lack of jury finding that defendant intended to kill victim necessitated reversal of death penalty was rejected. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Issue of discriminatory application of death penalty to defendant is barred, absent showing of cause, because issue had never been raised prior to appeal to Supreme Court. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

A defendant's Eighth Amendment rights were not violated by imposition of the death penalty following his conviction for capital murder based upon murder committed during the commission of a felony, where, although defendant did not actually kill the victim, he planned, schemed, and ultimately physically subdued the victim by choking him with a rope, while another stabbed and bludgeoned the victim to death. Leatherwood v. State, 435 So. 2d 645 (Miss. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772 (1984).

Imposition of the death penalty for the rape of a female child under the age of 12 years does not constitute cruel and unusual punishment in violation of the United States Constitution. Upshaw v. State, 350 So. 2d 1358 (Miss. 1977).

25. Lethal injection, cruel and unusual punishment.

Because Mississippi's lethal injection protocol appeared to be substantially similar to the protocol that was examined and upheld by the U.S. Supreme Court in Baze v. Rees, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), a defendant's Eighth Amendment challenge to the lethal injection protocol in Mississippi was without merit. Bennett v. State, 990 So. 2d 155 (Miss. 2008).

26. — Juvenile detention, cruel and unusual punishment.

Conditions of confinement at a state school for delinquent children which constituted cruel and unusual punishment and which were not conducive to rehabilitation and treatment of the students would be enjoined. Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977).

Commitment of a 16-year-old minor to a state training school until age 20 did not violate constitutional prohibitions against cruel and unusual punishment, where the minor was adjudicated delinquent on the basis of a charge of driving under the influence of alcohol, where at the time of such offense an automobile accident occurred resulting in fatal injuries to a youthful passenger in the car, and where the minor had previously been adjudicated delinquent at age 13 for aiding an escaped felon. Pettit v. State, 351 So. 2d 1353 (Miss. 1977).

A municipal or justice of the peace court may sentence a child convicted of a traffic offense to imprisonment in a facility with adults where the child is sentenced to imprisonment under a statute authorizing a jail sentence upon conviction, or where the child, originally fined under an alternative sentencing statute, defaults in the payment of the fine after the failure of reasonable methods designed to aid the child in the payment of the fine. Such imprisonment does not constitute cruel and unusual punishment. Nelson v. Tullos, 323 So. 2d 539 (Miss. 1975).

27. — Confinement conditions for inmates, cruel and unusual punishment.

Prisoner's Eighth Amendment rights were only infringed by extreme deprivation outside the normal bounds of society; the inmate asserted nothing that could possibly have risen to such a level; it was clear that no colorable claim was raised. Hurns v. Miss. Dep't of Corr., 878 So. 2d 223 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 918 (Miss. 2004).

In a capital murder case, the inmate asserted that he had been subjected to cruel and inhuman treatment in violation of his Fifth, Eighth, and Fourteenth Amendment rights because he had been kept in maximum confinement on Mississippi's death row under conditions that included lock-down and isolation for at least 23 hours of the day and because he had been subjected to numerous execution dates during those 19-20 years; however, there was no law in the United States or Mississippi that supported the inmate's claim and, thus, there were no grounds for postconviction relief on that issue. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Defendant's sentence of 30 years in prison for selling crack cocaine within 1500 feet of a school was not tantamount to cruel and inhuman punishment; there was no evidence that defendant's sentence was intended as punishment for defendant's action in exercising the right to a jury trial, nor was there any proof that the length of the sentence was in essence that of a life sentence that was going to subject defendant to unsanitary conditions and physical attacks. Green v. State, 834 So. 2d 724 (Miss. Ct. App. 2003).

The prohibition of cruel and unusual punishment does not apply to the confinement conditions of pretrial detainees. Jackson v. Minich, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 19632 (N.D. Miss. Nov. 24, 1999).

The court reversed the dismissal of an inmate's claim for declaratory and injunctive relief from an alleged Eighth Amendment violation and would remand for further proceedings where the inmate alleged (1) that the conditions of his confinement deprived him of cleanliness, sleep, and peace of mind, such conditions including housing in filthy, unsanitary cells, and (2) that he was subjected to frequent searches with no purpose but to harass him. Harper v. Showers, 174 F.3d 716 (5th Cir. 1999).

The court erred when it dismissed a prisoner's complaint which alleged that his Eighth Amendment rights were violated when he was placed in a lockdown and was thereby unable to bathe because he wore a leg brace, required assistance to dress and undress, and could not shower safely without a shower chair. Bradley v. Puckett, 157 F.3d 1022 (5th Cir. 1998).

To state violation of Eighth Amendment for denial of humane conditions of confinement, inmate must prove that prison official knew that inmate faced substantial risk of serious harm and disregarded risk by failing to take reasonable measures to abate it. Davis v. City of Greenville, 974 F. Supp. 884 (N.D. Miss. 1997).

Treatment prisoner receives in prison and conditions under which he or she is confined are subject to scrutiny under Eighth Amendment, and accordingly, prison officials must ensure that prisoners receive adequate food, clothing, shelter and medical care, and must take reasonable measures to guarantee their safety. Davis v. City of Greenville, 974 F. Supp. 884 (N.D. Miss. 1997).

Inmates who are placed in administrative segregation have no constitutional basis for demanding the same privileges as those inmates in the general prison population since prison officials have the discretion to determine whether and when to provide prisoners with privileges such as showers, exercise, visitation, and access to personal property. Thus, the 5 hours a week of exercise plus nightly showers of 15 minutes which were provided to an inmate confined to administrative segregation did not constitute cruel and unusual punishment. Additionally, the procedures provided when the inmate was placed in administrative segregation satisfied the due process clause where the inmate received notice of detention and a hearing on the matter. Terrell v. State, 573 So. 2d 730 (Miss. 1990).

The district court's findings that the confinement of inmates at the Mississippi State Penitentiary in barracks unfit for human habitation, in conditions that threatened their physical health and safety and deprived them of basic hygiene and medical treatment by reason of gross deficiencies in plant, equipment, and medical staff constituted cruel and unusual punishment, and the relief therein granted, were affirmed. Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).

28. Medical care of inmates.

While the State has a duty under the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic human needs, including medical care, plaintiff failed to establish any Eighth Amendment violation in her wrongful death action against the Mississippi Department of Corrections or a prison superintendent where she failed to establish any "deliberate indifference" on defendants' part in respect to the treatment of a decedent inmate who died after suffering multiple seizures. Carter v. Miss. Dep't of Corr., 860 So. 2d 1187 (Miss. 2003), writ of certiorari denied by 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399, 2004 U.S. LEXIS 2392, 72 U.S.L.W. 3614 (2004).

Although inadequate medical treatment may, at a certain point, rise to the level of a constitutional violation, malpractice or negligent care does not. Stewart v. Murphy, 174 F.3d 530 (5th Cir. 1999), writ of certiorari denied by 528 U.S. 906, 120 S. Ct. 249, 145 L. Ed. 2d 209, 1999 U.S. LEXIS 6315, 68 U.S.L.W. 3231 (1999).

29. — Solitary confinement, cruel and unusual punishment.

The district court's findings that the solitary confinement conditions, the administration of corporal punishment, the trusty system as practiced, and the failure to provide adequate protection against physical assaults and abuses by other inmates at the Mississippi State Penitentiary constituted cruel and unusual punishment, and the relief therein granted, were affirmed. Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).

30. — Habitual offenders, cruel and unusual punishment.

Defendant's effective sentence of 60 years without parole for a drug offense where none of his prior convictions involved crimes of violence was within the statutory guidelines prescribed by the legislature under Miss. Code Ann. §§ 41-29-147 and 99-19-81; additionally, although harsh, defendant's sentence was not grossly disproportionate to his crime. It was within the legislature's prerogative to determine that three crimes such as those committed by defendant could result in a sentence of 60 years without parole or chance of early release; thus, defendant's sentence did not violate the federal or state constitutional prohibitions of cruel and unusual punishment. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Defendant's argument that because of its prescribed sentence of life imprisonment without parole, the habitual offender statute, Miss. Code Ann. § 99-19-83, was violative of his Eighth Amendment right failed because § 99-19-83 was found not to violate one's Eighth Amendment rights and the length of sentences was properly controlled by the legislature. Forkner v. State, 902 So. 2d 615 (Miss. Ct. App. 2004), writ of certiorari denied by 901 So. 2d 1273, 2005 Miss. LEXIS 345 (Miss. 2005).

No merit to defendant's argument that his sentence was violative of the Eighth Amendment's ban on cruel and unusual punishment where defendant's sentence of life in prison without the possibility of parole was severe, but justified given the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. Miles v. State, 864 So. 2d 963 (Miss. Ct. App. 2003).

Defendant's 23-year sentence for aggravated assault and possession of a firearm by felon did not constitute cruel and unusual punishment based on the gravity of the offense, the harshness of the penalty under the habitual offender statute, Miss. Code Ann. § 99-19-81, and the sentences imposed in Mississippi and other jurisdictions for similar crimes. Everett v. State, 835 So. 2d 118 (Miss. Ct. App. 2003).

Defendant was sentenced to the maximum allowable sentence for selling cocaine because defendant was an habitual offender, having twice previously been convicted of sale of cocaine, and the trial court did not abuse its discretion in sentencing defendant within statutory guidelines; thus, defendant's right against cruel and unusual punishment guaranteed by the Eighth Amendment was not violated. Green v. State, 856 So. 2d 396 (Miss. Ct. App. 2003), reversed in part by, remanded by 884 So. 2d 733, 2004 Miss. LEXIS 714 (Miss. 2004).

Without waiving the procedural bar to the inmate's claim that the inmate's sentence was unconstitutional, the court held that the inmate was properly charged under Miss. Code Ann. § 97-9-45; having entered a plea of guilty to the escape, that the sentence of three years was well within the maximum prescribed by the statute, and the inmate was therefore not entitled to postconviction relief; although the inmate was in custody and on a work program in a county at the time of the escape, the inmate was considered to be under the Department's jurisdiction for purposes of § 97-9-45 because (1) the inmate's original burglary sentence required imprisonment in the "penitentiary" under Miss. Code Ann. § 97-17-23, which term meant any facility under the jurisdiction of the Department pursuant to Miss. Code Ann. § 47-5-3, (2) commitment to any institution within the jurisdiction of the Department was to the Department, not a particular institution pursuant to Miss. Code Ann. § 47-5-110, and (3) under Miss. Code Ann. § 47-5-541, the Department recommended rules concerning the participation of inmates in work programs. Gardner v. State, 848 So. 2d 900 (Miss. Ct. App. 2003).

Defendant's sentence of life in prison without the possibility of parole for possession of cocaine was not grossly disproportionate to the crime, as defendant was a habitual offender who had committed prior felonies, including a crime involving violence. Oby v. State, 827 So. 2d 731 (Miss. Ct. App. 2002).

A 30-year sentence for sale of a controlled substance, which sentence was enhanced on the basis that the defendant was an habitual offender, did not constitute cruel and unusual punishment where (1) the previous convictions of the defendant were acknowledged by the trial judge at the sentencing hearing prior to sentence was imposed, (2) the trial judge also acknowledged that the habitual offender statute was applicable and that he had the discretion to impose the maximum penalty of 30 years, (3) the trial court allowed the defendant to present any evidence he believed would mitigate the sentence that was going to be imposed, and (4) after the presentation of the defendant's testimony, the court declared that it took no satisfaction in imposing a prolonged sentence, but determined that the testimony of the defendant did not present mitigating circumstances requiring deviation from the statute. Bell v. State, 769 So. 2d 247 (Miss. Ct. App. 2000).

Habitual offender sentence imposed on defendant convicted of possession of cocaine with intent to deliver, requiring defendant to pay $30,000 fine and to serve 30 years without possibility of early parole, was not excessive and did not constitute cruel and unusual punishment: applicable sentencing statute allowed fines of $1,000 to $1 million and prison terms of up to 30 years. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

In any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty; where a defendant is adjudged to be a habitual offender, the jury should be informed that a life sentence means "life, without probation or parole." Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A 15-year sentence without hope of parole, imposed upon a defendant as a habitual offender, for uttering a forged check in the amount of $500, did not constitute cruel and unusual punishment. Barnwell v. State, 567 So. 2d 215 (Miss. 1990).

A defendant's life imprisonment under the recidivist statute, § 99-19-83, after he shoplifted and ate 2 cans of sardines in a store, and then attempted to steal the money to pay for them by breaking into a house, was unduly harsh under an Eighth Amendment cruel and unusual punishment analysis. Ashley v. State, 538 So. 2d 1181 (Miss. 1989).

The fact that a trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Thus, notwithstanding § 99-19-81, which requires habitual offenders to be sentenced to a maximum term, the trial court had authority, as a function of the Supremacy Clause, to review a particular sentence in light of constitutional principles of proportionality. Clowers v. State, 522 So. 2d 762 (Miss. 1988).

Imposition of a life sentence in prison without parole or probation imposed upon defendant who was convicted of child fondling, and who had 2 prior convictions-one for assault with intent to commit sodomy and the other for indecency with a child-did not constitute cruel and unusual punishment. Bandy v. State, 495 So. 2d 486 (Miss. 1986).

Sentence of life imprisonment without parole as violent habitual offender imposed upon defendant convicted of burglary of occupied house who has previously been convicted of mayhem and manslaughter is not disproportionate to crime and does not violate Eighth Amendment to United States Constitution. Jackson v. State, 483 So. 2d 1353 (Miss. 1986), cert. denied, 522 U.S. 1119, 118 S. Ct. 1059, 140 L. Ed. 2d 120 (1998).

Sentence to 20 years imprisonment without reduction, revocation or parole imposed upon defendant convicted of arson and of being habitual criminal is not unconstitutionally excessive where arson conviction is based upon defendant's having set occupied house on fire at both front and back doors and where defendant has prior convictions for burglary and uttering forgery. Jenkins v. State, 483 So. 2d 1330 (Miss. 1986).

Sentencing of defendant, who has entered plea of guilty to charge of capital murder, as habitual offender under § 99-19-81, to serve life in prison without parole does not constitute unconstitutional cruel and unusual punishment. Bridges v. State, 482 So. 2d 1139 (Miss. 1986).

Defendant was not deprived of his opportunity to be heard on the issue of prior convictions, where he had stipulated that he had been twice convicted of assault and the trial court based its enhanced sentence both on that stipulation and on certified copies of defendant's prior felony convictions; moreover, § 99-19-81 is not unconstitutional and a sentence of ten years for arson where the defendant had prior felony convictions for aggravated assault and assault with intent to commit murder did not violate the Eighth Amendment prohibition against cruel and unusual punishment. King v. State, 451 So. 2d 765 (Miss. 1984).

The sentence of 15 years without parole or probation was not disproportionate to the crime, and did not violate defendant's Eighth Amendment rights, where defendant had been convicted of three nonviolent felonies, even though very little money had been involved in the forgery of which he had been convicted. Seely v. State, 451 So. 2d 213 (Miss. 1984).

A sentence of life imprisonment without probation or parole for a defendant convicted of carrying a concealed weapon after conviction of a prior felony did not constitute cruel and unusual punishment in violation of the United States and Mississippi Constitutions. Baker v. State, 394 So. 2d 1376 (Miss. 1981).

31. Murder and manslaughter.

Sentences that are within the statutory limit are not considered cruel and unusual punishment. Hence, defendant's 20-year sentence for manslaughter was not excessive; law of Mississippi provides a maximum sentence of 20 years for manslaughter. Robinson v. State, 875 So. 2d 230 (Miss. Ct. App. 2004).

32. Robbery.

Under Miss. Code Ann. § 97-3-79 (armed robbery), the trial judge had the authority to impose any sentence but life imprisonment. Thus, defendant's sentence of 40 years was within the limits prescribed by statute and did not constitute cruel and inhuman treatment; further, the sentence was within the purview of the trial judge to impose, since he had adjudged defendant's remaining life expectancy to be 42 years. Calhoun v. State, 881 So. 2d 308 (Miss. Ct. App. 2004).

33. Competency of person to be executed.

In an appeal of a capital murder conviction and death penalty, defendant, who claimed he was mentally retarded, was not entitled to a remand to the trial court for an evaluation of his mental capacity in light of the U.S. Supreme Court's ruling in Atkins v. Virginia; testimony from the state's psychologist indicated that defendant was malingering and that his functioning did not fall within the range of mentally retarded, and because defendant failed to proffer the information necessary to warrant an Atkins hearing, he was not entitled to a reconsideration of his sentence on this issue. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Where petitioner raped and murdered a 79-year-old victim, the burden was upon petitioner to prove that he was mentally retarded to such an extent as to avoid the death penalty. Where his IQ score of 81 placed him in the category of "low dull normal," and well above the maximum score for "mild" mental retardation, imposition of the death penalty was not cruel and unusual punishment. Further, the jury instructions given at the sentencing phase, in accordance with Miss. Code Ann. § 99-19-101(7), did not violate petitioner's Eighth Amendment rights since the factors contained in § 99-19-101(7) required that the jury find the requisite intent set forth in Enmund and Tison before a death penalty verdict could be returned.. Gray v. State, 887 So. 2d 158 (Miss. 2004), writ of certiorari denied by 545 U.S. 1130, 125 S. Ct. 2935, 162 L. Ed. 2d 870, 2005 U.S. LEXIS 4905, 73 U.S.L.W. 3733 (2005).

34. Batson Challenge.

In a capital murder case, defendant's Batson challenge was meritless because the prosecution set forth race-neutral reasons for its use of peremptory strikes on African-American jury pool members; a failure to understand the proceedings, service on a prior jury that acquitted, reluctance to serve due to employment, lack of belief in the death penalty, and a failure to complete a jury questionaire were all race-neutral reasons. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

35. Sentence appropriate.

Defendant's 60-year prison sentence for possession of a controlled substance with intent to sell as a habitual offender was not grossly disproportionate to the crime where defendant was aware of defendant's own criminal history and chose to proceed to trial; defendant was also apprised of the perilous situation defendant faced if defendant was found guilty at trial. Baskin v. State, 986 So. 2d 338 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 562 (Miss. 2008).

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

Defendant's sentence after being convicted of the sale of marijuana within a correctional facility was appropriate because the maximum fine and the minimum sentence that he received were both within the statutory limits of Miss. Code Ann. § 47-5-198(3). Jackson v. State, 962 So. 2d 649 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Defendant's robbery sentence was appropriate pursuant to Miss. Code Ann. § 97-3-79 because it was within the statutory limit. Further, it was not grossly disproportionate to the crime of which he was convicted. White v. State, 919 So. 2d 1029 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

ALR. Propriety of carrying out death sentences against mentally ill individuals. 111 A.L.R.5th 491.

Application of constitutional rule of Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that execution of mentally retarded persons constitutes "cruel and unusual punishment" in violation of Eighth Amendment. 122 A.L.R.5th 145.

When does forfeiture of real property violate excessive fines clause of Eighth Amendment or state constitutions-State cases. 124 A.L.R.5th 509.

Administration of corporal punishment in public school system as cruel and unusual punishment under Eighth Amendment. 25 A.L.R. Fed. 431.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 A.L.R. Fed. 110.

When does forfeiture of currency, bank account, or cash equivalent violate excessive fines clause of Eight Amendment. 164 A.L.R. Fed. 591.

Am Jur. 21 Am Jur 2d, Criminal Law §§ 556, 565-570.

18 Am Jur Proof of Facts 2d 149, Excessive Bail.

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Law Reviews. Cartwright, Death on a whim: jury discretion and "Especially Heinous" crimes. 9 Miss College L. R. 357, Spring 1989.

1989 Mississippi Supreme Court Review: Eighth Amendment. 59 Miss L. J. 842, Winter, 1989.

Do the Crime, Do the Time, but the Time should Fit the Crime: Does Mississippi Need Sentencing Guidelines?: White v. State, 742 So. 2d 1126 (Miss. 1999), 21 Miss. C. L. Rev. 121, Fall, 2001.

Amendment IX

Construction of enumerated rights

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

JUDICIAL DECISIONS

1. In general.

Experts who rendered diagnosis of "no mental disorder" for low intelligence quotient for capital murder defendant, after being appointed to perform mental examination of him to determine his competency to stand trial, afforded defendant constitutionally adequate evaluation and furnished constitutionally adequate report. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Section 67-3-13 did not deny a defendant, who was convicted of possession of beer in a "dry" part of the county while traveling home after having legally purchased the beer in a "wet" city, equal protection under the laws and constitution of the State of Mississippi and the Constitution of the United States, nor was there any invasion of the defendant's constitutional right of privacy. Dantzler v. State, 542 So. 2d 906 (Miss. 1989).

RESEARCH REFERENCES

CJS. C.J.S. Constitutional Law §§ 53 to 57, 444, 445, 460, 619 to 648.

Law Reviews. The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Phillip Bobbit's Constitutional Fate, 75 Miss. L.J. 495, Winter, 2006.

AMENDMENT X

RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

JUDICIAL DECISIONS

1. In general.

Under this amendment, underlying control over criminal procedure in state court, dealing with distinctly local offenses such as burglary, remains in state. Odom v. State, 205 Miss. 572, 37 So. 2d 300 (1948), cert. denied, 336 U.S. 932, 69 S. Ct. 747, 93 L. Ed. 1092 (1949).

The state is sovereign over matters confided or reserved to it by the Tenth Amendment. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

State sovereignty cannot be bargained away or surrendered by the legislature. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

The Federal Social Security Act may name a provision governing the grant of aid or advantages to a State, which is free to accept or reject it, provided it does not infringe the State Constitution or rights reserved in the Tenth Amendment. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

RESEARCH REFERENCES

CJS. C.J.S. States § 53.

AMENDMENT XI

SUITS AGAINST STATES

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Proposal and Ratification. This amendment was proposed to the Legislatures of the several States by the Third Congress, on March 4, 1794; and was declared in a message from the President to Congress, dated January 8, 1798, to have been ratified by the legislatures of three-fourths of the States. The States which ratified this amendment, and the dates of ratification are: New York, Mar. 27, 1794; Rhode Island, Mar. 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between Oct. 9 and Nov. 9, 1794; Virginia, Nov. 18, 1794; Georgia, Nov. 29, 1794; Kentucky, Dec. 7, 1794; Maryland, Dec. 26, 1794; Delaware, Jan. 23, 1795; North Carolina, Feb. 7, 1795. Ratification was completed on February 7, 1795.

The amendment was subsequently ratified by South Carolina on December 4, 1797. New Jersey and Pennsylvania did not take action on the amendment.

This amendment was passed in consequence of the decision of Chisholm v Georgia, 2 US 419, 1 L Ed 440 (1793), which held that a state could be sued by a citizen of another state in assumpsit.

Cross References — Judicial jurisdiction, see Art III, § 2, cl 1, 2.

JUDICIAL DECISIONS

1. In general.
2. Local government entities.
3. Instrumentality of state.
4. Class actions.
5. Injunctive relief.
6. Attorney fees.

1. In general.

Notwithstanding Congress' intent to abrogate Eleventh Amendment immunity in enacting the Age Discrimination in Employment Act, Congress did not act pursuant to constitutional authority and, therefore, the plaintiff's claim against the Mississippi Department of Transportation for a violation of the ADA was barred by the Eleventh Amendment. Cooley v. Mississippi DOT, 96 F. Supp. 2d 565 (S.D. Miss. 2000), affirmed without opinion by 254 F.3d 70, 2001 U.S. App. LEXIS 9803 (5th Cir. Miss. 2001).

The Eleventh Amendment barred a claim against Mississippi for maintaining an unreasonably dangerous intersection where the plaintiff did not even argue for abrogation, and the state's resistance to the action indicated that it clearly had not consented to suit. Heard v. Kemp, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 1065 (N.D. Miss. Jan. 25, 2000).

A state university was entitled to immunity on all federal and state law claims, except claims under Title VII, in an action arising from the reassignment of the plaintiff professor's job duties and the nonrenewal of his employment contract. Gray v. Rent, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 19631 (N.D. Miss. Nov. 19, 1999).

Officials of a state university were entitled to immunity on all state law claims, but not on federal claims for prospective relief, in an action arising from the reassignment of the plaintiff professor's job duties and the nonrenewal of his employment contract. Gray v. Rent, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 19631 (N.D. Miss. Nov. 19, 1999).

The Mississippi Department of Economic and Community Development did not have authority to waive its Eleventh Amendment immunity and consent to suit in federal court. Magnolia Venture Capital Corp. v. Prudential Secs., Inc., 151 F.3d 439 (5th Cir. 1998), cert. denied, 525 U.S. 1178, 119 S. Ct. 1115, 143 L. Ed. 2d 110 (1999).

Congress abrogated the states' Eleventh Amendment immunity from suit under the Age Discrimination in Employment Act, 29 U.S.C.S. §§ 621 et seq., and, therefore, state employers may be sued in federal court under the act. Scott v. University of Miss., 148 F.3d 493 (5th Cir. 1998).

Mississippi statute requiring state to indemnify and hold harmless a special agent of Tax Commission for any liability arising out of execution of warrant did not waive State's Eleventh Amendment immunity from suit in federal court; statute contained no unequivocal waiver. Smith v. Luther, 973 F. Supp. 601 (N.D. Miss. 1997).

Claims for prospective relief, such as suits against state officials for declaratory relief, are not deemed to be actions against state for Eleventh Amendment purposes and may be brought against state officials in either their official or individual capacities. Smith v. Luther, 973 F. Supp. 601 (N.D. Miss. 1997).

Order requiring newspaper notice to allow victims named in sealed files of former Mississippi State Sovereignty Commission, which had gathered personal information about Mississippi citizens with purpose of thwarting desegregation, to object to public disclosure of files did not violate Eleventh Amendment but rather would remedy initial constitutional violations when files were made and prevent future violations if personal information about victims were disseminated without their knowledge. American Civil Liberties Union v. Fordice, 969 F. Supp. 403 (S.D. Miss. 1994), aff'd, 84 F.3d 784 (5th Cir. 1996), cert. denied, 519 U.S. 992, 117 S. Ct. 481, 136 L. Ed. 2d 375 (1996).

In an action for wrongful death against the State of Mississippi, the Mississippi State Highway Commission, and several officials and employees of the Commission in their official and individual capacities, the district court properly dismissed the complaint against the state and the Commission based on the Eleventh Amendment; however, the court erred in finding that the officers and employees of the Commission could invoke the absolute protection of the amendment. Congress has not abrogated Mississippi's immunity through enactment of the Bridge Act of 1906 and the Rivers and Harbors Appropriations Act. Karpovs v. State, 663 F.2d 640 (5th Cir. 1981).

Suit for damages against Mississippi Game and Fish Commission under 42 USCS §§ 1981 and 1983 was barred by the Eleventh Amendment. Clifton v. Grisham, 381 F. Supp. 324 (N.D. Miss. 1974).

The state was immune from suit under 42 USCS § 1983 seeking recovery of damages for deaths and injuries allegedly caused by state police officers. Burton v. Waller, 502 F.2d 1261 (5th Cir. 1974), cert. denied, 420 U.S. 964, 95 S. Ct. 1356, 43 L. Ed. 2d 442 (1975), reh'g denied, 421 U.S. 939, 95 S. Ct. 1668, 44 L. Ed. 2d 95 (1975).

Under this section, a state cannot be sued. Stone v. Interstate Natural Gas Co., 103 F.2d 544 (5th Cir. 1939), aff'd, 308 U.S. 522, 60 S. Ct. 292, 84 L. Ed. 442 (1939), reh'g denied, 308 U.S. 639, 60 S. Ct. 381, 84 L. Ed. 530 (1940).

2. Local government entities.

An action against a county department of human services was barred by the Eleventh Amendment since the county department was an arm of the state and a non-autonomous division of the Mississippi Department of Human Services and was primarily funded by the state. C.A. v. Lowndes County Dep't of Family & Children Servs., 93 F. Supp. 2d 744 (N.D. Miss. 2000).

Federal District Court had power to decide case where weighing of all relevant factors pointed away from Eleventh Amendment immunity for Levee Board. Among others, factors relevant to determination of whether Eleventh Amendment protection is proper are: (1) most significant factor in assessing entity's status is whether judgment against it will be paid with state funds, and judgment against Levee Board could be satisfied from board itself; (2) entity had authority to sue and be sued in its own name, and (3) board had right to hold and use property. McDonald v. Board of Mississippi Levee Comm'ns, 832 F.2d 901 (5th Cir. 1987).

The Rankin County school system is a locally controlled institution which is supported largely by local revenues and, therefore, the Eleventh Amendment does not bar the award of back pay to teachers who were reinstated pursuant to the district court's order in a school desegregation case. Adams v. Rankin County Bd. of Educ., 524 F.2d 928 (5th Cir. 1975), cert. denied, 438 U.S. 904, 98 S. Ct. 3121, 57 L. Ed. 2d 1146 (1978).

3. Instrumentality of state.

State board of medical licensure is instrumentality of state amounting to alter ego such that suit against board by state citizen is precluded by Eleventh Amendment immunity provisions; executive officer of board was protected by qualified immunity in release of information concerning plaintiff physician to hospital because physician executed release for information. Williams v. Morgan, 710 F. Supp. 1080 (S.D. Miss. 1989).

4. Class actions.

Although an action alleging discriminatory distribution of gasoline and other excise tax funds among the several counties of the State of Mississippi is not violative of the Eleventh Amendment to the U. S. Constitution, a class action to that effect brought by citizens and taxpayers is not an action brought by the real parties in interest, for such parties have no personal interest or personal benefit in the recovery sought. Schaeffer v. Sharp, 328 F. Supp. 762 (S.D. Miss. 1971).

5. Injunctive relief.

The Eleventh Amendment does not shield state officials acting in their official capacities from injunctive relief. LimeCo Inc. v. Division of Lime of Mississippi Dep't of Agric. & Commerce, 546 F. Supp. 868 (N.D. Miss. 1982).

Suit against the State of Mississippi in the Federal Courts for an injunction against the levy of a tax under an alleged unconstitutional statute is precluded by this Amendment. Stone v. Interstate Natural Gas Co., 103 F.2d 544 (5th Cir. 1939), aff'd, 308 U.S. 522, 60 S. Ct. 292, 84 L. Ed. 442 (1939), reh'g denied, 308 U.S. 639, 60 S. Ct. 381, 84 L. Ed. 530 (1940).

A suit by a state in its sovereign capacity or through its authorized officers may not be enjoined by the Federal courts. Robertson v. H. Weston Lumber Co., 124 Miss. 606, 87 So. 120 (1921).

6. Attorney fees.

Plaintiffs were not entitled to attorney fees in a suit against the Department of Public Safety, alleging discriminatory hiring practices with regard to highway patrolmen and other personnel, since the Department was not guilty of bad faith, it was in any case an alter ego of the state and thus immune by virtue of the 11th Amendment, and officials for the Department were acting in their official capacity and were, accordingly, also immune under the 11th Amendment. Morrow v. Dillard, 412 F. Supp. 494 (S.D. Miss. 1976), rev'd on other grounds, 580 F.2d 1284 (5th Cir. 1978).

Plaintiffs in a class action suit challenging the constitutionality of a statute (at the inception of litigation, Miss. Code Anno. §§ 6634 et seq. (1942), now Miss. Code Anno. §§ 37-43-3 et seq. [repealed]) providing for distribution by the state of free textbooks to private as well as public schools were entitled to an award of attorney fees against the state, following remand of the case by the United States Supreme Court to the District Court with instructions to determine private school eligibility for free books according to whether or not the schools were segregated, and such award of attorney fees, made pursuant to federal statute, had only an ancillary effect on the state treasury, and was not barred by the Eleventh Amendment to the United States Constitution. Norwood v. Harrison, 410 F. Supp. 133 (N.D. Miss. 1976), appeal dismissed 563 F.2d 722.

RESEARCH REFERENCES

Am Jur. 3C Am. Jur. 2d, Aliens and Citizens § 2110.

9A Am. Jur. 2d, Bankruptcy §§ 1523, 1611.

9B Am. Jur. 2d, Bankruptcy § 1720.

15A Am. Jur. 2d, Civil Service §§ 46, 60.

16A Am. Jur. 2d, Constitutional Law §§ 413, 419.

25 Am. Jur. 2d, Elections § 64.

26 Am. Jur. 2d, Elections § 290.

32 Am. Jur. 2d, Federal Courts § 439.

45C Am. Jur. 2d, Job Discrimination § 2065.

46 Am. Jur. 2d, Judgments § 185.

48A Am. Jur. 2d, Labor and Labor Relations § 1461.

57 Am. Jur. 2d, Municipal, County, School, and State Tort Liability § 31.

61C Am. Jur. 2d, Pollution Control § 924.

67B Am. Jur. 2d, Salvage § 63.

72 Am. Jur. 2d, States, Territories, and Dependencies § 106.

77 Am. Jur. Trials, Representing Law Enforcement Officers in Personnel Disputes and Employment Litigation, p. 1.

108 Am. Jur. Proof of Facts 3d, Proof of Public School District Liability for Injuries or Damages to Student Resulting from Harassment of Student by Teacher or Other District Staff Member, p. 1.

CJS. C.J.S. Federal Courts §§ 124-126, 128-135, 158, 159.

Lawyers' Edition. Unconstitutional conduct by state or federal officer as affecting governmental immunity from suit in federal court--Supreme Court cases. 12 L. Ed. 2d 1110. Sovereign immunity of state as applicable to suit by United States. 93 L. Ed. 2d 1095.

Sovereign immunity of state as applicable to suit by United States. 93 L. Ed. 2d 1095.

Supreme Court's construction of Eleventh Amendment, restricting federal judicial power over suits against states. 106 L. Ed. 2d 660.

Congressional abrogation of states' immunity, under or as reflected in Federal Constitution's Eleventh Amendment, from suits in federal court--Supreme Court cases. 144 L. Ed. 2d 869.

Supreme Court's views concerning waiver by state of its sovereign immunity, under or as reflected in Federal Constitution's Eleventh Amendment, from suit in federal court. 152 L. Ed. 2d 1155.

Patent infringement under 35 USCS § 271--Supreme Court cases. 162 L. Ed. 2d 977.

Supreme Court's views as to validity, construction, and application of 28 USCS § 1367, concerning supplemental jurisdiction of federal courts. 162 L. Ed. 2d 1031.

Intervention or joinder of parties in proceeding in Supreme Court under its original jurisdiction. 175 L. Ed. 2d 1145.

ALR. Immunity of state from civil suits under Eleventh Amendment — Supreme Court cases. 187 A.L.R. Fed. 175.

Law Reviews. Meaningful Judicial Review: A Protection of Civil Rights Board of Trustees of the University of Alabama v. Garrett, 22 Miss. C. L. Rev. 101, Fall, 2002.

Recent Decision: Constitutional Law -- Eleventh Amendment -- Abrogation of States' Sovereign Immunity in Title II of the Americans with Disabilities Act Held a Valid Exercise of Congress's Fourteenth Amendment Section Five Power, 74 Miss. L.J. 253, Fall, 2004.

AMENDMENT XII

PRESIDENTIAL ELECTORS

The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in presence of the Senate and House of representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Editor's Note — This Amendment was affected by the Twentieth Amendment.

Proposal and Ratification. The Twelfth Amendment, set out in 2 Stat. 306, was proposed to the legislatures of the several States by the Eighth Congress, on December 9, 1803, and was declared in a proclamation of the Secretary of State, dated September 25, 1804, to have been ratified by the legislatures of three-fourths of the States. It supersedes Article 2, section 1, clause 3. Ratification by the States was accomplished as follows: North Carolina, December 22, 1803; Maryland, December 24, 1803; Kentucky, December 27, 1803; Ohio, between December 5 and December 30, 1803; Virginia, between December 20, 1803, and February 3, 1804; Pennsylvania, January 5, 1804; Vermont, January 30, 1804; New York, February 10, 1804; New Jersey, February 22, 1804; Rhode Island, between February 27 and March 12, 1804; South Carolina, May 15, 1804; Georgia, May 19, 1804; New Hampshire, June 15, 1804; and Tennessee, July 27, 1804. The States of Delaware and Connecticut rejected this amendment on January 18, 1804 and May 10, 1804, respectively. Massachusetts rejected this amendment on February 3, 1804 and subsequently ratified it in 1961.

Cross References — Termination of terms of office, see USCS Const Amend XX, § 1.

When Vice President is to act as President, see USCS Const Art II, § 1(5), Amend XX, § 3, Amend XXV.

JUDICIAL DECISIONS

1. In general.

The provisions of Code 1942 § 3107 which provide a method whereby the state political party conventions may select two slates of presidential electors, one slate pledged to support the nominee of the national political party, and one slate unpledged offends no provision of the United States Constitution, for this section expressly provides that nothing therein shall prohibit a slate of electors pledged to support the national party candidate from running on the same general election ballot, and Code 1942 § 3260 enables such a slate to get on the ballot upon the petition of 1,000 voters. Gray v. State of Mississippi, 233 F. Supp. 139 (N.D. Miss. 1964).

RESEARCH REFERENCES

ALR. Challenges to Presidential Electoral College and Electors. 20 A.L.R. Fed 2d 183.

Am Jur. 16A Am. Jur. 2d, Constitutional Law § 419.

26 Am. Jur. 2d, Elections § 207.

77 Am. Jur. 2d, United States § 17.

CJS. C.J.S. United States § 46.

Lawyers' Edition. Supreme Court's construction and application of federal constitutional provisions (Art II, § 1, cl 2, 4; Amendments 12, 23) concerning appointment of, or voting by, Presidential electors. 148 L. Ed. 2d 1087.

AMENDMENT XIII

SLAVERY ABOLISHED; ENFORCEMENT

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Proposal and Ratification. This amendment was proposed to the legislatures of the several States by the Thirty-eighth Congress, on January 31, 1865, and was declared, in a proclamation of the Secretary of State, dated December 18, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States. The States which ratified this amendment, and the dates of ratification, are: Illinois, Feb. 1, 1865; Rhode Island, Feb. 2, 1865; Michigan, Feb. 2, 1865; Maryland, Feb. 3, 1865; New York, Feb. 3, 1865; Pennsylvania, Feb. 3, 1865; West Virginia, Feb. 3, 1865; Missouri, Feb. 6, 1865; Maine, Feb. 7, 1865; Kansas, Feb. 7, 1865; Massachusetts, Feb. 7, 1865; Virginia, Feb. 9, 1865; Ohio, Feb. 10, 1865; Indiana, Feb. 13, 1865; Nevada, Feb. 16, 1865; Louisiana, Feb. 17, 1865; Minnesota, Feb. 23, 1865; Wisconsin, Feb. 24, 1865; Vermont, Mar. 9, 1865; Tennessee, Apr. 7, 1865; Arkansas, Apr. 14, 1865; Connecticut, May 4, 1865; New Hampshire, July 1, 1865; South Carolina, Nov. 13, 1865; Alabama, Dec. 2, 1865; North Carolina, Dec. 4, 1865, and Georgia, Dec. 6, 1865.

The Legislatures of the following States ratified this amendment after Dec. 6, 1865; Oregon, Dec. 8, 1865; California, Dec. 19, 1865; Florida, Dec. 28, 1865 (Florida again ratified on June 9, 1868, upon its adoption of a new constitution); Iowa, Jan. 15, 1866; New Jersey, Jan. 23, 1866; Texas, Feb. 18, 1870, Delaware, Feb. 12, 1901; Kentucky, Mar. 18, 1976, and Mississippi, Mar. 16, 1995.

JUDICIAL DECISIONS

1. In general.
2. Involuntary servitude.
3. Employment discrimination.
4. Educational institutions.

1. In general.

Mother's assertions were without merit that by attempting to force her into the foster care system with her newborn, and by threatening to withhold contact with the child, the Department of Human Services subjected her to unconstitutional involuntary servitude in violation Miss. Const. Art. III, § 15 and U.S. Const. Amend. XIII; in every case in which the supreme court found a condition of in voluntary servitude, the victim had no available choice but to work or be subject to legal sanction. In the Interest of C.B.Y., 936 So. 2d 974 (Miss. Ct. App. 2006).

A law relating to hiring a renter or laborer having a contract with another must be construed consistently with this provision. Hill v. Duckworth, 155 Miss. 484, 124 So. 641 (1929).

2. Involuntary servitude.

In a sale of marijuana case, defendant was not entitled to be set free based on the State's alleged improper conduct in threatening imprisonment if defendant did not work as an undercover informant, as the evidence showed that defendant had voluntarily agreed to become an informant and had never actually performed any act as an informant. Poole v. State, 862 So. 2d 1285 (Miss. Ct. App. 2004).

An agreement by one accused of selling marijuana to work as an undercover informant in return for a sentence recommendation by the district attorney of probation did not constitute a violation of the constitutional prohibition against involuntary servitude. Clark v. State, 389 So. 2d 485 (Miss. 1980).

Involuntary servitude is unconstitutionally imposed by a statute punishing a laborer, share-cropper or renter who, having made one contract in writing, enters into another without giving notice of the first. State v. Armstead, 103 Miss. 790, 60 So. 778 (1913), Am. Ann. Cas. 1915B, 495.

3. Employment discrimination.

An employment discrimination action alleging that plaintiff employee had been discharged because of his race did not state a claim under the Thirteenth Amendment where there was no allegation that defendant defendant employer had imposed conditions comparable to involuntary servitude upon its employees and where no such inference could be drawn from a charge of discriminatory conduct by the employer. Jordan v. Lewis Grocer Co., 467 F. Supp. 113 (N.D. Miss. 1979).

4. Educational institutions.

Actions on part of state officials conclusively demonstrated they were fulfilling their affirmative duty to disestablish former dejure segregated system of higher education by adopting race-neutral policies and procedures in areas of student administration and recruitment, faculty and staff hiring, and resource allocation; they had also undertaken substantial affirmative efforts in areas of other-race student and faculty-staff recruitment, funding, and facility allocation. Differentiations made by officials with respect to each of individual institutions in designation of institutional missions were reasonable and not motivated by discriminatory purpose. Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987), reversed 893 F.2d 732, rehearing granted 898 F.2d 1014, on rehearing 914 F.2d 676, cert. granted in part 111 S. Ct. 1579, 499 U.S. 958, 113 L. Ed. 2d 644, vacated 112 S. Ct. 2727, 505 U.S. 717, 120 L. Ed. 2d 575, on remand 970 F.2d 1378.

The restraint incident to the proper education and discipline of children is not within the constitutional prohibition of involuntary servitude. Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325 (1928).

RESEARCH REFERENCES

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 222, 419.

17 Am. Jur. 2d, Contempt § 209.

45 Am. Jur. 2d, Involuntary Servitude and Peonage §§ 8, 11.

67B Am. Jur. 2d, Schools § 287.

ALR. Court appointment of attorney to represent, without compensation, indigent in civil action. 52 A.L.R.4th 1063.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination. 4 A.L.R. Fed. 449.

CJS. C.J.S. Peonage §§ 3 to 5.

C.J.S. Slaves § 10.

Lawyers' Edition. Race discrimination. 3 L. Ed. 2d 1556, 6 L. Ed. 2d 1302, 10 L. Ed. 2d 1105, 15 L. Ed. 2d 990, 21 L. Ed. 2d 915.

Validity, construction, and application of federal civil rights statute dealing with property rights of citizens (42 USCS § 1982). 20 L Ed. 2d 1768.

What provisions of the Federal Constitution's Bill of Rights are applicable to the states. 23 L. Ed. 2d 985.

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under 42 USCS § 1983, or in Bivens action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

Racial discrimination in connection with transfer or ownership of real property or interest therein--Supreme Court cases. 154 L. Ed. 2d 1193.

AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an Executive or Judicial Officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Proposal and Ratification. This amendment was proposed to the Legislatures of the several States by the Thirty-ninth Congress, on June 13, 1866. On July 21, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the Legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore, Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated July 28, 1868, declaring that the proposed fourteenth amendment had been ratified by the Legislatures of thirty of the thirty-six States. The amendment was ratified by the State Legislatures on the following dates: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866; Oregon, Sept. 19, 1866; Vermont, Oct. 30, 1866; Ohio, Jan. 4, 1867; New York, Jan. 10, 1867; Kansas, Jan. 11, 1867; Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Michigan, Jan. 16, 1867; Minnesota, Jan. 16, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Indiana, Jan. 23, 1867; Missouri, Jan. 25, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 7, 1867; Pennsylvania, Feb. 12, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Mar. 16, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868. Subsequent to the proclamation the following States ratified this amendment: Virginia, Oct. 8, 1869; Mississippi, Jan. 17, 1870; Texas, Feb. 18, 1870; Delaware, Feb. 12, 1901; Maryland, Apr. 4, 1959; California, May 6, 1959; and Kentucky, Mar. 18, 1976.

The Fourteenth Amendment originally was rejected by Delaware, Georgia, Louisiana, North Carolina South Carolina, Texas and Virginia. However, the State Legislatures of the aforesaid States subsequently ratified the amendment on the dates set forth in the preceding paragraph. Kentucky and Maryland rejected this amendment on Jan. 10, 1867 and Mar. 23, 1867, respectively.

The States of New Jersey, Ohio and Oregon "withdrew" their consent to the ratification of this amendment on Mar. 24, 1868, Jan. 15, 1868, and Oct. 15, 1868, respectively.

The State of New Jersey expressed support for this amendment on Nov. 12, 1980.

Cross References — Regulation of commerce, generally, Constitution, Art. I, § 8, cl. 3.

Powers denied states, generally, Constitution, Art. I, § 10.

States as prohibited from passing bills of attainder, ex post facto laws, or laws impairing obligation of contracts, Constitution, Art. I, § 10, cl. 1.

Full faith and credit, generally, Constitution, Art. IV, § 1.

Citizens of each state as entitled to privileges and immunities of citizens of the several states, Constitution, Art. IV, § 2, cl. 1.

Freedom of religion, speech, and press; right to assemble or petition, Constitution, Amendment 1.

Right to be secure against unreasonable searches and seizures; warrants, Constitution, Amendment 4.

Presentment or indictment of grand jury; double jeopardy; self-incrimination; just compensation for private property taken for public use, Constitution, Amendment 5.

Right to speedy and public trial by impartial jury of state and district wherein crime is committed; right to be informed of nature and cause of accusation; right to compulsory process; right to assistance of counsel, Constitution, Amendment 6.

Right to jury trial in civil cases, generally, Constitution, Amendment 7.

Cruel and unusual punishment; excessive bail or fines, Constitution, Amendment 8.

Prohibition of slavery and involuntary servitude, generally, Constitution, Amendment 13.

Right to vote as not precludable on account of race or color, generally, Constitution, Amendment 15.

Right to vote as not precludable on account of sex, Constitution, Amendment 19.

JUDICIAL DECISIONS

1. Construction and application.
2. Constitutionality.
3. State action.
4. Private Action.
5. Remedy at law.
6. Police powers.
7. Property interest.
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9. Sovereign immunity.
10. Taking without compensation.
11. Validity of statutes, generally.
12. Validity of ordinance, generally.
13. Equal protection — In general.
14. — Classification, equal protection.
15. — Validity of statutes, equal protection.
16. Due process —In general.
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19. — Rights of indigent defendant, due process.
20. — Validity of statutes, due process.
21. Due process — In general.
22. Prosecutorial misconduct.
23. Freedom of speech and press.
24. Alcoholic beverages.
25. Antitrust laws.
26. Banks and banking.
27. Bidders for public contracts.
28. Bonds.
29. Bulk sales.
30. Children, generally.
31. Child custody and adoption.
32. Child support.
33. Civil rights.
34. Civil service.
35. Colleges and universities.
36. Contracts.
37. Corporations.
38. Creditor's remedies.
39. Criminal offenses.
40. Elections—In general.
41. —Apportionment and districts, elections.
42. — Bond elections.
43. Fish and game laws.
44. Fraternal organizations.
45. Insurance.
46. Laborers and materialmen.
47. Labor and employment.
48. Municipal or local services.
49. Nuisance.
50. Parolees and probationers.
51. Prisoners.
53. Professional regulation.
54. Public health.
55. Public improvements.
56. Railroads — In general.
57. — Abolishing fellow-servant rule, railroads.
58. — Creating presumption of negligence, railroads.
59. Roads and highways.
60. Schools and school districts — In general.
61. — Teacher employment and termination, schools and school districts.
62. — Student conduct and discipline, schools and school districts.
63. — Sports and athletic programs, schools and school districts.
64. — Prayer and meditation, schools and school districts.
65. Taxation —In general.
66. — Chain store tax.
67. — Income taxes.
68. — Inheritance taxes.
69. — Privilege taxes generally.
70. — Property taxes.
71. — Motor vehicle taxes.
72. — Gross receipts tax.
73. — Sales and use taxes.
74. — Tobacco taxation.
75. — Insurance companies, taxation.
76. — Railroads and other carriers, taxation.
77. — Tax sales and enforcement, taxation.
78. Unemployment compensation.
78. Warranty law.
79. Welfare laws.
80. Workers' compensation.
81. Zoning.
82. Racial discrimination — In general.
83. — Clubs and associations, racial discrimination.
84. — Segregation of facilities or discontinuance of services, racial discrimination.
85. — Jury list, racial discrimination.
86. — Jury selection, racial discrimination.

87. — Race-neutral exercise of peremptory challenges, impartial jury.
88. — Voting rights, racial discrimination.
89. — Election districts, racial discrimination.
90. — Schools and school districts, racial discrimination.
91. — Correctional facilities, racial discrimination.
92. Administrative proceedings.
93. Civil practice and procedure — In general.
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95. —Long arm jurisdiction, civil practice and procedure.
96. — Summons or legal appearance, civil practice and procedure.
97. — Service of process, civil practice and procedure.
98. — Jury trial, civil practice and procedure.
99. — Continuances, civil practice and procedure.
100. — Contempt, civil practice and procedure.
101. — Limitation of actions, civil practice and procedure.
102. — Damages, civil practice and procedure.
103. — Appeals, civil practice and procedure.
104. — Reversal on issue of damages only, civil practice and procedure.
105. Juvenile practice and procedure.
106. Domestic relations action, generally.
107. Probate practice and procedure.
108. Real property actions and proceedings.
109. Torts.
110. Criminal practice and procedure — In general.
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112. — Prejudice, criminal practice and procedure.
113. — Public trial, criminal practice and procedure.
114. — Admissions to private persons, criminal practice and procedure.
115. — Compensation of judiciary, etc., criminal practice and procedure.
116. — Arrest, criminal practice and procedure.
117. — Bail, criminal practice and procedure.
118. — Guilty plea, criminal practice and procedure.
119. — Plea bargaining, criminal practice and procedure.
120. — Venue, criminal practice and procedure.
121. — Medical testing and treatment, criminal practice and procedure.
122. — Mental examination and treatment, criminal practice and procedure.
123. — Identification of accused, criminal practice and procedure.
124. — Discovery, criminal practice and procedure.
125. — Jury selection, criminal practice and procedure.
126. — Jury practice, criminal practice and procedure.
127. — Conduct of trial, criminal practice and procedure.
128. — Judicial conduct, criminal practice and procedure.
129. — Confrontation of witnesses, criminal practice and procedure.
130. — Hearsay evidence, criminal practice and procedure.
131. — Juvenile witnesses, criminal practice and procedure.
132. — Expert witnesses, criminal practice and procedure.
133. — Arguments to jury, criminal practice and procedure.
134. — Instructions to jury, criminal practice and procedure.
135. — Lesser included offenses, criminal practice and procedure.
136. — Habitual offenders, criminal practice and procedure.
137. — Sentencing proceeding, criminal practice and procedure.
138. — Sentence and punishment, criminal practice and procedure.
139. Parole.
140. Parole hearing.
141. —Cruel and unusual punishment, criminal practice and procedure.
142. —Sale of seized contraband, criminal practice and procedure.
143. —Appellate review, criminal practice and procedure.

144. —Post-conviction proceedings, criminal practice and procedure.
145. Speedy trial—In general.
146. —Statutory rights, speedy trial.
147. —Time right attaches, speedy trial.
148. —Assertion of right, speedy trial.
149. —Duty of state, speedy trial.
150. —Tolling of time, speedy trial.
151. —Factors considered, speedy trial.
152. —Time of application for speedy trial.
153. —Prejudice to defendant, speedy trial.
154. —Delay attributable primarily or solely to defendant, speedy trial.
155. —Delay attributable primarily or solely to state, speedy trial.
155.5. —Delay attributable neither to state nor defendant, speedy trial.
156. —Crowded dockets, speedy trial.
157. —Plea negotiations, speedy trial.
158. —Reindictment, speedy trial.
159. —Presumptions and burden of proof, speedy trial.
160. —Sufficiency of evidence, speedy trial.
161. —Waiver of rights, speedy trial.
162. —Appellate review, speedy trial.
163. —Double jeopardy—In general.
164. —Nolle prosequi, double jeopardy.
165. —Conspiracy, double jeopardy.
166. —Same elements, double jeopardy.
167. —Separate and distinct crimes, double jeopardy.
168. —Mistrial generally, double jeopardy.
169. —Mistrial at request of defendant, double jeopardy.
170. —Capital sentencing procedure, double jeopardy.
171. —Appellate rights, double jeopardy.
172. Search and seizure—In general.
173. —Warrant, search and seizure.
174. —Consent, search and seizure.
175. —Probable cause, search and seizure.
176. —Informants, search and seizure.
177. —Motor vehicle, search and seizure.
177. —Blood and bodily fluids, search and seizure.
178. —Abandonment of property, search and seizure.
179. —Search incident to arrest.
180. —Self-incrimination — In general.
181. —Advisement of Miranda rights, self-incrimination.
182. —Continued interrogation after defendant's invocation of rights, self-incrimination.
183. —Admissions following unlawful arrest, self-incrimination.
184. —Capacity of defendant to make knowing waiver, self-incrimination.
185. —Refusal to sign waiver form, self-incrimination.
186. —Voluntary admissions, self-incrimination.
187. —Physical evidence generally, self-incrimination.
188. —Breathalyzer tests, self-incrimination.
189. —Fingerprints, self-incrimination.
190. —Hearsay evidence, self-incrimination.
191. —Comment upon exercise of right to remain silent, self-incrimination.
192. —Impeachment, self-incrimination.
193. —Arguments of counsel, self-incrimination.
194. Confessions—In general.
195. —Capacity of defendant, confessions.
196. —Pre-arrest statements, confessions.
197. —Delay in release or arraignment, confessions.
198. —Voluntariness, confessions.
199. —Inducements or threats, confessions.
200. —Burden of proof, confessions.
201. Right to counsel — In general.
202. —Probationers and parolees, right to counsel.
203. —Post-conviction proceedings, right to counsel.
204. —Pro se or hybrid representation, right to counsel.
205. —Joint representation, right to counsel.
206. —Conflicts of interest, right to counsel.
207. —Indigent defendant, right to counsel.
208. —Time right attaches, right to counsel.
209. —Invocation of right to counsel.
210. —Interrogation continued after counsel has been requested, right to counsel.

211. —Critical stage, right to counsel.
212. —Trial preparation time, right to counsel.
213. —Refusal to sign waiver form, right to counsel.
214. —Waiver, right to counsel.
215. —Sufficiency of evidence of denial of right to counsel.
216. Ineffective assistance of counsel—In general.
217. —Tests, ineffective assistance of counsel.
218. —Time to raise issue, ineffective assistance of counsel.
219. —Trial strategy, ineffective assistance of counsel.
220. —Suppression of evidence, ineffective assistance of counsel.
221. —Guilty plea, ineffective assistance of counsel.
222. Preparation for trial, ineffective assistance of counsel.
223. —Admission of evidence, ineffective assistance of counsel.
224. —Objections to evidence or instructions, ineffective assistance of counsel.
225. —Arguments to jury, ineffective assistance of counsel.
226. —Instructions to jury, ineffective assistance of counsel.
227. —Burden of proof, ineffective assistance of counsel.
228. —Presumptions, ineffective assistance of counsel.
229. —Penalty phase practice and procedure, ineffective assistance of counsel.
230. —Appellate representation, ineffective assistance of counsel.
231. —Totality of circumstances, ineffective assistance of counsel.
232. —Different outcome, ineffective assistance of counsel.
233. —Sufficiency of evidence, ineffective assistance of counsel.
234. Interrogation.
235. Environment and pollution.

1. Construction and application.

Trial court properly denied defendant's request to question a venireman for which the State exercised a peremptory strike, as the record indicated the trial court relied not only upon information provided by outside sources (information for the strike was provided to the State by both a criminal investigator with the district attorney's office and the sheriff's department), but also upon the demeanor of the venire person. Thus, the State's reason for the strike was race neutral; as to another peremptory strike, the State was properly allowed to call a witness who worked at the district attorney's office to explain the State's reasons for the strike, there were no signs of discrimination; the trial court also properly denied defendant's request to question that venireman. Avant v. State, 910 So. 2d 695 (Miss. Ct. App. 2005).

Although all of petitioner death row inmate's arguments were procedurally barred either by res judicata or for failure to raise the arguments earlier, and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. Jackson v. State, 860 So. 2d 653 (Miss. 2003).

Dismissal for failure to state a claim of a retired state employee's equal protection challenge to the Legislature's establishment of a supplemental retirement plan for legislators was proper; since the different treatment of retired legislators had a rational basis in the financial uncertainties they risked, the proper course in seeking a remedy was political, not judicial. Dillard v. Musgrove, 838 So. 2d 261 (Miss. 2003).

Section 47-5-112 [repealed] did not violate any "right" enjoyed by a county under the Fifth amendment to the United States Constitution or § 17 of the Mississippi Constitution, since political subdivisions of a state have no Fifth or Fourteenth Amendment protections against the state, and § 17 of the Mississippi Constitution applies only to "private" property. State v. Hinds County Bd. of Supvrs., 635 So. 2d 839 (Miss. 1994).

Due process requirement is directed to the protection of individuals and does not apply to frustrate state agencies in their relationships with each other; county board of supervisors has the power to allocate space in the courthouse, and it would be impractical to hamper them in the exercise of this duty by granting traditional due process safeguards to those affected by their decisions in such matters. Tally v. Board of Supervisors, 307 So. 2d 553 (Miss. 1975).

2. Constitutionality.

Defendant's capital murder conviction in violation of Miss. Code Ann. § 97-3-19(2)(a) was proper where the statute did not violate U.S. Const. amends. VIII and XIV. The fact that Mississippi's capital murder scheme made the death penalty a possible punishment for felony murder where there was no requirement to prove an intent to kill did not make the Mississippi capital murder statute unconstitutional. Davis v. State, 914 So. 2d 200 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 746 (Miss. 2005), writ of certiorari denied by 549 U.S. 856, 127 S. Ct. 133, 166 L. Ed. 2d 98, 2006 U.S. LEXIS 6743, 75 U.S.L.W. 3167 (2006).

3. State action.

In cases where no fundamental right is implicated, due process clause, of its own force, requires at minimum that state action be supportable by some legitimate goal and that means chosen for its achievement be rational, i.e., it is of no consequence that state's method is over-inclusive or under-inclusive, so long as its legitimate goal may be attained by means chosen. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

State officials did not create special danger by allowing and encouraging out-patient of state mental health center to reside at state owned apartments reserved for such patients, as required to recover under state-created danger theory, were that theory adopted for purposes of analyzing state's obligations under Fourteenth Amendment Due Process Clause. Randolph v. Cervantes, 130 F.3d 727 (5th Cir. Miss. 1997), cert. denied, 525 U.S. 822, 119 S. Ct. 65, 142 L. Ed. 2d 51 (1998).

Fifth Circuit has not adopted state-created danger theory for purposes of analyzing state's obligation under Fourteenth Amendment Due Process Clause. Randolph v. Cervantes, 130 F.3d 727 (5th Cir. Miss. 1997), cert. denied, 525 U.S. 822, 119 S. Ct. 65, 142 L. Ed. 2d 51 (1998).

No special relationship existed between state and resident of state owned apartments leased to patients enrolled in state mental health treatment center's transitional living program, as required to trigger duty in state, under Fourteenth Amendment Due Process Clause, to protect resident from self-inflicted injuries; although resident was ordered to obtain out-patient treatment and lease required her to attend various center's programs, she was released on her own recognizance, she voluntarily entered into lease that specifically enabled her to terminate lease upon thirty days written notice, center and caseworker never took affirmative step of restraining resident's liberty so that she was rendered unable to care for herself, and never held her against her will. Randolph v. Cervantes, 130 F.3d 727 (5th Cir. Miss. 1997), cert. denied, 525 U.S. 822, 119 S. Ct. 65, 142 L. Ed. 2d 51 (1998).

Due Process Clause of Fourteenth Amendment confers upon individual the right to be free of state-occasioned damage to her bodily integrity, not entitlement to governmental protection from injuries caused by non-state actors; thus, as general rule, state's failure to protect individual against private violence does not constitute violation of Due Process Clause. Randolph v. Cervantes, 130 F.3d 727 (5th Cir. Miss. 1997), cert. denied, 525 U.S. 822, 119 S. Ct. 65, 142 L. Ed. 2d 51 (1998).

The phrase "under color of state law" found in 42 USCA § 1983 reflects the "state action" requirement of the Fourteenth Amendment, and consequently both phrases expressed the same legal principal. Taylor v. St. Clair, 685 F.2d 982 (5th Cir. Miss. 1982), rehearing denied 692 F.2d 757.

Under this Amendment, neither the legislature nor any of its agencies can deprive a person of life, liberty, or property without due process of law. Efferson v.

Bourn, 10 La. App. 143, 120 So. 434 (1929).

4. Private Action.

A landlord's actions in locking up a tenant's possessions pursuant to § 89-7-51(2) did not violate due process requirements where the landlord failed to use the attachment for rent statutes; since § 89-7-51 did not authorize the landlord to use self-help to seize the tenant's property, there was no state action. Bender v. North Meridian Mobile Home Park, 636 So. 2d 385 (Miss. 1994), rehearing denied.

Nonjudicial foreclosure of deed of trust constitutes private action authorized by contract and does not come within scope of due process clause of Federal Constitution. Leininger v. Merchants & Farmers Bank, 481 So. 2d 1086 (Miss. 1986).

5. Remedy at law.

This provision of constitution and § 24, State Constitution of 1890, providing that all courts shall be open and every person shall have remedy by due course of law, do not require that courts shall be open to hear ecclesiastical controversies even though reputation of litigant may be affected by failure of court to set aside action of ecclesiastical body. Trapani v. State ex rel. Dist. Att'y Maples, 44 So. 2d 52 (Miss. 1950).

6. Police powers.

Provisions of the Fourteenth Amendment to the Federal Constitution do not operate as a limitation on the police power of the state to pass and force such laws as will inure to the health, morals and general welfare of the people. Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (Miss. 1954).

7. Property interest.

Business owner did not meet his burden of showing that he was being deprived of his property without due process of law because the criminal statutes, Miss. Code Ann. § 97-33-7 and Miss. Code Ann. § 97-33-17, were not too broad in their description of what caused a video game to be an illegal slot machine, and a person with ordinary intelligence would have little difficulty determining what exactly was prohibited; Mississippi did not extend a property right to illegal gambling machines, such that there were no due process rights violations under the Fourteenth Amendment and Miss. Const. Art. 3, § 14, and Miss. Code Ann. § 97-33-7(2) was not unconstitutionally vague. Trainer v. State, 930 So. 2d 373 (Miss. 2006).

Federal due process interests in property arise only from an independent source, such as state law statutory guarantees; if plaintiff fails to show property interest through independent source, due process considerations are not implicated. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

A restrictive covenant is an interest in real property for which due compensation must be paid upon a taking by the exercise of eminent domain powers. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284 (Miss. 1994).

8. Rules of court.

Where defendant was charged with and found guilty of felony driving under the influence of alcohol, the trial court did not err in denying defense counsel's motion to suppress evidence of defendant's blood alcohol results; the warrant authorizing the blood alcohol test was valid and thus, defendant's constitutional rights were not violated. Inter alia, the officer observed defendant's slurred speech and staggered walk, and he noted that defendant's breath smelled of alcohol and defendant actually admitted to having drunk four beers that morning and was unable to recite the alphabet. Dove v. State, 912 So. 2d 1091 (Miss. Ct. App. 2005).

Rule providing that case could not be heard or re-heard en banc unless majority of all judges in regular active service, including any who may be recused in particular case, vote that case be heard or re-heard en banc does not deny equal protection and due process. U.S. v. Nixon, 827 F. 2d 1019 (C.A. 5th Miss. 1987).

9. Sovereign immunity.

Sovereign immunity does not violate due process; such a violation requires the infringement of a liberty or property right and as the right to sue the State has been withheld by the Mississippi Legislature, the denial of the right to sue the State or other governmental entities and their employees under Miss. Code Ann. § 11-46-

9(1)(m) does not infringe upon any property right and does not violate due process. Carter v. Miss. Dep't of Corr., 860 So. 2d 1187 (Miss. 2003), writ of certiorari denied by 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399, 2004 U.S. LEXIS 2392, 72 U.S.L.W. 3614 (2004).

In 1990, Mississippi public officials had qualified immunity in civil action when they performed functions which were discretionary in nature; however, public official had no immunity to civil action for damages if his breach of legal duty caused injury and (1) that duty was ministerial in nature, or (2) that duty involved use of discretion and governmental actor greatly or substantially exceeded his authority and in course thereof caused harm, or (3) governmental actor commits intentional tort. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

Codification of principles of sovereign immunity did not violate due process clause of Fourteenth Amendment; there was no right to sue state or its political subdivisions at common law and, through codification, legislature continued to withhold such right, and thus there was no property right to sue state. Mohundro v. Alcorn County, 675 So. 2d 848 (Miss. 1996).

There is no "property right" to sue the State, since the Mississippi Legislature has withheld that right through its statutes, and therefore the principle of sovereign immunity, as enacted by the legislature in §§ 11-46-1 et seq., does not violate the due process clause of the Mississippi Constitution or the 14th Amendment to the United States Constitution. Robinson v. Stewart, 655 So. 2d 866 (Miss. 1995), rehearing denied.

The continuance of electrical power is a property interest worthy of due process protections. Thus, the defense of sovereign immunity was not available to a county where a homeowner alleged that he had been damaged when the county and an electrical utility discontinued his electrical power, since sovereign immunity is no defense where a violation of constitutional rights is concerned. Tucker v. Hinds County, 558 So. 2d 869 (Miss. 1990).

10. Taking without compensation.

In a dispute surrounding the enactment of a district ordinance regulating the disposal of wastewater, residents, who owned septic systems, alleged that the enactment of the ordinance amounted to a taking. A genuine issue of material fact existed; therefore, the chancellor erred in granting summary judgment on this issue, and the record was insufficiently developed to afford review. Green v. Cleary Water, Sewer & Fire Dist., 910 So. 2d 1022 (Miss. 2005), writ of certiorari denied by 547 U.S. 1098, 126 S. Ct. 1883, 164 L. Ed. 2d 568, 2006 U.S. LEXIS 3287, 74 U.S.L.W. 3598 (2006).

The 2 lakes artificially created by dredging for fill materials used in construction of Interstate Highway I-10 are not part of the State's tidelands public trust, and to strip these artificial tidelands from their record titleholders would constitute a taking within the Fifth and Fourteenth Amendments to the United States Constitution and within Mississippi Constitution Article 3, § 17, which taking would require just compensation from the State. Cinque Bambini Partnership v. State, 491 So. 2d 508 (Miss. 1986), certiorari granted 107 S.Ct. 1284, 479 U.S. 1084, 94 L.E.2d 142, dismissal denied, 481 U.S. 1003, 107 S. Ct. 1623, 95 L. Ed. 2d 197 (1987), aff'd, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988), reh'g denied, 486 U.S. 1018, 108 S. Ct. 1760, 100 L. Ed. 2d 221 (1988).

State law requiring landlords to allow cable television facilities on property constitutes "taking" of property compensable under Fifth and Fourteenth Amendments. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), on remand 58 N.Y.2d 143, 459 N.Y.S.2d 743, 446 N.E.2d 428.

11. Validity of statutes, generally.

Supposed "notice" to a special assistant attorney general is not sufficient under Miss. R. Civ. P. 24(d) or Miss. R. App. P. 44; therefore, a hospital was procedurally barred from bringing constitutional challenges to Miss. Code Ann. § 41-7-191(16) under Miss. Const. Art. 4, § 87, Miss. Const. Art. 3, § 14, and the Fourteenth Amendment where there was no notice to the Mississippi Attorney General. Oktibbeha County Hosp. v. Miss. State

Dep't of Health, 956 So. 2d 207 (Miss. 2007).

Miss. Code Ann. § 11-46-9(1)(m), which denies inmates the right to bring claims against the State or other governmental entities, does not violate the Equal Protection clause of the Fourteenth Amendment because there is a legitimate purpose in protecting governmental entities from claims brought by inmates. Carter v. Miss. Dep't of Corr., 860 So. 2d 1187 (Miss. 2003), writ of certiorari denied by 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399, 2004 U.S. LEXIS 2392, 72 U.S.L.W. 3614 (2004).

Evidence that State Attorney General's office encouraged check cashers' association to lobby Legislature for regulation of their industry supported determination that State did not give check cashing businesses adequate notice that usury could be prosecuted under State RICO Act and, thus, that RICO was unconstitutionally vague as applied to check cashers; contact between check cashers and Attorney General's office led check cashers to believe that their business was legal. State v. Roderick, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

Usury is not criminal under State law and, thus, application of State's RICO Act to usury would criminalize activity without fair notice and definite warning of prohibited conduct and would violate due process. State v. Roderick, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

Criminal statute prohibiting disorderly conduct by failing or refusing to promptly reply with or obey request or order of law enforcement officer was not unconstitutionally vague under due process clause as applied to arcade owner who carried baseball bat toward small crowd in his parking lot; regardless of whether owner was cursing or threatening officer, presence of baseball bat greatly enhanced possibility of grievous injury to police officers or others if disturbance escalated, case concerned officer's right to control conduct greatly increasing potential for sudden violence, and statute provided adequate notice that failure to obey order under the circumstances could result in arrest. Smith v. City of Picayune, 701 So. 2d 1101 (Miss. 1997).

The discretion granted the Secretary of State by § 29-15-7 was not unconstitutionally vague in violation of the Fourteenth Amendment to the United States Constitution and Article 3, § 14 of the Mississippi Constitution, since the procedure established by the tidelands legislation had a reasonable relation to the governmental purpose of establishing the boundary of public trust lands; the mere fact that the discretion granted the Secretary of State could be interpreted in different lights did not automatically render it vague. Secretary of State v. Wiesenberg, 633 So. 2d 983 (Miss. 1994).

The Child Residential Home Notification Act (§§ 43-16-1 et seq.) did not interfere with the constitutional religious freedom rights of a church congregation which operated a children's home. Fountain v. State ex rel. State Dep't of Health, 608 So. 2d 705 (Miss. 1992).

Section 97-3-7(2) is not unconstitutionally vague on the ground that it does not define the term "serious bodily harm," particularly when applied in a case involving brutal injuries; in more ambiguous cases, prosecutors and trial courts should refer to the definition of "serious bodily injury" set out in § 210.0 of the Model Penal Code. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

Section 99-15-17, which limits the compensation which an attorney may receive for the representation of an indigent, does not amount to an unconstitutional taking of an attorney's property, deprive indigent defendants of the effective assistance of counsel, or violate the equal protection clause. The statute allows for "reimbursement of actual expenses," which can be interpreted to include reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle the case; there is a rebuttable presumption that a court-appointed attorney's actual overhead within the statute is $25 per hour. This construction of § 99-15-17 will allow an attorney to receive $1,000 in profit plus his or her actual expenses. A rebuttal presumption arises that the actual cost contemplated by the statute is the average of $25 per hour; this figure may be subject to change when the 1988 survey conducted by the Mississippi State Bar is updated. The trial court is bound by the $25 per hour figure only when proof to the contrary is not forthcoming. The hours submitted by an attorney are subject to scrutiny under a reasonable and necessary standard. Specific expenses must be approved by the court before the attorney incurs the expenses. Court approved expenses include, but are not limited to, such items as the cost of an investigator, the cost of an expert witness, and a trip to interview witnesses. This interpretation of the statute avoids unconstitutionality on all grounds. Wilson v. State, 574 So. 2d 1338 (Miss. 1990).

Permanent injunction has been issued to prevent enforcement of § 39-5-63 because this act and others relating to sealing of files of state sovereignty commission, which had a clandestine purpose of perpetuating racial inequality, unconstitutionally infringe on black citizens' rights to free speech and association, personal privacy, and lawful search and seizure. American Civil Liberties Union of Miss., Inc. v. Mabus, 719 F. Supp. 1345 (S.D. Miss. 1989), vacated, 911 F.2d 1066 (5th Cir. 1990), reh'g denied, 919 F.2d 735 (5th Cir. 1990), on remand, 969 F. Supp. 403 (S.D. Miss. 1994).

Outdoor Advertising Act (Code 1972 §§ 49-23-1 through 49-23-29) does not violate Miss Const § 17 or US Const Amendment 14. Mississippi State Hwy. Comm'n v. Roberts Enters., Inc., 304 So. 2d 637, 81 A.L.R.3d 557 (Miss. 1974).

A provision of the Milk Products Sales Act for recovery by the state of the cost of investigation and of attorney's fees from violators of the Act is not unconstitutional in failing to provide for the recovery of such costs by a person who is charged with a violation of the Act but is the successful party in a suit. McCaffrey v. State ex rel. Patterson, 220 So. 2d 826 (Miss. 1969).

A state criminal statute prohibiting among other things, picketing in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any courthouses or other public buildings is not so broad, vague, indefinite, and lacking in definitely ascertainable standard as to be unconstitutional on its face, is not void for overbreadth, but is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society. Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968), reh'g denied, 391 U.S. 971, 88 S. Ct. 2029, 20 L. Ed. 2d 887 (1968).

A statute which prohibits signs, placards, advertisements, harangues, orations, loud language, parades, processions, assemblages, and partisan flags, banners, or devices on the grounds occupied by the State capitol buildings, office buildings and executive mansion infringe no constitutional limitation. Coppock v. Patterson, 272 F. Supp. 16 (S.D. Miss. 1967).

Sections of statutes which authorize certain state officials in their own judgment or discretion to suspend the terms of laws prohibiting certain activities on grounds occupied by capitol buildings, state office buildings, and the state executive mansion in favor of other activities of their choice are invalid and unconstitutional. Coppock v. Patterson, 272 F. Supp. 16 (S.D. Miss. 1967).

The Mississippi Criminal Syndicalism Act (Code 1942 §§ 2066.5-01 to 2066.5-06) on its face unconstitutionally abridges the freedoms of speech, press and assembly. Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967).

Code amendment of statute, declaring rents arising from demise of land by life tenant apportionable, by adding words "and a like apportionment shall be made in the case of annuities," held constitutional. New York Life Ins. Co. v. Majet, 178 Miss. 440, 173 So. 412 (1937).

An ordinance and statute prohibiting auction sales of jewelry between certain hours does not violate the requirements of due process and equal protection. Matheny v. Simmons, 165 Miss. 429, 139 So. 172 (1932).

A privileged communication statute is not unconstitutional although the effect of enforcing it is to prevent the defendant from introducing proof on the main point in issue. Yazoo & Miss. Valley Ry. v. Decker, 150 Miss. 621, 116 So. 287 (1928).

12. Validity of ordinance, generally.

A city's noise control ordinance, which prohibited "unnecessary or unusual noises... which either annoys, injures or endangers the comfort, repose, health or safety of others . . . ," violated the due process clauses of the federal and state constitutions because it failed to provide clear notice and sufficiently definite warning of the conduct that was prohibited. A statute is unconstitutionally vague when the standard of conduct it specifies is dependent upon the individualized sensitivity of each complainant, and whether a noise is "unnecessary," "unusual" or "annoying" depends upon the ear of the listener. Nichols v. City of Gulfport, 589 So. 2d 1280 (Miss. 1991).

The construction and maintenance of a warehouse for the reception of freight on railroad right-of-way, which had existed as such for more than 50 years prior to the adoption of an ordinance making most of such right-of-way a residential district, held to be a reasonable use of such right-of-way in facilitating the company's principal business and no more objectionable than the operation of trains, and to be authorized by provision of ordinance excepting existing nonconforming uses; and, accordingly, action of city authorities in denying such use of the property was an unreasonable and arbitrary interpretation of the ordinance which tended to deprive the company of its property and use thereof in violation of both Federal and State Constitutions. Jones v. City of Hattiesburg, 207 Miss. 491, 42 So. 2d 717 (1949).

13. Equal protection — In general.

Bar applicant's Equal Protection claim failed as a matter of law because not only did the applicant fail to allege purposeful discrimination, but the applicant also failed to offer any evidence that the Mississippi Board of Bar Admissions' rules and policies actually had a disproportionate impact. Griffin v. Miss. Bd. of Bar Admissions, 113 So. 3d 1257 (Miss. 2013).

Defendant argued that trial court erred in accepting state's allegedly race-neutral reasons for striking two potential jurors in defendant's trial possession of cocaine, marihuana, and firearms violations; however, the state's reason for striking one juror, which was that she had a past experience in the courtroom that exhibited a distaste for the prosecutor, was an acceptable, race-neutral reason, and as to the second potential juror that was removed, the state's given explanation—that the juror worked across the street from defendant's home—was also an acceptable, race-neutral reason. Chester v. State, 935 So. 2d 976 (Miss. 2006).

Requiring a landowner to pay for a sewer connection, after he refused a free connection, did not violate equal protection. The owner was notified that after a certain period of time, he would be responsible for the connection costs, and he was treated no differently than any other person who refused to allow the district to connect him for free. Croke v. Southgate Sewer Dist., 857 So. 2d 774 (Miss. 2003).

A real estate developer's equal protection rights were not violated when he was unable to obtain a building permit to construct apartments. Bryan v. City of Madison, 213 F.3d 267 (5th Cir. 2000), writ of certiorari denied by 531 U.S. 1145, 121 S. Ct. 1081, 148 L. Ed. 2d 957, 2001 U.S. LEXIS 1127, 69 U.S.L.W. 3552 (2001).

The court properly dismissed a judge's claim that a formal complaint against her was based on race-based discrimination in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and § 177A of the Mississippi Constitution because she had no factual basis for such claim; the fact that the Commission on Judicial Performance had recommended discipline against African-American judges in 24% of the total reported cases while they held less than 12% of the judgeship positions was insufficient proof of racial discrimination. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

An indigent's equal protection rights are violated when all potential defendants are offered one way to avoid prosecution and that one way is to pay a fine, and there is no determination as to an individual's ability to pay such a fine; subjecting one to a jail term merely because he cannot afford to pay a fine, due to no fault of his own, is unconstitutional. Moody v. State, 716 So. 2d 562 (Miss. 1998).

No equal protection claim is made unless plaintiff asserts that challenged government action classifies or distinguishes between two or more relevant groups. Smith v. Luther, 973 F. Supp. 601 (N.D. Miss. 1997).

Under equal protection clause, state may confer benefits on some people and not others, so long as the decision to do so is rational. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Rational basis test is used for equal protection claim without suspect criteria, requiring government to show that act or policy is a rational means of achieving a legitimate government interest. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

A statute authorizing the continued detention of a convicted person after expiration of the term for which he was sentenced, in default of payment by him of the costs of prosecution, does not deny the equal protection of the laws. Ex parte McInnis, 98 Miss. 773, 54 So. 260 (1911).

14. — Classification, equal protection.

That portion of a statute providing for the underground storage of natural gas exempting therefrom "a county having two judicial districts and being intersected by U.S. Highway 84 and Interstate 59" was a private and local exception suspending the operation of the general legislative act, did not amount to a classification germane to the subject matter of the legislation, and was, therefore, unconstitutional and void. Smith v. Transcontinental Gas Pipeline Corp., 310 So. 2d 281 (Miss. 1975).

The legislature has broad discretion as regards "classification," which is not obnoxious to the equal protection clause unless manifestly arbitrary. State ex rel. Rice v. Evans-Terry Co., 173 Miss. 526, 159 So. 658 (1935), aff'd, 296 U.S. 538, 56 S. Ct. 126, 80 L. Ed. 383 (1935), reh'g denied, 296 U.S. 663, 56 S. Ct. 177, 80 L. Ed. 473 (1936).

Legislature has wide discretion in classification of subjects of legislation, and law is general, not local, if classification has reasonable relation to purpose of Act and embraces all of stated class. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

A classification is constitutionally permissible whenever it proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. State ex rel. Jordan v. Gilmer Grocery Co., 156 Miss. 99, 125 So. 710 (1930).

15. — Validity of statutes, equal protection.

Miss. Code Ann. § 97-3-95 was held not to be unconstitutionally vague in a sexual battery case where the inmate admitted that he knew that raping an 11-year-old girl was wrong, but he did it anyway. Calhoun v. State, 849 So. 2d 892 (Miss. 2003).

City sign regulations which barred the placement of an exterior sign on a "single office building" did not violate the right to equal protection under the Fourteenth Amendment as the sign ordinance was applied evenly according to building classification. American Federated Gen. Agency, Inc. v. City of Ridgeland, 72 F. Supp. 2d 695 (S.D. Miss. 1999).

The jurisdictional provisions of the Youth Court Act in § 43-21-151 do not violate the rights to due process and equal protection under the United States Constitution and the Mississippi Constitution. Miller v. State, 740 So. 2d 858 (Miss. 1999).

One is entitled to due process of law before an administrative agency. McFadden v. Mississippi State Bd. of Medical Licensure, 735 So. 2d 145 (Miss. 1999).

Section 11-46-9(1)(d) does not violate either the fourteenth amendment of the U.S. Constitution or the Remedy Clause of the Mississippi Constitution, Article 3, Section 24, which guarantees that individuals shall have access to courts to redress their injuries. Jones v. Mississippi DOT, 744 So. 2d 256 (Miss. 1999).

The defendant city's refusal to rezone residential property to light commercial was not a denial of due process, notwithstanding that property across the street had already been commercially developed by various businesses, since the city's decision was "fairly debatable." Burdine v. City of Greenville, 755 So. 2d 1154 (Miss. Ct. App. 1999).

Section 21-15-6 is rationally related to the legitimate purpose of protecting the public treasury and, therefore, does not violate equal protection. Mosby v. Moore, 716 So. 2d 551 (Miss. 1998).

The notice provision of the § 11-46-11 does not violate the equal protection clause of the federal constitution, notwithstanding that it requires a person to give 90 days notice to the head of a government entity before suing that entity whereas this type of notice is not required when suing an individual. Vortice v. Fordice, 711 So. 2d 894 (Miss. 1998).

In determining whether law is invalid because of arbitrary or unreasonable classification, object thereof and question whether classification is reasonably expected to attain such object and germane thereto must be considered. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

If statute has reasonable relation to governmental purpose and is calculated to carry out some governmental design, courts cannot strike it down as being "arbitrary." Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

16. Due process —In general.

Chancellor did not err in granting partial summary judgment to the county in dismissing the property owner's claims under Miss. Code Ann. § 19-5-22 and 42 U.S.C.S. § 1983 because the initial requirement for either a procedural or substantive due process claim was proving the plaintiff had been deprived by the government of a liberty or property interest; otherwise, no right to due process could accrue. The property owner failed to prove injury to himself since it was the property owner's tenant, and not the property owner, who the lien was against. LaCroix v. Marshall County Bd. of Supervisors, 28 So. 3d 650 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 90 (Miss. 2010).

Trial court did not err in failing to appoint an independent medical examiner where defendant appeared to base his argument on a hope that another medical expert would find another cause of death rather than having any specific evidence to support his defense. Conley v. State, 948 So. 2d 462 (Miss. Ct. App. 2007).

Arrestee's due process rights were not violated by an assistant district attorney's act of providing incorrect identifying information to police that led to a wrongful arrest in a false pretenses case because the overall actions were objectively reasonable, even though a picture of the correct perpetrator and a discrepancy regarding birth dates was contained in a file; as such, the assistant district attorney was entitled to qualified immunity. Stewart v. DA, 923 So. 2d 1017 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 161 (Miss. 2006).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder where the sexual molestation was integrally related to her murder such that one could not coherently present the facts of her demise without reference to it, and it described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

State's loss of one of three bullets recovered from a crime scene did not violate defendant's due process rights, as (1) there was no evidence that the State knew of the exculpatory value of the bullet, which had not been tested; (2) defendant could have produced the gun he fired, which would have proven his innocence (if he was telling the truth), but he chose to dispose of it; and (3) there was no evidence that the State acted in bad faith. Murray v. State, 849 So. 2d 1281 (Miss. 2003).

A real estate developer's due process rights were not violated when he was unable to obtain a building permit to construct apartments since he had no property right to construct the apartments. Bryan v. City of Madison, 213 F.3d 267 (5th Cir. 2000), writ of certiorari denied by 531 U.S. 1145, 121 S. Ct. 1081, 148 L. Ed. 2d 957, 2001 U.S. LEXIS 1127, 69 U.S.L.W. 3552 (2001).

The general manager of a country club and property owners association had no right to due process in connection with the termination of his employment contract as the parties to the employment contract were private, rather than state, actors. Diamondhead Country Club & Prop.

Owners Ass'n v. Montjoy, 820 So. 2d 676 (Miss. Ct. App. 2000).

By its own terms, due process clause is not implicated unless individual's property or liberty interests are threatened. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

The Constitutions of the United States and Mississippi require that no person may be deprived of his property except by due process of law, and an administrative body must protect such rights before depriving a person of his property. Mississippi Tel. Corp. v. Mississippi Pub. Serv. Comm'n, 427 So. 2d 963 (Miss. 1983).

The phrase "due process of law" as used in the Constitution, has been construed as protecting substantive as well as procedural rights. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

The requirement of due process should not be so construed as to put state and Federal governments into a strait jacket and prevent them from adapting life to the continuous change in social and economic conditions. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

17. — Substantive due process.

Although all of petitioner death row inmate's arguments were procedurally barred either by res judicata or for failure to raise the arguments earlier, and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. Jackson v. State, 860 So. 2d 653 (Miss. 2003).

The plaintiff failed to state a cause of action based on the denial of the use and enjoyment of her property without due process of the law where she alleged that defendant highway patrol officers would drive to her house late at night and shine their headlights into her bedroom window, causing her to wake up and go to the front door, at which point they would drive away. Walker v. Henderson, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 19638 (N.D. Miss. Dec. 9, 1999), affirmed by 239 F.3d 366, 2000 U.S. App. LEXIS 30118 (5th Cir. Miss. 2000).

The Fourteenth Amendment's protection of the plaintiff's liberty interest was clearly established since his alleged nine month detention without proper due process protections was not objectively reasonable in light of the clearly established legal rules. Jones v. City of Jackson, 203 F.3d 875 (5th Cir. 2000).

Extent to which individual interest is property interest protected by due process clause must be determined by examination of source of interest; where interest is created by some state law or contract, limitations of interest are determined by examination of state law or contract. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

The phrase "due process of law" as employed in the constitutional guaranty is, as applied to substantive rights interpreted to mean that the government is without the right to deprive a person of life, liberty or property by an act that has no reasonable relation to any proper governmental purpose or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

18. — Procedural due process.

Out-of-state law firm was subject to personal jurisdiction in Mississippi with respect to claims of legal malpractice and related other issues because the firm committed a tort against a contractor within the State of Mississippi, it had sufficient minimum contacts within the State, and traditional notions of fair play and substantial justice were not offended because it purposefully availed itself of the benefits and protections of Mississippi law. Baker & McKenzie, LLP v. Evans, 123 So. 3d 387 (Miss. 2013).

Trial court abused its discretion and violated a juvenile defendant's due process rights when it refused to grant funds for the retention of a post-traumatic-stress-disorder (PTSD) expert to assist the juvenile in preparing his imperfect self-defense theory. The juvenile established a need for the expert testimony to assist the jury in understanding how PTSD might have affected the juvenile's thought process at the time he shot and killed his father. Evans v. State, 109 So. 3d 1044 (Miss. 2013).

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art. 3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064 (Miss. 2009).

Attorney had separate counsel to represent her interests at the hearing on contempt and sanctions and she did not object to the private nature of the hearing at the time it occurred and the court permitted her to call witnesses in her defense and to testify on her own behalf; the chancellor rescinded the portions of her contempt order sentencing the attorney to imprisonment; it was not a violation of the Due Process Clause of the Fourteenth Amendment to hold contempt hearings in youth court abuse proceedings out of the public eye under these circumstances. In re Spencer, — So. 2d —, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008), substituted opinion at, opinion withdrawn by 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss. 2008).

Rather than a denial of due process, the appellate court found that the student failed to take advantage of the process; the student was provided notice of and the opportunity to be heard at all of the hearings, including the one held on the summary judgment motion, and the student, for whatever reason, simply failed to attend the hearings. Harvey v. Stone County Sch. Dist., 982 So. 2d 463 (Miss. Ct. App. 2008).

In a sexual battery case, Miss. Code Ann. § 97-3-101(3) authorizes the maximum sentence to be life in prison, but does not require the jury to arrive at that verdict. Because the trial court acted within the limits of the statute and the statute did not require a finding by the jury, the procedure used by the trial court did not violate his due process rights because it did not fail to take into consideration certain factors in determining a proper sentence. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

Student expulsion was affirmed because the student was not denied due process when the school failed to provide a list of witnesses prior to his hearing, since the student was apprised of the charges against him, the student knew that the hearing before the district's discipline review committee was in relation to his suspension for possession and selling controlled substances and "threatening to have a snitch jumped on and beat up," and the student was allowed to have legal counsel present to aid his defense against the charges. C.B. v. Bd. of Trs. (In the Interest of T.B.), 931 So. 2d 634 (Miss. Ct. App. 2006).

Defendant was properly denied post-conviction relief after he pled guilty to armed robbery because the trial court did not err in not disqualifying the assistant district attorney on the ground that he had served as defendant's court-appointed attorney prior to serving as assistant district attorney. Confidential information was not used in the prosecution of the case, and defendant was not denied fair trial. Vandergriff v. State, 920 So. 2d 486 (Miss. Ct. App. 2006).

Claimant, a teacher, was not denied procedural due process in her claim for disability benefits. Neither the referral by a doctor to a clinic where he was a director, nor the unavailability of the author of a medical report for cross-examination at the hearing constituted a violation of due process. Pub. Emples. Ret. Sys. v. Stamps, 898 So. 2d 664 (Miss. 2005).

Defendant was properly denied post-conviction relief after defendant's probation was revoked; nowhere in the revocation hearing did defendant indicate that defendant did not have proper notice of the hearing or that defendant was not aware of the specific grounds for the revocation. Mathis v. State, 882 So. 2d 798 (Miss. Ct. App. 2004).

Before the appellate court was authorized to overturn a trial court's denial of a request for expert assistance at public expense, it had to find an abuse of discretion so egregious as to deny due process rendering a trial fundamentally unfair; while it was true that defendant denied signing the waiver of rights form, the overwhelming evidence was that he did, and under the circumstances, defendant did not offer concrete reasons to justify the provision of expert consultation at public expense, such that the denial of defendant's request for public assistance was not an abuse of discretion resulting in a denial of due process. Stewart v. State, 879 So. 2d 1089 (Miss. Ct. App. 2004).

Errors occurred when the administrative law judge acted contrary to his ruling at a hearing in which he found that an employee accident report was inadmissible because of discovery violations and when the Mississippi Workers' Compensation Commission chose to disregard the administrative hearing officer's decision as to the enforcement of its own procedural rules; however, the employee could not complain that the Commission's consideration of the employee accident report caused surprise or contend that trial by ambush would have occurred if the administrative hearing officer had allowed the report to be introduced at the hearing because she knew the document existed and what it contained. Thus, although the administrative law judge erred when he reopened the record to admit the employee accident report, the error did not rise to the level of denying the employee due process. Bermond v. Casino Magic, 874 So. 2d 480 (Miss. Ct. App. 2004).

In a contract dispute over the installation of a swimming pool, a trial court violated a contractor's procedural due process rights in basing its judgment on testimony that was neither taken under oath nor subject to cross-examination where the contractor consulted with a concrete finisher, and relied on the finisher's unsworn opinion. Pulliam v. Chandler, 872 So. 2d 752 (Miss. Ct. App. 2004).

In a rape and simple assault case, admission of photographs of doors showing what were purported to be new locks, already testified to by the victim, did not affect the fundamental fairness of the trial to the extent of constituting reversible error. Williams v. State, 868 So. 2d 346 (Miss. Ct. App. 2003).

Eyewitness testimony of multiple witnesses was sufficient evidence that homicide committed by defendant, an armed late arriver to a nightclub fight, was not self-defense, and defendant was not prejudiced by the failure of the original indictment to state a specific overt act by which the homicide was committed, particularly where the indictment was amended to read "by shooting with a pistol." Jones v. State, 856 So. 2d 285 (Miss. 2003).

Former employer that had consistently and arrogantly denied a former employee's right to an accounting of earnings allegedly in the employer's possession was not denied due process or its rights to a remedy when the chancery court ordered an equitable accounting without holding a hearing. Univ. Nursing Assocs., PLLC v. Phillips, 842 So. 2d 1270 (Miss. 2003).

State's loss of one of three bullets recovered from a crime scene did not violate defendant's due process rights, as (1) there was no evidence that the State knew of the exculpatory value of the bullet, which had not been tested; (2) defendant could have produced the gun he fired, which would have proven his innocence (if he was telling the truth), but he chose to dispose of it; and (3) there was no evidence that the State acted in bad faith. Murray v. State, 849 So. 2d 1281 (Miss. 2003).

There was no violation of due process where a physician examined the claimant and provided a diagnosis and recommendation, and then voted with his fellow members of the medical board in the initial administrative determination to deny the claimant's application for disability retirement benefits as such procedure was justifiable by weighing the importance of the claimant's interests against the risk of an erroneous decision and the costs of alternative procedures. Dean v. Public Emples. Retirement Sys., 797 So. 2d 830 (Miss. 2000).

In an action pertaining to an agreement whereby the defendant agreed to provide certain land features of a tour of Greece and round-trip airfare from New York to Athens, Greece for the plaintiff's travel group, personal jurisdiction could not be imposed under the requirements of due process because (1) the defendant was a New York corporation with its principal and only place of business in the United States in New York, (2) the defendant stated that none of its contracted travel arrangements with the the plaintiff involved travel to or from any location in Mississippi, (3) the defendant had no office or other presence in Mississippi, and (4) the defendant had never had a client from Mississippi other than the plaintiff. Christian Tours, Inc. v. Homeric Tours, Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 4594 (N.D. Miss. Mar. 30, 2000), affirmed by 239 F.3d 366, 2000 U.S. App. LEXIS 30099 (5th Cir. Miss. 2000).

The defendants were subject to personal jurisdiction in an action for breach of a contract regarding a book distribution agreement where the plaintiff alleged that the defendants maintained ongoing business relationships within Mississippi related to the present cause of action and, more specifically, that the defendants shipped hundreds of books into bookstores in Mississippi as well as maintain a sales force that visited Mississippi during each season to market the defendants' books. Genesis Press, Inc. v. Carol Publ. Group, Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 4595 (N.D. Miss. Mar. 30, 2000).

Personal jurisdiction over the defendants was not appropriate in an action for libel and slander where the plaintiff alleged that the defendants published the alleged defamatory information complained of on the Internet and allowed access and publication within Mississippi and among Mississippi residents, but the offending website was used solely as an advertising tool to be accessed via the Internet by individuals interested in aircraft conversion and the defendants did not have an office within Mississippi, did not have Mississippi employees or sales representatives, did not solicit business in Mississippi, and did not derive any income from Mississippi customers. Lofton v. Turbine Design, Inc., 100 F. Supp. 2d 404 (N.D. Miss. 2000).

A letter, which specifically mentioned the statute allegedly violated and had attached complaint letters of persons relating the factual predicate for the alleged violation, was enough to provide a veterinarian proper notice of the charges against him before the licensing board, especially where the record before the licensing board was left open for 30 days after taking the testimony of the complaining witnesses to allow the veterinarian an opportunity to respond to the charges against him. Mississippi Bd. of Veterinary Med. v. Geotes, 770 So. 2d 940 (Miss. 2000).

Although a school district's failure to follow the procedures set forth in the handbook were problematic, there was no violation of the student's due process rights under the Fourteenth Amendment and any possible due process violations were cured when the student received a second formal hearing. Covington County v. G.W., 767 So. 2d 187 (Miss. 2000).

A county was not denied due process when monetary sanctions were imposed against it in a criminal proceeding for discovery violations, notwithstanding that the board of supervisors did not receive notice on either the hearing on the motion for sanctions or on the hearing on the supplemental motion for sanctions; the county's board of supervisors was notified of the hearing on the District Attorney's motion to clarify and was represented by counsel at the hearing, the county made no motions in relation to being allowed to cross-examine the witnesses from the previous hearings, the county did not complain to the trial court regarding the notice that it received, and the county's attorney was given an opportunity to argue the county's position at the hearing. State v. Blenden, 748 So. 2d 77 (Miss. 1999).

The claimant was deprived of due process where two physicians sat in judgment, as members of the disability appeals committee, of their own conclusions that the claimant was not entitled to disability benefits under the Public Employees' Retirement System. Flowers v. Public Emples. Retirement Sys., 1999 Miss. App. LEXIS 219 (Miss. Ct. App. Apr. 20, 1999), opinion withdrawn by, substituted opinion at, remanded by 748 So. 2d 178, 1999 Miss. App. LEXIS 431 (Miss. Ct. App. 1999); Burns v. Public Emples. Retirement Sys., 1999 Miss. App. LEXIS 210 (Miss. Ct. App. Apr. 20, 1999), opinion withdrawn by, substituted opinion at, remanded by 748 So. 2d 181, 1999 Miss. App. LEXIS 430 (Miss. Ct. App. 1999); Dean v. Public Emples. Retirement Sys., — So. 2d —, 1999 Miss. App. LEXIS 209 (Miss. Ct. App. Apr. 20, 1999), affirmed by 797 So. 2d 830, 2000 Miss. LEXIS 258 (Miss. 2000).

A bill that created a sewer district and an ordinance that established a gray-water collection system and that regulated the use of public and private sewers and drains were not unconstitutional. Croke v. Lowndes County Bd. of Supvrs., 733 So. 2d 837 (Miss. 1999).

The defendant was not denied a fair trial when the trial court refused to quash the venire on the basis that, of the entire venire of 47 jurors selected for service, 16 had been exposed to pretrial publicity, where those 16 jurors were removed from the venire. Baldwin v. State, 732 So. 2d 236 (Miss. 1999).

The defendant in a murder prosecution was not denied due process when, after deliberating for two hours and 40 minutes, the jury sent a note to the court stating that they could reach a decision, the court instructed the jury to continue to deliberate, and the jury reached a verdict within 30 more minutes. Greenlee v. State, 725 So. 2d 816 (Miss. 1998).

The defendant was not denied due process by the court's denial of 2 challenges to jurors for cause where the jurors at issue were ultimately excused by peremptory challenge. Sewell v. State, 721 So. 2d 129 (Miss. 1998).

A citizens' group had no due process right to be involved in the policy decision made by a waste management authority on the location of a landfill since the authority was created as a public body corporate and politic constituting a political subdivision of the state and, therefore, the choice of a landfill location was an exclusive legislative function of the authority. Golden Triangle Regional Solid Waste Mgmt. Auth. v. Concerned Citizens Against Location of Landfill, 722 So. 2d 648 (Miss. 1998).

Procedural due process is positivist notion, designed to protect property interests, existing not by force of due process clause itself, but established by reference to some independent source, such as state law or contract. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

Due process clause provides mechanism by which person's property or liberty may not be permanently diminished or abrogated without first being accorded that procedural protection designed to ensure principled and even-handed examination of basis for any such deprivation. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within meaning of due process clause. Esco v. Blackmon, 692 So. 2d 74 (Miss. 1997).

Procedural due process questions are addressed in two steps: first step asks whether there exists liberty or property interest which has been interfered with by state, while second examines whether procedures attendant upon that deprivation were constitutionally sufficient. Esco v. Blackmon, 692 So. 2d 74 (Miss. 1997).

19. — Rights of indigent defendant, due process.

Where, as here, the State relies on expert testimony alone to connect the defendant to the offense charged, an independent defense expert is part of the raw materials integral to building an effective defense, and the trial judge deprives an indigent defendant of a fundamentally fair trial by refusing him funds to procure such an expert; the circuit court deprived defendant of a fair trial by denying him the assistance of a computer forensics expert when the State relied exclusively on its own expert to identify defendant as the perpetrator. Lowe v. State, 127 So. 3d 178 (Miss. 2013).

20. — Validity of statutes, due process.

Kidnapping statute, Miss. Code Ann. § 97-3-53, is not unconstitutionally vague because the use of other descriptive words in § 97-3-53, such as e.g. and inveigle, leave defendants well informed on the crimes of which they are accused. Perkins v. State, 863 So. 2d 47 (Miss. 2003).

Miss. Code Ann. § 97-41-16 was not unconstitutionally vague under the due process clause where an ordinary person reading the statute would have concluded that defendant's conduct in shooting his neighbor's dog was prohibited, and defendant was given sufficient notice that the conduct in which he engaged was proscribed. Hill v. State, 853 So. 2d 100 (Miss. 2003).

Miss. Code Ann. § 97-3-95 was held not to be unconstitutionally vague in a sexual battery case where the inmate admitted that he knew that raping an 11-year-old girl was wrong, but he did it anyway. Calhoun v. State, 849 So. 2d 892 (Miss. 2003).

The "self-help" provision contained in § 41-29-139(f) is unconstitutionally vague based on the due process clause of the Fourteenth Amendment to the United States Constitution; however, the clear intent of the legislature is that the statute is severable and, therefore, the remainder of the subsection is effective. Lewis v. State, 765 So. 2d 493 (Miss. 2000).

City sign regulations which barred the placement of an exterior sign on a "single office building" did not violate either the substantive or procedural right to due process under the Fourteenth Amendment. American Federated Gen. Agency, Inc. v. City of Ridgeland, 72 F. Supp. 2d 695 (S.D. Miss. 1999).

Municipal corporation cannot invoke due process protection of Fourteenth Amendment against its own state, and is prevented from attacking constitutionality of state legislation on grounds that its own rights have been impaired. City of Oxford v. Northeast Miss. Elec. Power Ass'n, 704 So. 2d 59 (Miss. 1997), reh'g denied, 702 So. 2d 133 (Miss. 1997).

When legislature extinguishes "right" via legislation that affects general class of people, legislative process provides all process that is due. City of Oxford v. Northeast Miss. Elec. Power Ass'n, 704 So. 2d 59 (Miss. 1997), reh'g denied, 702 So. 2d 133 (Miss. 1997).

All crimes used as bases for State RICO Act prosecution are outlined in RICO Act, and there are cross-references between RICO and underlying criminal statutes, and, therefore, application of RICO to usury would violate due process for lack of notice that usury is prosecutable offense; no reference to RICO is made in usury statute or other statutes on interest and finance charges, and person of ordinary intelligence would not be given fair warning that usury is prosecutable offense. State v. Roderick, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

State RICO Act does not set out level of intent required for prosecution of usury as collection of unlawful debt and, thus, RICO would omit essential element of crime and would be too vague to satisfy due process; although RICO is general intent crime that takes its intent from underlying crimes, level of intent for usury is defined by civil statute and would not apply to criminal prosecution. State v. Roderick, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

Statute which either forbids or requires doing of act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. State v. Roderick, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

Statute attacked on grounds of vagueness is void under due process clause if individuals of common intelligence must necessarily guess at meaning and differ as to its application. Smith v. City of Picayune, 701 So. 2d 1101 (Miss. 1997).

The Business Sign Statute (§ 15-3-7) does not violate the Due Process Clause of the Fourteenth Amendment and was not repealed by implication in § 75-10-103, but was virtually continued by express direction in § 75-2-326(3)(a); furniture and office equipment "used or acquired" in the business was subject to execution and sale under the statute. In re Bruneau's, Inc., 642 F.2d 146 (5th Cir. Miss. 1981), rehearing denied 647 F.2d 1121.

Absent evidence of invidious discrimination as to a class or a person, state

Sunday closing laws did not violate due process clause of state and federal constitutions. Genesco, Inc. v. J. C. Penney Co., 313 So. 2d 20 (Miss. 1975).

In order for a statute to survive when confronted with due process of law, it must not appear to be arbitrary or capricious, but must have a reasonable relation to a legitimate end. Saucier v. Life & Cas. Ins. Co., 189 Miss. 693, 198 So. 625 (1940).

It is presumed that legislature in making discriminations in classifications in statutes bases them on adequate grounds. Russell Inv. Corp. v. Russell, 182 Miss. 385, 182 So. 102 (1938).

Code amendment of statute, declaring rents arising from demise of land by life tenant apportionable, by adding words "and a like apportionment shall be made in the case of annuities," held not violative of constitutional guaranty of due process of law in application to annuities arising under disability provisions of life policies as requiring apportionment notwithstanding express contract to contrary, where disability provisions contained no express stipulation that benefits should be apportionable. New York Life Ins. Co. v. Majet, 178 Miss. 440, 173 So. 412 (1937).

21. Due process — In general.

In a trial for possession of cocaine, where the State subjected three witnesses to improper questioning which suggested a sexual relationship between defendant and her co-defendant, but the court instructed the jury to disregard the testimony, and there was no request for a mistrial, judging from the record as a whole, the particular questions by the prosecution did not establish a level of prejudice which would have merited granting a mistrial. Brown v. State, 37 So. 3d 1205 (Miss. Ct. App. 2009), writ of certiorari denied by 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510, 79 U.S.L.W. 3269 (U.S. 2010).

In a trial for cocaine possession, the State's references to the fact that defendant's codefendant had pleaded guilty did not constitute plain error so as to merit reversal, where the codefendant was convicted of possession of different parcels of cocaine found in a different location, and where it was only after defense counsel asked an officer on cross-examination whether he asked the codefendant to change his statement and put any of the illegal drugs on defendant that the State brought into evidence the codefendant's guilty plea. Brown v. State, 37 So. 3d 1205 (Miss. Ct. App. 2009), writ of certiorari denied by 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510, 79 U.S.L.W. 3269 (U.S. 2010).

22. Prosecutorial misconduct.

Defendant complained that a prosecutor's closing argument statement inferred that he might have been sexually inappropriate with the victim in the past; however, looking at the record of the entire trial, the actions of the State did not constitute prosecutorial misconduct and, even if the statements were erroneous, the error was unquestionably harmless. Lastly, the jury was properly instructed that comments from the attorneys were not to be regarded as evidence when the jury deliberated on its verdict; thus, defendant was not denied his constitutional right to a fundamentally fair trial because of prosecutorial misconduct at closing argument. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

23. Freedom of speech and press.

City of Vicksburg Ordinance 93-37 § 1014(A)(1)(g), banning nude and seminude dancing in adult entertainment establishments, violated the First Amendment. Steverson v. City of Vicksburg, 900 F. Supp. 1 (S.D. Miss. 1994).

City of Vicksburg Ordinance 93-37, prohibiting adult entertainment establishments from locating within 1000 feet of churches and certain other facilities, provided reasonable alternative avenues of communication for the purposes of determining whether it violated the First Amendment, where the city planning commissioner submitted evidence of 93 potential sites for such establishments, including at least 69 with road access.

Steverson v. City of Vicksburg, 900 F. Supp. 1 (S.D. Miss. 1994).

Pursuant to § 67-3-65, a city was authorized to enact ordinances regulating light wine and beer on adult entertainment premises without showing any secondary effects or showing that such establishments were conducive to criminal behavior; accordingly, any artistic or communicative value that might attach to topless dancing was overridden by the city's exercise of its broad powers arising under the Twenty First Amendment, and the city's prohibition of light wine and beer in a lounge featuring topless dancing was constitutionally permissible. Steverson v. City of Vicksburg, 900 F. Supp. 1 (S.D. Miss. 1994).

Three doctors who worked in the emergency room of a hospital whose administrator was the center of controversy within the hospital and county government generally for his institution of efficiency programs that rankled the medical staff, including the three doctors, became vortex public figures when they issued an ultimatum to the board of trustees of the hospital even if they had not theretofore been public figures; accordingly, the three doctors had no right of recovery for libel absent proof by clear and convincing evidence of actual malice on the part of a newspaper writer who criticized them sharply in an editorial. Ferguson v. Watkins, 448 So. 2d 271 (Miss. 1984).

The section of an ordinance enacted by the City of Tupelo authorizing the Chief of Police to deny a parade permit if he finds that "the conduct of the parade will probably cause injury to persons or property or provoke disorderly conduct or create a disturbance" is unconstitutional in that the term "disorderly conduct" is overbroad because it could be applied to deny permits to those seeking to engage in protected activity; the provision constitutes a prior restraint upon free speech because it is not narrowly drawn to relate to health, safety, and welfare interests, but instead sanctions the denial of a permit on the basis of the so-called "hecklers' veto"; "the provision is unconstitutionally vague as well since it contains no instructions directing the Chief of Police in the formulation of his opinion. The phrase "will probably cause injury" is constitutionally invalid since the term "probably" is simply too vague and indefinite and does not control adequately the discretion of the Chief in his determination of when to grant or deny a permit; the phrase "create a disturbance" is unconstitutional because it vests in the licensing authority the unbridled discretion to determine when, in his opinion, it is likely that criminal conduct will occur in the future. Limiting parade activity to the hours before 6:00 pm is invalid where it remains light in Tupelo well past that hour most of the year and the protection of citizens at night is not thereby jeopardized by a later time limit. The requirements of the ordinance that all paraders be unarmed, line up no more than four abreast, in the right-hand lane of the street, in units of 100 or fewer, with 15-foot intervals between units is unconstitutional in that it violates the Equal Protection Clause since such requirements do not apply to students or governmental agencies. The requirement that marchers act in an "orderly manner" is unconstitutionally overbroad; and the restriction on the use of "profanity" is void since profanity is protected speech unless it falls into such unprotected categories as obscenity or fighting words. Exemption of governmental agencies and students participating in educational activities from the licensing and regulatory requirements constitutes a violation of the Equal Protection Clause since such discrimination is based upon the content of the speech involved. That section of the ordinance which requires that the applicant for a permit demonstrate the noise level of sound equipment to be used is not facially unconstitutional since all it requires is a demonstration of the noise level; however, in the course of applying this statute, if the Chief of Police denies permits because of the demonstrated noise level of the equipment, the applicant will be able to make the argument offered herein that the section fails to give narrow and objective standards to be used in the determination. The blanket prohibition against sound equipment in areas zoned for residential purposes is overbroad because the ordinance presumes incompatibility based on an area's merely being zoned residential and oftentimes areas zoned residential include structures other than homes, such as churches and schools, which are not incompatible with the use of sound equipment. The restriction of the operation of sound equipment at any location between the hours of 6:00 pm and 9:00 am is invalid where, although nighttime restrictions might be justifiable, the hour at which the restriction commences is not necessarily at night. Beckerman v. City of Tupelo, 664 F.2d 502 (5th Cir. 1981).

The superintendent's refusal to approve employment of a teacher because of her husband's controversial activities violated her right of free association guaranteed by the First and Fourteenth Amendments. Randle v. Indianola Mun. Separate Sch. Dist., 373 F. Supp. 766 (N.D. Miss. 1974).

The Mississippi Criminal Syndicalisin Act (Code 1942 §§ 2066.5-01 to 2066.5-06) on its face unconstitutionally abridges the freedoms of speech, press and assembly. Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967).

Federal courts have pre-empted the field of libel and slander and have established that hatred, ill will, enmity, intent to harm or negligence are insufficient to establish malice toward those involved in discussions on public issues. Reaves v. Foster, 200 So. 2d 453 (Miss. 1967).

A public school principal, plaintiff in an action for damages for libel, cannot recover unless he shows malice by proving that the defendant when he published the words in question either knew that they were false, or published them in reckless disregard of whether true or not. Reaves v. Foster, 200 So. 2d 453 (Miss. 1967).

By instructing the jury that if the defendant was arrested for public protest against racial segregation he could not be found guilty, the instruction constituted recognition that could not be applied to restrict defendant's constitutional right so to protest, and that it could not be used to infringe upon the constitutional right of any person to speak freely within the framework of the law. McLaurin v. Greenville, 187 So. 2d 854 (Miss. 1966), cert. denied, 385 U.S. 1011, 17 L. Ed. 2d 548, 87 S. Ct. 704 (1967).

Right to peacefully picket grows out of right of freedom of speech and freedom of press. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

A statute which, as construed by the state courts, makes it a criminal offense to communicate to others views and opinions respecting governmental policies, and prophesies concerning the state of this and other nations, irrespective of whether the communication was with an evil or sinister purpose or advocated or incited subversive action against the nation or state, or threatened any clear and present danger to American institutions or government, denies the liberty guaranteed by the Fourteenth Amendment. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d 663 (1943).

A statute making it a criminal offense to indoctrinate any creed, theory, or any set of principles which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag of the United States or of the state, denies the liberty guaranteed by the Fourteenth Amendment. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d 663 (1943).

Freedom of speech includes the freedom to speak unwisdom or even heresy. Tisdale v. State, 4 So. 2d 356 (Miss. 1941).

The right to speak may never include the right to destroy or impair thereby that which protects such rights, for the right to speak is inseparable from the duty to respect. Tisdale v. State, 4 So. 2d 356 (Miss. 1941).

The citizens may reasonably criticize even the court or the judges thereof; and the exercise of this right may embarrass the particular functionary; it may depreciate the effectiveness of our legal procedure, yet so long as it pulls up short of the obstruction or impedance of the machinery of the court, then in motion, it is free from interference by the court. Tisdale v. State, 4 So. 2d 356 (Miss. 1941).

The right of the court to enforce respect for itself begins where the right of the citizen to speak ends, and the line of demarcation is fixed at that point where that which is spoken or published is calculated to obstruct the functioning processes of the court or to impede or impair the efficiency of its machinery then in motion, it being immaterial whether the obstruction is by force, insult, persuasion or disobedience, whether committed by act or word, or whether it affects the judge, the grand or petit jury, or any person made part of its personnel by its process. Tisdale v. State, 4 So. 2d 356 (Miss. 1941).

A newspaper editorial published after the court had adjourned, commenting on the circuit judge's crusade against liquor selling and gambling, that the results thereof were exceedingly small, that any belief that crime was rampant in the community was unfounded, expressing confidence in the local law enforcement officers, and the like, did not constitute constructive contempt. Tisdale v. State, 4 So. 2d 356 (Miss. 1941).

24. Alcoholic beverages.

Section 67-3-13 did not deny a defendant, who was convicted of possession of beer in a "dry" part of the county while traveling home after having legally purchased the beer in a "wet" city, equal protection under the laws and constitution of the State of Mississippi and the Constitution of the United States, nor was there any invasion of the defendant's constitutional right of privacy. Dantzler v. State, 542 So. 2d 906 (Miss. 1989).

Zoning ordinance prohibiting sale of beer within 500 feet of public school constitutes valid and reasonable exercise of police power of city because only minimal showing of rationality is necessary to enable liquor zoning ordinance to withstand constitutional attack. Davidson v. City of Clinton, 826 F.2d 1430 (5th Cir. 1987).

Holders of license for sale of beer and light wines were not entitled to challenge constitutionality of statute authorizing election to determine whether sales of beer and light wine should be abolished on ground that failure of statute to provide for notice constituted denial of due process in absence of showing that if statute had provided for notice that result would have been different as to holders of license. Adams v. Board of Supvrs., 177 Miss. 403, 170 So. 684 (1936).

A statute making the keeper of a liquor nuisance liable to a penalty enforceable by attachment and seizure does not violate the Fourteenth Amendment where it provides for a hearing. State ex rel. Att'y Gen. v. Marshall, 100 Miss. 626, 56 So. 792, Am. Ann. Cas. 1914A,434 (1911).

25. Antitrust laws.

A statute forbidding certain unlawful combinations of cotton ginners in restraint of trade does not violate the equal protection clause merely because it is not all-embracing. State ex rel. Jordan v. Gilmer Grocery Co., 156 Miss. 99, 125 So. 710 (1930).

A classification of cotton ginners in a statute forbidding certain unlawful combinations of cotton ginners in restraint of trade between those operating gins in one place and those operating gins in two or more places, is not unreasonable or arbitrary. State ex rel. Jordan v. Gilmer Grocery Co., 156 Miss. 99, 125 So. 710 (1930).

Prohibiting corporations from owning or operating any cotton gin where such corporations are interested in the manufacture of cottonseed oil or cottonseed meal does not deny the equal protection of the laws to corporations merely because the act applies to corporations alone and not to natural persons, where before the law was enacted cotton gins had been operated in Mississippi by individuals as well as corporations but there is no showing that oil mills and cotton gins were both operated by an individual or groups of individuals, since it may well be assumed that because of the larger capital required, and perhaps for other reasons, oil mills and cotton gins may have been operated in the state only by corporations, and that for this reason the restraint of the evil aimed at could be accomplished by controlling corporations only. Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 42 S. Ct. 42, 66 L. Ed. 166 (1921).

The Mississippi Antitrust Act (Laws 1900, c 88) does not, as applied to an agreement between retail lumber dealers not to deal with any manufacturer or wholesale dealer who sells direct to consumers in localities in which such retailer dealers conduct their business and keep a sufficient stock to meet demands, and to inform each of any such sale, unconstitutionally abridges the right of freedom of contract. Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 30 S. Ct. 535, 54 L. Ed. 826 (1910).

26. Banks and banking.

Code 1942 § 4109, excepting banks from the prohibition against corporations holding or purchasing public lands, and permitting such holding or purchase by banks owning tax forfeited lands or holding a mortgage or deed of trust thereon at the time of the sale to the state for taxes, is not violative of the Fourteenth Amendment as denying equal protection of the law, but is reasonable, not arbitrary, not class legislation, and is germane to the purposes to be reasonably accomplished thereby. State v. Bellinger, 202 Miss. 675, 32 So. 2d 286 (1947).

A statute empowering the court of chancery to reopen a closed bank in accordance with a plan proposed by at least three-fourths of the creditors and recommended by the superintendent of banks, if the court is satisfied after hearing the plan is feasible and just, and the superintendent is satisfied that the bank is solvent and can repay its depositors, providing that assenting and nonassenting creditors shall be required to accept payment in accordance with the terms of the approved plan, and that the superintendent shall have no power to diminish to the prejudice of creditors any assets otherwise available for payment, does not annul property rights in violation of the 14th Amendment. Doty v. Love, 295 U.S. 64, 55 S. Ct. 558, 79 L. Ed. 1303, 96 A.L.R. 1438 (1935).

A state bank guaranty statute authorizing the issuance of non-interest bearing guaranty certificates does not deprive a prior holder of an interest-bearing guaranty certificate of deposit under prior statutes of any vested right. Love v. Mangum, 160 Miss. 590, 135 So. 223 (1931).

A statute requiring banks having tax collections on deposit to pay interest thereon, under penalty, does not deny the equal protection of the laws. Bank of Indianola v. Miller, 147 Miss. 695, 112 So. 877 (1927), error dismissed, 276 U.S. 605, 48 S. Ct. 337, 72 L. Ed. 727 (1928).

The imposition of a penalty for failure of banks having tax collections on deposit to pay interest thereon is not a denial of due process because it is out of proportion to the unpaid interest. Bank of Indianola v. Miller, 147 Miss. 695, 112 So. 877 (1927), error dismissed, 276 U.S. 605, 48 S. Ct. 337, 72 L. Ed. 727 (1928).

27. Bidders for public contracts.

The appellant was not denied equal protection when a county board of supervisors suspended contract negotiations with the appellant regarding a privately owned waste facility and called for a special election since, at the time the board accepted the petition and declared an election, the appellant was still in the negotiating stage and no formal contract had been entered into by the parties and, therefore, no liberty interest existed. Miss. Waste of Hancock County, Inc. v. Bd. of Supervisors, 818 So. 2d 326 (Miss. 2001).

Nonresidents not having a printing plant in the state, may constitutionally be excluded from bidding for contracts for public printing. Dixon-Paul Printing Co. v. Board of Pub. Contracts, 117 Miss. 83, 77 So. 908 (1918).

A statute prohibiting counties from letting contracts for blank books, printed forms, stationery, or office supplies, to any bidder who is not a bona fide resident of the state actually engaged in the printing business or who, being a nonresident has not a printing plant in the state, does not violate the due process, equal protection and privileges and immunities of citizens clause of the Fourteenth Amendment. State ex rel. Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 76 So. 258, Am. Ann. Cas. 1918B,953 (1917).

28. Bonds.

Provision of private work bond statute (§ 85-7-191) establishing that only one cause of action is permitted against surety's bond is inapplicable to party who has not been given constitutionally adequate notice of suit. American Fid. Fire Ins. Co. v. Athens Stove Works, Inc., 481 So. 2d 292 (Miss. 1985).

The contention of property owners in a new area annexed to a city that they are thereby denied due process and equal protection of the laws because their property will be subject to taxation to pay general obligation bonds issued by the city before the annexation ordinance was passed is not supported either by reason or by authority. Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), motion overruled, 253 Miss. 812, 180 So. 2d 154 (1965), motion overruled, 253 Miss. 812, 180 So. 2d 641 (1965), appeal dismissed, 383 U.S. 574, 86 S. Ct. 1077, 16 L. Ed. 2d 106 (1966).

The statutes which provide for the issuance of county road bonds for construction or reconstruction of roads and bridges in cases of emergency without a submission of the question to a vote of the electors is not unconstitutional. Hutchins v. Board of Supvrs., 227 Miss. 766, 87 So. 2d 54 (1956).

A statute validating all road districts theretofore organized and legalizing their bonds, validates bonds theretofore issued, without regard to whether the law under which this district was organized violated the due process clause. Memphis & C. Ry. v. Bullen, 154 Miss. 536, 121 So. 826 (1928), aff'd, 282 U.S. 241, 51 S. Ct. 108, 75 L. Ed. 315 (1931).

29. Bulk sales.

The Mississippi bulk sales law of 1908 is not repugnant to the due process or equal protection clauses. Moore Dry Goods Co. v. Rowe, 97 Miss. 775, 53 So. 626 (1910), error overruled 99 Miss. 30, 54 So. 659.

30. Children, generally.

Law does not allow parental rights to supercede the best interests of the child; parental rights, as is true of other fundamental rights, can be forfeited or taken away, and the law does recognize some means by which third parties can overcome the law's preference of natural parents. Davis v. Vaughn, 126 So. 3d 33 (Miss. 2013).

While due process clause of Federal Constitution proscribes governmental interference with individual liberties such as parent's right to determine his child's care, custody, and management, right is not absolute. Martin v. Coop, 693 So. 2d 912 (Miss. 1997).

To extent defendant referee of Youth Court failed to have record made of Youth Court proceeding for allegations of abuse of child, allegedly abused child was deprived of property interest to which she was entitled under Fourteenth Amendment. In addition, while referee did appoint guardian ad litem for child, he failed to insure that her interests were adequately protected by such representation and thus effectively denied her right to present evidence on her behalf, as established under state law, and deprived her of a protected property interest in that respect as well. Appropriate remedy for violation was to enjoin referee to hold new hearing in full conformity with statutory and constitutional requirements. Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare, 780 F. Supp. 1104 (S.D. Miss. 1991), aff'd in part, rev'd on other grounds, 995 F.2d 595 (5th Cir. 1993), reh'g denied, 3 F.3d 441 (5th Cir. 1993), cert. denied, 510 U.S. 1214, 114 S. Ct. 1336, 127 L. Ed. 2d 684 (1994).

There can be no per se prohibition against a child witness testifying in a divorce case between the child's parents. The right of every litigant to compulsory process for witnesses and to have them testify under oath in court is so well grounded that any per se exclusion simply because he or she is a child of the divorcing parents risks offending the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Mississippi Constitution Art 3, § 14. Before excluding the testimony of a child witness of tender years in a divorce proceeding, the chancellor, at a minimum, should follow the procedure required by Crownover v Crownover (1975) 33 Ill App 3d 327, 337 NE2d 56. Although no parent can be precluded from having a child of the marriage testify in a divorce proceeding simply because of that fact, parents in a divorce proceeding should, if at all possible, refrain from calling children of their marriage as witnesses, and counsel should advise their clients against doing so except in the most exigent cases. Jethrow v. Jethrow, 571 So. 2d 270 (Miss. 1990).

A state may, consistent with the equal protection clause of the Fourteenth Amendment, withhold from the father of an illegitimate child the privilege of vetoing the adoption of that child in those cases where the father has never come forward to participate in the rearing of the child; a state may provide by statute that fathers who have abandoned their children have no right to block adoption of those children. Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L. Ed. 2d 297 (1979), on remand 47 N.Y.2d 880, 41 N.Y.S.2d 74, 392 N.E.2d 1257.

A juvenile has the same right to due process as an adult has under the Constitution of the United States and the state Bill of Rights. Dependents of Roberts v. Holiday Parks, 221 So. 2d 92 (Miss. 1969).

31. Child custody and adoption.

Chancery court did not err in granting custody to the father after finding that he had not deserted his child because there was no legally compelling reason to alter or abandon the established standards for rebuttal of the natural-parent presumption; requiring the maternal grandmother first to demonstrate that the father had relinquished his right to parent his child was not an undue burden. Davis v. Vaughn, 126 So. 3d 33 (Miss. 2013).

The chancellor's grant of sole legal and physical custody to the grandparents did not constitute the termination of a fundamental right of the mother that would merit an in forma pauperis appeal because the loss of custody alone did not sever the parent-child bond. The chancellor endeavored to maintain the parent-child bond between the mother and her son by granting liberal visitation rights. Schonewitz v. Pack, 913 So. 2d 416 (Miss. Ct. App. 2005).

In proceedings to determine custody of 2 children who had been adjudicated neglected and placed in foster care, the children were denied their due process right of representation where they were without the services of an attorney or guardian ad litem for approximately 3 years during the course of the custody proceedings. Copiah Dep't of Human Servs. v. Linda D., 658 So. 2d 1378 (1995).

Continuing and exclusive nature of chancery court jurisdiction over issues involving child custody precludes Youth Court from having exclusive original jurisdiction over proceedings involving abused child, where allegations of abuse are raised in context of custody proceeding over which chancery court already exercises jurisdiction. Rights of minor child suspected of having been sexually abused by parent, to access to court, were not impaired by chancery court's considering allegations of sexual abuse without referring matter to Youth Court; minor was not deprived of procedural due process by alleged failure of officials to follow investigatory procedure set forth in Mississippi Youth Court Law, because of assertion of jurisdiction by chancery court; and even though Youth Court statute provided for exercise of exclusive jurisdiction over child abuse cases, such provision was not applicable to charges raised in case over which chancery court had already assumed and was exercising jurisdiction. Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare, 780 F. Supp. 1104 (S.D. Miss. 1991), aff'd in part, rev'd on other grounds, 995 F.2d 595 (5th Cir. 1993), reh'g denied, 3 F.3d 441 (5th Cir. 1993), cert. denied, 510 U.S. 1214, 114 S. Ct. 1336, 127 L. Ed. 2d 684 (1994).

A mother whose parental rights were terminated under § 93-15-103(3)(e) on the ground that there was a "substantial erosion of the relationship" between her and 2 of her children failed to show that the statute was unconstitutionally vague, since a person of common intelligence should have been aware that the result of a factual situation such as the mother's could well be the termination of one's parental rights. If the statute were more specific, then the cases in which it could be applied could be so drastically reduced as to make it ineffective in protecting the children it was meant to serve. Vance v. Lincoln County Dep't of Pub. Welfare ex rel. Weathers, 582 So. 2d 414 (Miss. 1991).

In an action regarding parental rights termination, the Mississippi Supreme Court would consider the question regarding the constitutionality of the standard of proof required by § 93-15-109 authorizing parental rights termination, despite the fact that such question was not raised at the trial level, where the basic issue involved the rights and destiny of small children. Natural Father v. United Methodist Children's Home, 418 So. 2d 807 (Miss. 1982).

Where a licensing agreement between foster parents and the State of Mississippi, as well as state statutes, made clear the foster parent-child relationship was merely a temporary one, there could have been no expectation or entitlement on the part of the foster parents that a child placed in their home would remain permanently in their home. Therefore, the foster parents had no liberty or property interests which were entitled due process protection under the Fifth or Fourteenth Amendments. Crim v. Harrison, 552 F. Supp. 37 (N.D. Miss. 1982).

That portion of § 93-15-109 allowing parental rights termination to be decreed based upon a preponderance of the evidence standard is deficient and unconstitutional, since the standard of proof in an action for termination of parental rights must be "clear and convincing" in accordance with a mandate of the United States Supreme Court. Natural Father v. United Methodist Children's Home, 418 So. 2d 807 (Miss. 1982).

Where in an adoption proceeding, the rights of the prospective adoptive child's natural parents were not involved, the admission in evidence of the welfare department report, which contained hearsay material consisting of a statement by a welfare worker of conversation and correspondence with others, did not deprive the prospective adoptive parents of due process of the law. Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852 (1958).

So long as a procedure for adoption affects all persons alike who are similarly situated and is suitable to accomplish the paramount purpose for which adoption laws are enacted, which is the promotion of the welfare of the children, and is not unjust, unreasonable or arbitrary, it will be adjudged due process. Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852 (1958).

The granting of authority to the court in adoption proceedings to make investigations limited to matters concerning whether the child is a proper subject for adoption, the petitioners are suitable parents for the child, the adoption is in the best interest of the child, and any other facts or circumstances which might be material to the proposed adoption, is not unreasonable, and such procedures do not constitute a denial of due process of law. Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852 (1958).

Any proceeding to adopt a child without making presumptive father party to proceeding is invalid under due process provision of state and federal constitutions. Davis v. Davis, 37 So. 2d 735 (Miss. 1948).

A child's parents cannot, under the due process of law provisions of the state and Federal constitutions, be deprived by a judicial proceeding of their parental rights without notice thereof, and an opportunity to be heard in opposition thereto. Britt v. Allred, 199 Miss. 786, 25 So. 2d 711 (1946).

Due process requires hearing before the court on notice to parent before depriving parent of custody of child. Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238 (1931).

32. Child support.

While it could not be said that the increase in child support was unreasonable, it was not requested by the father; the chancellor committed error in sua sponte granting an increase in the amount of child support the mother would be required to pay. Purviance v. Burgess, 980 So. 2d 308 (Miss. Ct. App. 2007).

Order finding a father in contempt for his nonpayment of child support was upheld where he had received a valid summons for the initial hearing; because the father appeared at the hearing at which he was found in contempt, any defects in the issuance of the notice by the court administrator were waived, and the father was not deprived of notice or the ability to prepare. Bailey v. Fischer, 946 So. 2d 404 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 54 (Miss. 2007).

A father in a child support proceeding would be required to assert his claim of privilege against self-incrimination on a question by question basis with respect to questions regarding his tax returns, and would be required to tender sufficient information to allow the court to make an informed decision concerning the claim of privilege. Harrell v. Duncan, 593 So. 2d 1 (Miss. 1991).

A defendant father was not subject to in personam jurisdiction in Mississippi consistent with due process in an action brought by the mother regarding his child support obligations, even though an Ohio court had transferred jurisdiction over the case to a chancery court in Mississippi in accordance with the Uniform Child Custody Jurisdiction Act and the child resided in Mississippi, where the father had no minimum contacts with Mississippi and had not purposely availed himself of the benefits of the laws of the state of Mississippi or derived personal or commercial benefit from his child's presence in Mississippi. Carpenter v. Allen, 540 So. 2d 1334 (Miss. 1989).

33. Civil rights.

An action brought against a municipality for alleged deprivation of civil rights under the Fourteenth Amendment to the United States Constitution failed to state a claim, where there was no allegation that municipal policy, custom, edict or act inflicted injury. Saunders v. Mullins, 412 So. 2d 245 (Miss. 1982).

34. Civil service.

Employee's property interest in his employment was created by Miss. Code Ann. §§ 21-31-21 and 21-31-23, which provided that civil service employees could not be discharged except for cause; where he was given written notification of termination and told of the actions he could take if he disagreed with the termination, the employee was given the minimum due process required. Burleson v. Hancock County Sheriff's Dep't Civ. Serv. Comm'n, 872 So. 2d 43 (Miss. Ct. App. 2003), writ of certiorari denied by 873 So. 2d 1032, 2004 Miss. LEXIS 467 (Miss. 2004), writ of certiorari denied by 543 U.S. 1038, 125 S. Ct. 809, 160 L. Ed. 2d 605, 2004 U.S. LEXIS 8252, 73 U.S.L.W. 3354 (2004).

Section 25-11-103(f), which provides that the spouse of a member of the Public Employees' Retirement System shall be the member's beneficiary unless the member has designated another beneficiary subsequent to the date of marriage, does not constitute an unreasonable impairment of an employee's contractual right contrary to the United States and Mississippi Constitutions because it provides protection to those whose spouse fails to redesignate due to "inadvertence" while allowing an employee to make a "conscious decision" to redesignate if he or she does not want his or her spouse to receive the death benefits. Dillon v. Beal, 632 So. 2d 1298 (Miss. 1994).

Ordinance requiring all municipal employees qualified under the rules and regulations of the civil service commission to maintain their domicil and principal place of business within the corporate limits of the city during the period of their employment did not infringe their constitutional right to intrastate travel, and the city was not required to justify the ordinance under the compelling interest standard which must be met upon interference with a right to travel interstate; dismissal of the action affirmed. Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975).

35. Colleges and universities.

Two former students at a state university medical center were not denied their substantive due process rights when they were dismissed for failing to pass an examination after three attempts since, even assuming that the students had a constitutional right to continued enrollment free from arbitrary state action, they were not treated in a manner completely devoid of reasoned academic decision making. University of State Med. Ctr. v. Hughes, 765 So. 2d 528 (Miss. 2000).

An otherwise qualified male applicant to the nursing school of the Mississippi University for Women who had been rejected on the ground that the institution did not admit men was denied his constitutional right to equal protection of the law by the university's discriminatory policy of exclusion based upon gender, particularly where the state did not maintain a corresponding all-male school of nursing. Hogan v. Mississippi Univ. for Women, 646 F.2d 1116 (5th Cir. 1991), reh'g denied 653 F.2d 222, cert. granted 454 U.S. 962, 102 S. Ct. 501, 70 L. Ed. 2d 377, aff'd 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090.

A college professor did not have a property interest protected by due process in his grant of tenure. Section 37-101-15 empowers the Board of Trustees of institutions of Higher Learning to terminate professors' employment contracts at any time for malfeasance, inefficiency or contumacious conduct but does not create a legitimate expectation of continued employment for a non-tenured employee. If a state regulation conditions receipt of a benefit upon a discretionary decision of an administrator, there is no legitimate claim of entitlement to the benefit. Wicks v. Mississippi Valley State Univ., 536 So. 2d 20 (Miss. 1988).

In an action against an out-of-state university, where the university engaged in a wide variety of educational functions in the recruitment and education of students from Mississippi, where the university encouraged alumni activities in Mississippi, including the solicitation and acceptance of funds from alumni and friends in the state, and where the university participated in a variety of intercollegiate competitions and activities with private and public institutions of Mississippi, such activities were sufficient, under the Fourteenth Amendment, to render it constitutionally amenable to an adjudication of its rights in funds held by the clerk of the Chancery Court. Administrators of Tulane Educ. Fund v. Cooley, 462 So. 2d 696 (Miss. 1984), cert. denied, 474 U.S. 820, 106 S. Ct. 70, 88 L. Ed. 2d 57 (1985).

A non-tenured university employee has no property interest under the Fourteenth Amendment in continued government employment, and is therefore not entitled to constitutionally-mandated due process procedural safeguards upon the failure of the university to renew his contract at the end of its term. Montgomery v. Boshears, 698 F.2d 739 (5th Cir. 1983).

State-supported university's policy excluding males from enrolling in university's professional nursing school violates equal protection clause of Fourteenth Amendment. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982).

A university professor who was denied tenure and whose contract was not renewed had not acquired a protectable property interest in an expectation of future employment, even though he had been employed at the university for a term of years, where there was no evidence showing the existence of any understanding or implied promise of continued employment; nor did the nonrenewal of his contract amount to a denial of a liberty interest by stigmatizing his reputation in foreclosing other employment opportunities where there was no showing that defendant university officials had committed any overt act to impugn plaintiffs character, to damage his reputation in the community, or prevent him from finding other employment. Citron v. Jackson State Univ., 456 F. Supp. 3 (S.D. Miss. 1977), aff'd 577 F.2d 1132.

The trial court erred in enjoining the National Collegiate Athletic Association from interfering with the right of a Mississippi State University football player to engage in intercollegiate athletics, on the asserted basis of the Association's violation of procedural due process in suspending the player, since the privilege of engaging in interscholastic athletics is not a "property" right. National Collegiate Athletic Ass'n v. Gillard, 352 So. 2d 1072 (Miss. 1977).

"One man, one vote" rule has no relevancy to selection of trustees of Mississippi public junior colleges, as such selection is appointive rather than elective. Oaks v. Board of Trustees, 385 F. Supp. 392 (N.D. Miss. 1974).

Classification of all aliens as nonresidents for purpose of charging tuition and fees at state-supported institutions of higher education violates both the equal protection and due process clauses of the Fourteenth Amendment. Jagnandan v. Giles, 379 F. Supp. 1178 (N.D. Miss. 1974), aff'd in part, 538 F.2d 1166 (5th Cir. 1976), cert. denied, 432 U.S. 910, 97 S. Ct. 2959, 53 L. Ed. 2d 1083 (1977).

The state may require a member of a chapter of a Greek letter fraternity of another college to renounce his allegiance to and affiliation with such fraternity before admitting him as a student into any educational institution supported by the state without denying due process of law or his privileges as a citizen of the United States under the 14th Amendment, although the fraternity to which he belongs may be a moral and self-disciplinary force. Waugh v. Board of Trustees, 237 U.S. 589, 35 S. Ct. 720, 59 L. Ed. 1131 (1915).

A statute prohibiting the existence of Greek letter fraternities and similar societies in the state educational institutions and depriving members in them of the right to receive or compete for diplomas, class honors, prizes or medals, does not deny the equal protection of the laws because it is construed by the officials charged with its enforcement not to apply to "students already entered and to conduct themselves with decorum as expected of a southern gentleman." Waugh v. Board of Trustees, 237 U.S. 589, 35 S. Ct. 720, 59 L. Ed. 1131 (1915).

A statute forbidding the existence of Greek-letter fraternities in educational institutions supported by public funds, and making renunciation of membership a condition of the receipt by members of such fraternities of class honors, diplomas, or distinctions is constitutional. Board of Trustees v. Waugh, 105 Miss. 623, 62 So. 827, Am. Ann. Cas. 1916E,522 (1913), aff'd, 237 U.S. 589, 35 S. Ct. 720, 59 L. Ed. 1131 (1915).

36. Contracts.

Service provider had no protected interest in the renewal or award of the fiscal agent contract of the Mississippi Division of Medicaid; the unilateral expectation of the contract was not sufficient to support a 42 U.S.C.S. § 1983 cause of action for a due process violation under U.S. Const. amend. XIV. Elec. Data Sys. Corp. v. Miss. Div. of Medicaid, 853 So. 2d 1192 (Miss. 2003).

"Liberty" within constitutional provisions against depriving any person thereof except by due process of law includes "liberty of contract" which, in turn, means freedom from arbitrary or unreasonable restraint. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

The right to make contracts is one of the rights guaranteed by the Fourteenth Amendment. Jones v. Mississippi Farms Co., 116 Miss. 295, 76 So. 880 (1917).

37. Corporations.

In a personal injury action against a domesticated foreign corporation, the trial court's exercise of jurisdiction as an attachment in chancery on the grounds of nonresidency did not violate the corporation's right to equal protection of the laws, even though it claimed to be a domestic corporation for all intents and purposes, where the state of incorporation retained, inter alia, supervisory power and the final authority to dissolve the corporation. Louisville & N.R. Co. v. Hasty, 360 So. 2d 925 (Miss. 1978), cert. denied, 439 U.S. 1003, 99 S. Ct. 614, 58 L. Ed. 2d 679 (1978).

Code 1942 § 5310.1 which gives to the Governor unlimited discretion to deny a charter to a non-profit corporation is unconstitutional for the reason that it confers an absolute and arbitrary discretion on a state official to grant or deny a right or privilege. Smith v. Ladner, 288 F. Supp. 66 (S.D. Miss. 1968).

38. Creditor's remedies.

Section 91-7-145's time bar did not apply, and therefore a creditor's untimely claim against an estate was valid, where the creditor was "reasonably ascertainable" and the administratrix merely published notice rather than providing notice by mail as mandated by the statute; furthermore, the insufficient notice violated the due process clause of the Fourteenth Amendment to the United States Constitution. Vann v. Mississippi Neurosurgery, P.A., 635 So. 2d 1389 (Miss. 1994).

The role played by the chancery court in probate proceedings under § 91-7-143, upon which the statute's time bar is dependent in that notice may be published only after an affidavit is filed with the clerk of court, is sufficient state action to implicate the due process clause of the Fourteenth Amendment to the United States Constitution; thus, a creditor's claim against an estate was a property interest protected by the Fourteenth Amendment. Vann v. Mississippi Neurosurgery, P.A., 635 So. 2d 1389 (Miss. 1994).

A circuit judge erred in deciding not to subject a creditor to liability for injurious violation of a debtor's constitutional right to due process when the creditor seized the debtor's mobile home and furnishings in compliance with § 11-37-101 simply because the creditor acted pursuant to a presumptively valid (albeit unconstitutional) statute. An evidentiary hearing should have been held, and the creditor's claim of good faith reliance on a presumptively valid statute should have been considered in light of not only the sincerity in its belief that it was acting properly, but the reasonableness of its actions under the circumstances. A fact finder conceivably could have concluded that the creditor's "surprise" seizure of the debtor's mobile home and its contents was, under the circumstances, unreasonable and compensable, where the record indicated no explanation for the necessity of an immediate seizure. Underwood v. Foremost Fin. Servs. Corp., 563 So. 2d 1387 (Miss. 1990).

39. Criminal offenses.

Miss. Code Ann. § 97-3-95 was held not to be unconstitutionally vague in a sexual battery case where the inmate admitted that he knew that raping an 11-year-old girl was wrong, but he did it anyway. Calhoun v. State, 849 So. 2d 892 (Miss. 2003).

Section 97-29-59, which prohibits unnatural intercourse, is not unconstitutionally vague and overbroad. McDonald v. Department of Human Servs., 636 So. 2d 391 (Miss. 1994), reh'g denied.

The statutory law providing for prehearing suspension of a driver's license when the driver refuses to submit to a breathalyzer test is not violative of minimum due process requirements. Lavinghouse v. Mississippi Hwy. Safety Patrol, 620 So. 2d 971 (Miss. 1993).

Section 97-3-65, which proscribes rape of a female, does not deny equal protection of the laws to males since it is the victim, not the accused, who must be a female under the wording of this statute; furthermore, by the very nature of the crime, it is the male who must make the criminal assault in order to sustain a conviction and there is no rational basis to attempt to apply this statute to any female accused. Dixon v. State, 519 So. 2d 1226 (Miss. 1988).

The sexual battery statute, § 97-3-95, is not void for vagueness and in violation of due process of law since, the statute as it applies to a male adult who allegedly stuck his finger into the vagina of a 10-year-old girl, gives prior notice to a person of ordinary intelligence that the defendant's alleged conduct is forbidden, and there are no indications that the statute encourages erratic arrest and convictions. Roberson v. State, 501 So. 2d 398 (Miss. 1987).

Due process clause of Fourteenth Amendment does not confer fundamental right on homosexuals to engage in consensual sodomy, even in privacy of home. Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), reh'g denied 478 U.S. 1039, 107 S. Ct. 29, 92 L. Ed. 2d 779, on remand 804 F.2d 622.

Criminal statute (§ 97-3-65) which establishes crime for rape of female but fails to make it crime to rape male does not violate equal protection clause. Harper v. State, 463 So. 2d 1036 (Miss. 1985).

The fondling statute is void since it discriminates against males and denies them equal protection of the law. Tatro v. State, 372 So. 2d 283 (Miss. 1979).

Statutory phrase "crime against nature" was not so vague as to violate the due process clause since long use of the phrase to characterize various offenses including sodomy, for which the defendant was indicted, gave fair warning of conduct proscribed. State v. Mays, 329 So. 2d 65 (Miss. 1976), cert. denied, 429 U.S. 864, 97 S. Ct. 170, 50 L. Ed. 2d 143 (1976).

The fact that Code 1942 § 6846 eliminated criminal intent as an element of the offense of possession of marijuana did not render it unconstitutional as violative of the due process clause. Wright v. Edwards, 343 F. Supp. 792 (N.D. Miss. 1972), aff'd 470 F.2d 980, reh'g denied 472 F.2d 1405.

The fact that Code 1942 § 2412.5 applies only to persons of the male sex and is inapplicable to females is not, therefore, violative of the equal protection clause of the Fourteenth Amendment; for there exists rational justification for singling out males for punishment under Code 1942 § 2412.5 and the statute does not rest upon an invidious and patently arbitrary sex classification, but has a sound basis in the physical and psychological difference between men and women. Mississippi State Hwy. Comm'n v. Cook, 270 So. 2d 695 (Miss. 1972).

The Legislature has the power to render the possession or ownership of slot machines and pay-off tables unlawful, and to provide for their seizure and destruction, without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States. Clark v. Holden, 191 Miss. 7, 2 So. 2d 570 (1941).

A statute penalizing the sale of obscene books or papers defines the offense with sufficient certainty, and therefore is not violative of the due process clause. Williams v. State, 130 Miss. 827, 94 So. 882 (1923).

40. Elections—In general.

Due process rights of defeated candidate in state legislative election, who voluntarily appeared at initial hearing in connection with election contest, thus submitting himself to jurisdiction of legislature, and received hearing before legislature, were not violated in connection with challenge; candidate had been given notice of date of his appearance before legislative committee and had sufficient time to conduct discovery, and had chance to respond to statements by candidate who had been elected. Esco v. Blackmon, 692 So. 2d 74 (Miss. 1997).

When individual files proper qualifying papers and pays requisite filing fee to become candidate for public office, neither state nor, in case of primary election, political party, may arbitrarily or capriciously deprive him or her of place on ballot; process afforded to individual by party executive committee exceeded his minimum due, where individual informally learned that committee was meeting, had acted negatively upon his candidacy, went uninvited to meeting, and there appeared before committee and fully presented his views and case. Meeks v. Tallahatchie County, 513 So. 2d 563 (Miss. 1987).

Access to candidacy is not fundamental right and § 23-15-217 places no special burdens on minority parties or independent candidates; state has legitimate interest in preventing election commissioner from seeking another office while he has control of electors that shall vote for all candidates, where there would be potential for mischief were elections commissioner allowed effective control over registration and poll books, for 2 years, for example, then allowed to resign and seek another elective office. Meeks v. Tallahatchie County, 513 So. 2d 563 (Miss. 1987).

Section 23-15-217 is not unconstitutionally void for vagueness because ordinary person of common intelligence upon reading it could understand what was allowed and what was not; statute provides two disqualifications upon county election commissioner offering himself as candidate for office: the first, no person holding office of elections commissioner may be candidate for election to any other office at any election held or to be held during 4 year term for which that person has been elected to serve as elections commissioner; second, commissioner may not be candidate for any other office in any election with respect to which he has taken any action in his official capacity; exception to both disqualifications is that incumbent election commissioner may be candidate for re-election. Meeks v. Tallahatchie County, 513 So. 2d 563 (Miss. 1987).

The provisions of Article 12 § 251 of the Mississippi Constitution of 1890 and Mississippi Code annotated § 3235 that prescribe a period of 4-months registration for qualified electors before voting in elections are held unconstitutional, void and of no effect, as contrary to the equal protection clause of the Fourteenth Amendment, and the enforcement hereafter of such provisions is enjoined. Ferguson v. Williams, 343 F. Supp. 654 (N.D. Miss. 1972).

The provisions of § 251 of the Mississippi Constitution and of Code § 3235 that prescribe a period of 4 months' registration for qualified electors before voting in elections are unconstitutional, void, and of no effect, as contrary to the equal protection clause of the Fourteenth Amendment of the United States Constitution. Ferguson v. Williams, 343 F. Supp. 654 (N.D. Miss. 1972).

Residence requirements for qualified elector which require a residence of one year in the state, one year in the county, and 6 months in the precinct or municipality clearly violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States; nor do they further a compelling state interest. Graham v. Waller, 343 F. Supp. 1 (S.D. Miss. 1972).

Those residence requirements for a qualified elector which requires a residence of one year in the state, one year in the county, and 6 months in the precinct, or municipality, clearly violate the equal protection protection clause of the Fourteenth Amendment to the Constitution of the United States; and those requirements as contained in § 241 of the Mississippi Constitution and Code § 3235 are clearly not necessary to further a compelling state interest, are violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and are null and void. Graham v. Waller, 343 F. Supp. 1 (S.D. Miss. 1972).

A statute which provides for the creation of a second judicial district in a certain county and the holding of an election to determine whether such district shall be created is not unconstitutional as denying equal protection of the laws. Carter v. Harrison County Election Comm'n, 183 So. 2d 630 (Miss. 1966).

The provisions of Code 1942 § 3107 which provide a method whereby the state political party conventions may select two slates of presidential electors, one slate pledged to support the nominee of the national political party, and one slate unpledged offends no provision of the United States Constitution, for this Section expressly provides that nothing therein shall prohibit a slate of electors pledged to support the national party candidate from running on the same general election ballot, and Code 1942 § 3260 enables such a slate to get on the ballot upon the petition of 1,000 voters. Gray v. State of Mississippi, 233 F. Supp. 139 (N.D. Miss. 1964).

The United States Constitution does not require all states to provide voters with an opportunity to vote for pledged electors running under a national party label. Gray v. State of Mississippi, 233 F. Supp. 139 (N.D. Miss. 1964).

Statute, which provided that when a political party registers, no other political party may use that name which has already been registered, as applied, prevents a political party which had used the word Republican in its name for many years, from using this name because another organization had registered the word Republican, was not unconstitutional as denying the right to reassemble and petition the government or as depriving members of their liberty and property without due process of law, or as denying right of freedom of speech and of press or as destroying liberty of members of the political party to organize and associate themselves with others for political purposes and as denying for them the right to freely exercise their franchise. Hoskins v. Howard, 214 Miss. 481, 59 So. 2d 263 (1952), cert. denied, 344 U.S. 915, 73 S. Ct. 334, 97 L. Ed. 705 (1953). But see Howard v Ladner, 116 F Supp 783 (rev'd apparently on jurisdictional grounds in mem op in White v Howard, 347 US 910, 98 L Ed 1067, 74 5 Ct 476, reh'g den'd 347 US 931, 98 L Ed 1083, 74 5 Ct 529), wherein it was held that where a statute which required name of political party to be registered and which also provided that no other political party shall use any name already registered, was construed to deny a political party existing before the passage of the statute the right to continue to use its name because another party has already appropriated that name, this was a denial of due process.

41. —Apportionment and districts, elections.

City's redistricting plan used to elect alderman and executive committee members violated the one-person/one-vote principle of the Fourteenth Amendment where the city did not dispute that its aldermanic wards had become malapportioned and constitutionally impermissible due to population shifts within the city since the 1990 census and the maximum deviation for the city's wards was far in excess of the threshold established by judicial precedent. Boddie v. City of Cleveland, 297 F. Supp. 2d 901 (N.D. Miss. 2004).

A Federal District Court's legislative reapportionment plan for the houses of the Mississippi Legislature which permitted maximum population deviations of 16.5 per cent in the districts for one legislative house and 19.3 per cent in the districts for the other house, failed to meet the requirement of the Equal Protection Clause that legislative districts be as nearly of equal population as is practicable. The deviations could not be justified on the ground of the plan's deference to Mississippi's historic respect for the integrity of county boundaries in conjunction with legislative districts where the District Court failed to identify any unique features of the state's political structure to support its variation from population equality and had been presented with a feasible plan which was less statistically offensive and which also better served the state policy against fragmenting county boundaries. Connor v. Finch, 419 F. Supp. 1072 (S.D. Miss. 1976), supplemented, 419 F. Supp. 1089 (S.D. Miss. 1976), supplemented, 422 F. Supp. 1014 (S.D. Miss. 1976), probable jurisdiction noted, 429 U.S. 1060, 97 S. Ct. 782, 50 L. Ed. 2d 775 (1977), rev'd on other grounds, 431 U.S. 407, 97 S. Ct. 1828, 52 L. Ed. 2d 465 (1977).

The rule requiring equal apportionment must be held to apply to a governing body which has the broad powers, duties, and responsibilities of the Mississippi county Board of Supervisors, and when the right to an equal voice in selecting the members of that body is diluted and denied by gross misapportionment, the Fourteenth Amendment affords an avenue of relief. Dyer v. Rich, 259 F. Supp. 741 (N.D. Miss. 1966).

The fact that one supervisor's district of a county contained over 63 percent of the entire population of the county while the population of the other four districts ranged from approximately three percent to 10 percent of the county's population, such gross imbalance in the population of the several supervisor's districts constituted a case of invidious discrimination and was violative of the "one person, one vote" rule. Dyer v. Rich, 259 F. Supp. 741 (N.D. Miss. 1966).

42. — Bond elections.

Black voters failed to show that failure to repeal the provision of § 37-59-17 requiring that school bond referenda be passed by a 60 percent majority vote rather than a simple majority was motivated by racial factors, and thus they failed to show that the 60 percent requirement violated the Fourteenth and Fifteenth amendments, where the predominant theme of legislators who voted against repeal was opposition to raising property taxes; the fact that some House members perceived that repeal of the 60 percent requirement involved racial considerations did not make it so. Armstrong v. Allain, 893 F. Supp. 1320 (S.D. Miss. 1994).

In action by registered voters against county board of supervisors alleging that board violated due process right by refusing to hold election on bond issues, refusal did not rise to level of constitutional deprivation, and even if board members, as alleged, improperly eliminated signatures on plaintiffs' protest petition or viewed required number of signatures too restrictively, proper avenue for such claims was through state election procedures, not action in federal court. Thrasher v. Board of Supvrs., 765 F. Supp. 896 (N.D. Miss. 1991).

Fact that decision of federal court declaring Mississippi poll tax law unconstitutional was handed down on day which was deadline for filing protest petitions against issuance of state aid road bonds, thereby increasing the number of electors in county from 8855 to 13510 and making total number of signatures on petitions insufficient to prevent board of supervisors from issuing bonds without calling election therefor, did not deprive petitioners of their constitutional rights, for the decision of the federal court was a fact beyond the power of the board to alter, but of which they were bound to take cognizance. Ratliff v. Board of Supvrs., 193 So. 2d 137 (Miss. 1966).

That the burden of taxation is not spread on a road district in proportion to benefits does not render unreasonably discriminatory a statute authorizing county supervisors to order an election on a proposal to issue road district bonds. Memphis & C. Ry. v. Bullen, 154 Miss. 536, 121 So. 826 (1928), aff'd, 282 U.S. 241, 51 S. Ct. 108, 75 L. Ed. 315 (1931).

A statute authorizing county supervisors to order an election on a proposal to issue road district bonds on petition of electors, does not deny due process when construed in the light of a state constitutional provision vesting in the supervisors legislative discretion to organize or to refuse to organize road districts petitioned for. Memphis & C. Ry. v. Bullen, 154 Miss. 536, 121 So. 826 (1928), aff'd, 282 U.S. 241, 51 S. Ct. 108, 75 L. Ed. 315 (1931).

43. Fish and game laws.

A statute conferring authority upon county boards of supervisors to adopt measures for the conservation of local game and fish for the use and consumption of the inhabitants, unconstitutionally discriminates against the inhabitants of other counties. State v. Hill, 98 Miss. 142, 53 So. 411 (1910).

A statute regulating the taking of fish does not violate the due process clause. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. R. 700 (1905).

44. Fraternal organizations.

Code 1942 § 5310.1 which gives to the Governor unlimited discretion to deny a charter to a non-profit corporation is unconstitutional for the reason that it confers an absolute and arbitrary discretion on a state official to grant or deny a right or privilege. Smith v. Ladner, 288 F. Supp. 66 (S.D. Miss. 1968).

Members of a fraternal organization, before being deprived of their offices, memberships and other rights, must have a hearing and opportunity to defend, or to meet the charges preferred against them. Cherry v. Bivens, 185 Miss. 329, 187 So. 525 (1939).

In view of the due process clause, it will be assumed that the governing body of a fraternal organization acted in accordance with its rules and proceeded from adequate cause in forfeiting the charter of a subordinate lodge. Vicksburg Lodge No. 26 v. Grand Lodge of Free & Accepted Masons, 116 Miss. 214, 76 So. 572 (1917), cert. denied, 246 U.S. 668, 38 S. Ct. 336, 62 L. Ed. 930 (1918).

45. Insurance.

The highway patrol had no authority to deliver a stolen pickup truck, which had an altered vehicle identification number and had been seized from an innocent purchaser pursuant to a valid search warrant, to an insurance company, which had paid the owner the full value of the truck under a theft loss insurance policy and was therefore the lawful owner of the vehicle, absent court approval with no advance notice to the innocent purchaser of its intent to do so and without giving him an opportunity contest the matter in a court of competent jurisdiction; the appropriate procedure would have been for the highway patrol, once the truck served no further purpose in the criminal investigation or prosecution, to make a motion in the justice court for authority to release it to the insurance company, and to give the innocent purchaser and the insurance company reasonable notice of such application and an opportunity to be heard; however, the circuit court erred in directing return of the pickup truck to the innocent purchaser without making the insurance company a party to the hearing or giving it any notice of the proceeding, as this was a blatant violation of the insurance company's right to due process. Weaver v. State, 597 So. 2d 609 (Miss. 1992).

If it be said that the legislature by reenacting a statute adopted the construction put on it by previous judicial decisions, which had the effect to raise an insurance company's special agent with limited powers, into its general agent when acting for it in the particulars specified herein, with authority to then make material changes in a policy of insurance issued by the company, in violation of its provisions, this section, so construed, would violate due process of law. Saucier v. Life & Cas. Ins. Co., 189 Miss. 693, 198 So. 625 (1940).

Where on former appeals, terminating in a decision by the Federal Supreme Court, the point raised by demurrer to insurers plea involved the question whether a provision in a fidelity bond requiring any claim thereunder to be made within 15 months after the termination of the the suretyship was subject to the law of Tennessee where the contract was made at a time when the insured was then located in Tennessee, or subject to the laws of Mississippi, to which insured had removed and where the defalcation occurred, and resulted in a determination that the laws of Tennessee governed, such determination did not preclude subsequent litigation as to the effect of such provision under Tennessee decisions as being a condition precedent to liability of the insurer or merely a postponement of the right to sue. Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 189 Miss. 496, 195 So. 667 (1940), cert. denied, appeal dismissed, 311 U.S. 610, 61 S. Ct. 25, 85 L. Ed. 387 (1940).

Group policy which was performable and was delivered in Alabama was governed by Alabama Laws, notwithstanding that insured employee was a resident of Mississippi, had never been in Alabama and insured employer operated its busses only in Mississippi, and notwithstanding statute requiring court to solve interpretation of contract of insurance according to the laws of Mississippi, since a contrary construction would result in the denial of due process. Protective Life Ins. Co. v. Lamarque, 180 Miss. 243, 177 So. 15 (1937).

Statute imposing personal liability on policy on agent of insurance company unauthorized to do business in State held not unconstitutional as abridging privilege of contract and depriving agent of the defense of agency. Wilkinson v. Goza, 165 Miss. 38, 145 So. 91 (1932).

46. Laborers and materialmen.

City ordinance requiring that at least 40 percent of employees of contractors and subcontractors working on city construction projects be city residents is subject to strictures of privileges and immunities clause even though ordinance is municipal, not state, law, and even though it discriminates among state residents on basis of municipal residence. United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984).

The provisions of Code 1930, §§ 2274 — 2281 whereby the bond of a contractor guaranteeing to an owner the faithful performance of a contract for the construction of a building is declared to inure to the protection of materialmen and laborers as if a guaranty that the contractor shall pay them had been expressed therein, but which does not require that a bond be given, does, not as applied to a bond which expresses an intention to exclude materialmen and laborers, constitute an arbitrary interference with liberty of contract, with resulting violation of the 14th Amendment. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

The Fourteenth Amendment does not preclude the creation of liens in favor of materialmen and laborers upon lands improved or affected by their material or labor, even though there be no privity of contract between them and the owner, or of liens upon any moneys due the contractor from the owner or collected by the contractor from the owner. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

A statute providing that a building contractor's bond to the owners shall inure to the benefit of laborers and materialmen, subject to the obligee's rights, does not unduly abridge liberty of contract. United States Fid. & Guar. Co. v. Parsons, 147 Miss. 335, 112 So. 469, 53 A.L.R. 88 (1927).

47. Labor and employment.

Even though a legislative amendment extinguished the employee's property rights as to his job, he was not denied due process where the Mississippi Department of Corrections terminated more than 160 employees; Laws of 2004, ch. 595, § 13 (Section 13) affected a general class of people due to a mandated reorganization of the department, Miss. Code Ann. § 25-9-127(1), and thus, the employee was entitled to due process only as provided under Section 13. Hemba v. Miss. Dep't of Corr., 998 So. 2d 1003 (Miss. 2009).

Employee was not denied due process when he received notice that he was placed on leave but not informed of the type of leave he was placed on or given a formal notice of suspension where the employee was placed on administrative leave with pay pending the resolution of the investigation, and once the investigation was concluded the employee was properly noticed of the employer's intention to terminate his employment. Payne v. Miss. Dep't of Mental Health, 964 So. 2d 582 (Miss. Ct. App. 2007).

The "state actor" threshold was not met and, therefore, the plaintiff had no due process right under the Fourteenth Amendment in connection with his employment where the plaiuntiff was the general manager of a private country club and property owners association. Diamondhead Country Club & Prop. Owners Ass'n v. Montjoy, 820 So. 2d 676 (Miss. Ct. App. 2000).

Right to work for living in common occupations of community is of very essence of personal freedom and opportunity that it was purpose of due process clause to secure. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

Due process clause protects individual's liberty interest which is viewed as including individual's freedom to work and earn living and to establish home and position in one's community. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

Although Constitution, standing alone, confers no property right in continued employment, such property right can arise pursuant to state law, and once created is subject to constitutional protection. Gardner v. Coffeeville Sch. Dist., 982 F. Supp. 1221 (N.D. Miss. 1997).

Vested property interest in one's job is protected by due process clause. Gardner v. Coffeeville Sch. Dist., 982 F. Supp. 1221 (N.D. Miss. 1997).

Valid claim of constitutional entitlement to employment must be grounded either in express contract of employment or in some other legal source, such as state statute, local ordinance, or implied contract. Gardner v. Coffeeville Sch. Dist., 982 F. Supp. 1221 (N.D. Miss. 1997).

A county board of supervisors could not bar a chancery clerk, who had temporarily vacated his positions as clerk of the board of supervisors and county auditor, from performing his duties in those positions based upon a claim that the chancery clerk had failed to perform his duties, without affording him a hearing so as to comply with due process requirements. Barlow v. Weathersby, 597 So. 2d 1288 (Miss. 1992).

A 16-year veteran police officer, who had vested permanent employment rights under the civil service laws, resigned on his own volition and was not "constructively discharged" where he obtained legal counsel when he became aware that he was the object of an investigation and resigned his job on his attorney's advice. Thus, he could not thereafter pursue an untimely claim that he was denied procedural due process. In order to ensure that a civil service employee preserves his or her procedural due process guarantees, he or she should "stay the course" and remain with the job until relieved from the assignment by an official with statutory authority to fire. While the work environment could become the source of some irritation or embarrassment, such embarrassment will usually afford the civil servant nothing in the way of a procedural due process claim after a voluntary resignation. The instances will be few when a claim of constructive discharge will preserve procedural guarantees that the employee has waived by resigning. The wisdom of "staying the course" is especially crucial in light of state law which deems civil service administrative remedies as the exclusive remedy before relief can be sought in state court. Bulloch v. City of Pascagoula, 574 So. 2d 637 (Miss. 1990).

The termination of employees of a state facility for the mentally retarded after the employees refused to take a polygraph examination regarding injuries received by a resident under their supervision did not violate the employees' federally guaranteed right to due process. Jackson v. Hudspeth Mental Retardation Ctr., 573 So. 2d 750 (Miss. 1990).

Court order imposing percentage nonwhite membership goal on union and establishing fund to be used in remedying discrimination was not violative of equal protection. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344 (1986).

Although a discharged police officer was denied due process in that the dismissal decision was made one day before the time for his response to the charges expired, the dismissed police officer waived this issue by not raising it before the Civil Service Commission prior to his full evidentiary hearing and he was thus precluded from challenging the pretermination procedure on appeal. Little v. City of Jackson, 375 So. 2d 1031 (Miss. 1979), cert. denied, 445 U.S. 933, 100 S. Ct. 1325, 63 L. Ed. 2d 768 (1980).

A city ordinance prohibiting the operation of self-service automobile fueling stations did not constitute discrimination against self-service automobile fueling station operators, since it classified them in a constitutionally permissible manner and operated on all self-service fueling stations alike, so as to afford public security against the perils of explosions and fires in the use of gasoline and other flammable substances covered by the ordinance, and was a valid and constitutional exercise of the city's police power. McCardle v. City of Jackson, 260 So. 2d 482 (Miss. 1972).

The operator of an unlawful business, who fails to pay the tax required of him, cannot be heard to complain of discrimination because of the state's failure to prosecute some of the offenders against its laws. Bishop v. Bailey, 209 Miss. 892, 48 So. 2d 588 (1950).

Act, harmless when done by one, may become public wrong when done by many acting in concert and when it becomes object of conspiracy and operates in restraint of trade police power of state may prohibit it without impairing liberty of contract. Wagley v. Colonial Baking Co., 208 Miss. 815, 45 So. 2d 717 (1950), suggestion of error overruled, 46 So. 2d 925 (Miss. 1950).

State cannot, under guise of protecting public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

Labor is property and to deprive laborer and employer of right to contract peaceably with one another is to violate Fifth and Fourteenth Amendments which provide that no persons shall be deprived of life, liberty, or property without due process of law, and that no state shall deprive any person within its jurisdiction equal protection of law. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

This amendment leaves the state ample discretion in dealing with manifestations of force in settlement of industrial conflicts. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

State court of equity has jurisdiction to protect certified common carrier of passengers by motor vehicle in interstate and intrastate commerce in its property rights in its large investments in state and to prevent, by injunction, through force, intimidation and violence, irreparable injury to persons and property. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

A statute, applicable only to manufacturers, imposing a penalty for failure to pay wages at least once a month, denies equal protection. Sorenson v. Webb, 111 Miss. 87, 71 So. 273 (1916).

The privileges and immunities of citizens are unconstitutionally abridged by a statute making it a punishable offense for a laborer, share-cropper, or renter, who has made one contract in writing, to enter into another without giving notice of the first. State v. Armstead, 103 Miss. 790, 60 So. 778 (1913), Am. Ann. Cas. 1915B, 495.

A statute making it unlawful for those engaged in manufacturing or repairing to work their employees more than 10 hours per day, except in cases of emergency or public necessity, is valid. State v. J.J. Newman Lumber Co., 102 Miss. 802, 59 So. 923 (1912), error overruled, 103 Miss. 263, 60 So. 215 (1912).

48. Municipal or local services.

Municipalities lacked due process rights which could be offended by amendments to Public Utilities Act of 1956 requiring Public Service Commission (PSC) cancellation of public utility's certificate of public convenience and necessity before municipal exercise of eminent domain power over utility facilities, despite contention that amended Act, by allowing utility to correct any inadequacies before Commission would cancel certificate, placed option of preventing exercise of municipalities' power of eminent domain in hands of utilities; municipalities had no due process rights against legislature, and municipalities could not invoke due process clause against utilities because they were private entities. City of Oxford v. Northeast Miss. Elec. Power Ass'n, 704 So. 2d 59 (Miss. 1997), reh'g denied, 702 So. 2d 133 (Miss. 1997).

Homeowner did not have federally protected property interest in fire protection by city; Constitution did not confer affirmative rights to governmental aid. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

In apportioning limited resources, government need not provide same level of benefits to all recipients to satisfy equal protection. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

City's failure to provide fire service to homeowner in annexed area was rational and thus did not violate homeowner's right to equal protection, where city demonstrated infeasibility in providing water lines absent significant cost. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

General guarantees of municipal level fire protection in annexation ordinance did not create protected property rights in homeowner personally. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Property interest in review of his claim was necessary to support homeowner's assertion that his due process rights were violated by city's selective payment of claims to some parties from city's claims fund, but not others. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

There was no record of specific guidelines used by city to pay claims from its claims funds, as required for court to determine whether city discriminated between homeowners in annexed area and residents with water lines in its administration of claims fund, in violation of equal protection. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995), rehearing denied.

Receipt of garbage pick-up services is not life, liberty, or property interest which is protected by Fourteenth Amendment. Taylor v. County of Copiah, 937 F. Supp. 573 (S.D. Miss. 1994), aff'd, 51 F.3d 1042 (5th Cir. 1995).

49. Nuisance.

The Mississippi statute forbidding nuisances, §§ 95-3-1 et seq., is not unconstitutionally vague; adequate notice was clearly provided by the terms of the statute, which were clearly understandable words that left no room for misinterpretation. Collins v. City of Hazlehurst, 151 F. Supp. 2d 749 (S.D. Miss. 2001).

50. Parolees and probationers.

Denial of the inmate's petition for writ of habeas corpus was affirmed as (1) Miss. Code Ann. § 47-7-17 did not create a constitutionally protected liberty interest in parole; thus, the inmate's right to due process was not violated under U.S. Const. amends. V and XIV, (2) the inmate waived his right to argue that he was prejudiced by the Parole Board's failure to publish notice of his parole hearing as it was not raised below, and (3) the inmate did not argue in his petition that he had ever been denied the opportunity to call witnesses or that the Parole Board refused to listen to their testimony. Way v. Miller, 919 So. 2d 1036 (Miss. Ct. App. 2005).

Defendant's due process rights were not violated where the trial judge complied with the minimum requirements of due process, applicable in a revocation hearing, which included written notice of the claimed violations of probation, disclosure to the probationer of evidence against him, an opportunity to be heard and to present witnesses and evidence, the right to confront and cross-examine adverse witnesses, a neutral and detached hearing body, and a written statement by the factfinders as to the evidence relied on and the reasons for revoking probation. Lambert v. State, 904 So. 2d 1150 (Miss. Ct. App. 2004).

A probationer was afforded due process with regard to the revocation of his probation, notwithstanding his assertion that he did not receive any written notice of the final revocation hearing, where a petition was filed affording the probationer notice that he had violated his probation conditions and he subsequently waived his right to a preliminary probation revocation hearing. Crowell v. State, 801 So. 2d 747 (Miss. Ct. App. 2000).

A prisoner was not denied equal protection in the denial of parole, notwithstanding the assertion that he was treated differently than other similarly situated prisoners, where the prisoner failed to show that the actions of the parole board were motivated by a discriminatory purpose. Justus v. Mississippi State Parole Bd., 750 So. 2d 1277 (Miss. Ct. App. 1999).

Arrestee had no due process protection against being arrested for probation violation of possessing beer, despite his claim that possession of beer was manifestation of depression that would have warranted civil commitment rather than arrest; although arresting officers were not trained mental health professionals, there was no demonstration that arrestee met criteria for insanity. McKlemurry ex rel. Rayborn v. Hendrix, 971 F. Supp. 1089 (S.D. Miss. 1997).

Arrestee, who had been arrested for probation violation of possessing beer, did not have equal protection right to civil commitment, rather than incarceration. McKlemurry ex rel. Rayborn v. Hendrix, 971 F. Supp. 1089 (S.D. Miss. 1997).

Where parolee is incarcerated, both Fourteenth Amendment due process concerns and the Eighth Amendment's prohibition against cruel and unusual punishment are implicated, but the presumptive intent to punish derived from the *Bell*test does not arise in such a case involving conditions of confinement; rather, detained parolee may establish a Fourteenth Amendment due process claim for the conditions of his confinement only where he can present direct evidence of an expressed intent to punish him for the crime for which he has been charged but not yet convicted, but even without the availability of the *Bell*test, he may still utilize the Eighth Amendment to pursue a separate claim regarding conditions of confinement. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

Pretrial detainees are protected from harm by virtue of the Due Process clause of the Fourteenth Amendment, while convicted inmates are protected from harm by the Eighth Amendment's prohibition against cruel and unusual punishment. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

A defendant who allegedly violated the terms of his probation by committing the crime of sale of cocaine was denied due process of law by having his probation revoked immediately after a mistrial was declared in his trial on the charge of sale of cocaine where the revocation was based upon the trial which had just resulted in a mistrial, the defendant never agreed that the court could summarily revoke his probation in the event the trial resulted in anything other than a conviction, and he was not given advance notice of a revocation hearing. Grayson v. State, 648 So. 2d 1129 (Miss. 1994).

When failure to pay court-imposed fines becomes a possible basis for a probation revocation, the trial court must follow the procedural mandates of § 99-19-20(2). Berdin v. State, 648 So. 2d 73 (Miss. 1994).

A defendant was deprived of due process by a trial court's failure to conduct an inquiry as to the reason she was delinquent in paying her probation fines before revoking her probation because of her failure to pay those fines. Berdin v. State, 648 So. 2d 73 (Miss. 1994).

A defendant's probation revocation violated her due process rights where there was no record of the defendant receiving notice of a probation violation, and the disparity between the court's statements when probation was revoked, the written and signed order of revocation, and the court's after-the-fact explanation at the defendant's post-conviction relief hearing demonstrated a lack of actual notice. Berdin v. State, 648 So. 2d 73 (Miss. 1994).

A trial court properly denied a parolee's petition for writ of habeas corpus, in which the parolee claimed that he was not afforded a timely parole revocation hearing, where the admitted evidence showed that the parolee had violated the conditions of his parole by 2 Tennessee felony convictions and failure to waive extradition back to Mississippi; these were reasonable grounds for revoking his parole, and therefore all procedural due process guarantees were met. Godsey v. Houston, 584 So. 2d 389 (Miss. 1991).

A probationer was not denied due process due to the lack of a preliminary hearing in his probation revocation proceedings, even though a hearing expressly designated as "preliminary" was not held, where 3 hearings were held in the circuit courts and the first and second hearings were, for all practical purposes, equivalent to a preliminary hearing. Additionally, the probationer was not wrongfully denied the opportunity to call his own witnesses where he made a last-minute request during the third hearing to call witnesses who allegedly would have testified in his behalf, the court concluded that the witnesses would have offered no new evidence, the probationer had already admitted that he committed probation violations, and at most the witnesses would have testified in regard to the probationer's character and would have had no effect on the outcome of the case. Riely v. State, 562 So. 2d 1206 (Miss. 1990).

The probation-revocation procedure delineated in § 47-7-37 is constitutional; the statute includes the minimum due process requirements applicable to parole and probation revocation procedures set forth in Morrissey v Brewer (1972, US) 33 L Ed 2d 27, 92 S Ct 2593 and Gagnon v Scarpelli (1973, US) 36 L Ed 2d 656, 93 S Ct 1756. Riely v. State, 562 So. 2d 1206 (Miss. 1990).

The Mississippi parole statutes do not create a constitutionally protected liberty interest in the form of an expectation of parole because of the use of the permissive "may" in § 47-7-3, which provides that a prisoner "may be released on parole as hereinafter provided," read in the context of the other provisions of that section and, as well, those of § 47-7-17. Thus, Mississippi law did not vest a convicted and incarcerated felon with a liberty interest in parole entitling him to due process of law incident to his application for parole. Harden v. State, 547 So. 2d 1150 (Miss. 1989).

Parole board members receive absolute immunity in suit for damages by parolee alleging revocation procedures violated his right to due process, and official who, because of organization of government in particular state, performs parole board's quasi-judicial duties enjoys same protection. Farrish v. Mississippi State Parole Bd., 836 F. 2d 969 (5th Cir. 1988).

Officers whose activities fell within scope of parole board's protected function were absolutely immune from liability in suit for damages alleging denial of prisoner's due process rights where one, acting as hearing officer, had conducted hearing without critical adverse witness even though defendant requested his presence; other officer had served in prosecutorial role during revocation proceeding. Farrish v. Mississippi State Parole Bd., 836 F. 2d 969 (5th Cir. 1988).

Commissioner of Corrections, whose conduct involved administrative activities which, although they impacted on adjudicatory process, were not integral part of it, merited only qualified immunity where allegation was that procedural due process violation had occurred; this official, who had failed to establish adequate policies or procedures to govern preliminary hearing in such an elementary case, should have known that his conduct violated a clearly established right and was therefore liable for damages. Farrish v. Mississippi State Parole Bd., 836 F. 2d 969 (5th Cir. 1988).

Absolute discretion conferred on parole board in Mississippi affords prisoner no constitutionally recognized liberty interest in being released on parole. Scales v. Mississippi State Parole Bd., 831 F.2d 565 (5th Cir. 1987).

Contention that prisoner is denied equal protection because only one black person is member of parole board is meritless. Scales v. Mississippi State Parole Bd., 831 F.2d 565 (5th Cir. 1987).

51. Prisoners.

Inmate's allegations of a Fourteenth Amendment violation against a dispatcher did not comport with the stringent requirements necessary to maintain a claim of deliberate indifference by the individual defendant; the episodic act or omission of a state jail official did not violate a pretrial detainee's constitutional right to be secure in his basic human needs, such as medical care and safety, unless the detainee demonstrated that the official acted or failed to act with deliberate indifference to the detainee's needs. Harvison v. Greene County Sheriff Dep't, 899 So. 2d 922 (Miss. Ct. App. 2005).

Inmate had no cause of action under the Fourteenth Amendment because any due process claim had to arise from the Mississippi Department of Corrections' own misapplication of reasonable prisoner classification regulations; the allegations and attached documents did not support a finding of arbitrarinous or capriciousness. Hurns v. Miss. Dep't of Corr., 878 So. 2d 223 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 918 (Miss. 2004).

In instances where inmate's "failure to protect" claim arises out of an episodic act or omission on the part of a jail official, the appropriate standard to be applied is identical regardless of the inmate's custodial status as pretrial detainee or convicted inmate, requiring demonstration of subjective knowledge of a substantial risk of serious harm and the failure to take reasonable measures to abate it, but where a pretrial detainee challenges a general condition of confinement, the court presumes intent on the part of prison officials and looks to whether the challenged condition of confinement is reasonably related to a legitimate governmental objective. Earrey v. Chickasaw County, 965 F. Supp. 870 (N.D. Miss. 1997).

A prisoner has a constitutional right of access to the civil courts founded in the due process clause of the 14th Amendment, though this right is not absolute; at a minimum, due process requires that absent a countervailing state interest of overriding significance, prisoners must be afforded meaningful access to the courts and an opportunity to be heard. In re Merrell, 658 So. 2d 50 (Miss. 1995).

In determining whether to allow a prisoner to make a personal appearance and give testimony in a civil action wherein he or she is a party/litigant, the trial judge should take into consideration the following guidelines: (1) the costs and inconvenience of transporting the prisoner from the place of incarceration to the courtroom, (2) any potential danger or security risk which the presence of the particular inmate would pose to the court, (3) the substantiality of the matter at issue, (4) the need for an early determination of the matter, (5) the possibility of delaying trial until the prisoner is released, (6) the probability of success on the merits, (7) the integrity of the correctional system, (8) the interest of the inmate in presenting his or her testimony in person rather than by deposition, (9) the possibility of a change of venue to the appropriate trial court in the county where the prisoner is domiciled when legally permissible, and (10) any other appropriate criteria which the trial judge, in his or her sound discretion, might consider. In re Merrell, 658 So. 2d 50 (Miss. 1995).

In order to state a cognizable Eighth Amendment claim against prison officials, a prisoner must allege causative acts or omissions demonstrating "subjective recklessness" by the defendants. Bilbo v. Thigpen, 647 So. 2d 678 (Miss. 1994).

Although prisoners do not enjoy an absolute constitutional right to unrestricted visitation, and their visitation privileges are subject to the discretion of prison officials, restrictions on an inmate's visitation privileges should not be imposed arbitrarily or discriminatorily. Puckett v. Stuckey, 633 So. 2d 978 (Miss. 1993).

In inmate suit for preliminary injunction against sheriff's alleged utilization of illegal force upon inmates to extract information, report in recommendation of Magistrate Judge was adopted, holding that inmate was entitled to preliminary injunction against such use of force, on basis that any physical violence by prison officers against person being interrogated who poses no threat to safety of officers or others, violates due process. Cohen v. Coahoma County, 805 F. Supp. 398 (N.D. Miss. 1992).

Neither due process nor equal protection rights are violated by requiring a prisoner to demonstrate some specific need before requiring the State or county to furnish the prisoner with free copies of trial records in post-conviction relief proceedings. The State is not required to subsidize a "fishing expedition" for grounds upon which to attack a conviction and sentence, merely because the prisoner is indigent. Fleming v. State, 553 So. 2d 505 (Miss. 1989), but see De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992).

The unexplained failure to award an inmate meritorious earned time did not amount to a violation of his federal and state constitutional rights to due process and equal protection, since an inmate's earning of "time" is a matter of grace or privilege under § 47-5-142, which provides that "meritorious earned time may be awarded." Since correctional officials are vested with discretionary power to award time under certain conditions, inmates are not entitled to it. Ross v. State, 584 So. 2d 777 (Miss. 1991).

Neither the due process clause nor Mississippi law gives rise to a protected liberty interest in the form of an expectation of release on probation. There is no liberty interest in release pursuant to the provisions of § 47-7-47, which creates a procedure whereby the courts may place a prisoner on probation, since the language of the statute is permissive rather than mandatory in nature; the statute vests absolute discretion in both the Department of Corrections and the court in determining whether probation should be recommended and granted, and this discretion affords a prisoner no constitutionally recognized liberty interest. Smith v. State, 580 So. 2d 1221 (Miss. 1991).

A prisoner did not have a protected liberty interest in being transferred from a county correctional facility to a state prison, absent a state law or regulation or prison policy or procedure conditioning such a transfer on proof of misbehavior or some other event. McFadden v. State, 580 So. 2d 1210 (Miss. 1991).

A prison inmate does not have a protected liberty interest in a particular job assignment under the due process clause. However, a liberty interest may be created by state law or prison regulation. McFadden v. State, 580 So. 2d 1210 (Miss. 1991).

Inmates who are placed in administrative segregation have no constitutional basis for demanding the same privileges as those inmates in the general prison population since prison officials have the discretion to determine whether and when to provide prisoners with privileges such as showers, exercise, visitation, and access to personal property. Thus, the 5 hours a week of exercise plus nightly showers of 15 minutes which were provided to an inmate confined to administrative segregation did not constitute cruel and unusual punishment. Additionally, the procedures provided when the inmate was placed in administrative segregation satisfied the due process clause where the inmate received notice of detention and a hearing on the matter. Terrell v. State, 573 So. 2d 730 (Miss. 1990).

An inmate was properly denied credit for time served upon her original sentence for time spent out of prison on parole prior to its revocation, even though credit is allowed for time spent on work release, which is functionally similar to parole; nor did denying her credit for time served while on parole deprive her of rights secured under the double jeopardy clause, deny her due process of law, or subject her to an ex post facto law. Segarra v. State, 430 So. 2d 408 (Miss. 1983).

A person may not be involuntarily committed to a state mental institution unless (1) there is clear and convincing evidence that the person is in substantial need of mental treatment, and (2) the state renders to him a minimally adequate course of care and treatment; accordingly, a deceased had a substantive right not to be "warehoused," and if he was substantially mentally ill, the state's right to commit him involuntarily was conditioned on its affording him minimally adequate care and treatment. Chill v. Mississippi Hosp. Reimbursement Comm'n, 429 So. 2d 574 (Miss. 1983).

Where petitioner, who had been charged with several criminal offenses, had been confined at the state mental hospital for over nine years under a circuit court order on account of his mental incapacity to stand trial, and where the evidence showed that he was not making any progress and there was no substantial probability that he would attain the capacity to stand trial in the foreseeable future, the due process and equal protection clauses of the United States and Mississippi constitutions required that the state initiate proceedings at the next term of the circuit court to have petitioner committed to a state mental institution under the civil commitment statutes or that he be released from custody. Brown v. Jaquith, 318 So. 2d 856 (Miss. 1975).

The district court's findings that the disciplinary procedures at the Mississippi State Penitentiary failed to meet the minimum procedural requisites of the Fourteenth Amendment, and the relief therein granted, were affirmed. Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).

Where a condemned prisoner was confined in maximum security cell block in a state penitentiary with restrictions as to visits from friends and attorneys and conversations and where there were other condemned men awaiting execution, this confinement was not a violation of the equal protection and due process clauses of the Constitution. Wetzel v. Wiggins, 226 Miss. 671, 85 So. 2d 469 (1956), appeal dismissed, cert. denied, 352 U.S. 807, 77 S. Ct. 80, 1 L. Ed. 2d 39 (1956), reh'g denied, 352 U.S. 919, 77 S. Ct. 217, 1 L. Ed. 2d 125 (1956).

53. Professional regulation.

Massage therapist's due process rights were not violated when a Mississippi State Board of Massage Therapy member investigated the client's complaint against the therapist and later participated in the administrative hearing because the Board member's dual capacity as investigator and hearing participant was procedurally correct. Dawson v. Miss. State Bd. of Massage Therapy, 949 So. 2d 829 (Miss. Ct. App. 2006).

Plaintiff physician was not deprived of any procedural due process property interest when defendant hospital denied him further access to its end stage renal disease (ESRD) units for out-patient kidney dialysis upon severance of his practice from that of second physician, with whom hospital had exclusive medical director contract under which only he or his designated representative could perform chronic, outpatient, kidney dialysis in ESRD units; source of plaintiffs property interest was not hospital's grant to him of full medical staff privileges when he became associated with second physician, but rather, it was exclusive medical director contract, and such interest was extinguished when association between physicians ended. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

Even if plaintiff nephrologist were deprived of liberty interest as result of defendant hospital's refusal to grant him further access to its end stage renal disease (ESRD) units for out-patient kidney dialysis upon severance of his practice from that of physician with whom hospital had exclusive medical director contract, nephrologist was not entitled to procedural due process, i.e., hearing, because that deprivation occurred as result of quasi-legislative decision not based on his individual competency or qualifications as nephrologist. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

Hospital's exclusive arrangement with physician for provision of out-patient kidney dialysis on hospital's end stage renal disease (ESRD) units was not arbitrary or capricious, and thus did not violate nephrologist's right to substantive due process; having single doctor administer all chronic, out-patient dialysis was logistically and legally desirable, and at least in part the goal of exclusive arrangement was to ensure that all patients received same high quality dialysis treatment. Martin v. Memorial Hosp., 130 F.3d 1143 (5th Cir. 1997).

Procedure followed by State Board of Nursing in revoking nurse's license did not violate nurse's statutory or constitutional due process rights; nurse was informed of time and place of hearing, that she had right to appear, and of her right to produce evidence and witnesses, of which she took advantage, and no showing was made that Board prejudged her or had pecuniary interest in revocation of her license. Mississippi Bd. of Nursing v. Hanson, 703 So. 2d 239 (Miss. 1997), reh'g denied, 702 So. 2d 133 (Miss. 1997).

Physician was collaterally estopped from relitigating issue of whether hospital's termination of his surgical privileges was state action for purposes of due process clause of State Constitution, where federal court had previously determined that hospital's actions were not state action for purpose of Federal Constitution. Wong v. Stripling, 700 So. 2d 296 (Miss. 1997).

Physician's procedural due process rights were satisfied in proceedings that resulted in denial of reinstatement of medical license when physician was provided with opportunity to be heard, to present witnesses, to cross-examine adverse witnesses, to be represented by attorney of physician's choice, and physician was given ample notice of hearings and detailed explanation of why license was not reinstated. Montalvo v. Mississippi State Bd. of Medical Licensure, 671 So. 2d 53 (Miss. 1996).

The complaint procedure established by the Supreme Court for attorney disciplinary proceedings does not violate due process on the ground that it does not provide for an appeal to any other state court. Asher v. Mississippi Bar, 661 So. 2d 722 (Miss. 1995).

The complaint procedure established by the Supreme Court for attorney disciplinary proceedings does not violate due process on the ground that members of the complaint tribunal are also members of the Mississippi Bar. Asher v. Mississippi Bar, 661 So. 2d 722 (Miss. 1995).

The balancing test used in criminal proceedings for determining whether the right to a speedy trial has been violated is not applicable in an attorney disciplinary action; although attorney disciplinary proceedings are quasi-criminal in nature, they are not governed by the same rules that are utilized in criminal proceedings. Barrett v. Mississippi Bar, 648 So. 2d 1154 (Miss. 1995).

Rule 11, Miss. R. Discipline, which permits the partners of a suspended or disbarred attorney to continue to represent any client affected by the suspension or disbarment, does not violate a sole practitioner's right to equal protection; Rule 11 has an identical impact on all lawyers since a suspended or disbarred attorney could recommend a non-partner lawyer to represent the client who would be willing to share the fee derived from the representation. Hall v. Mississippi Bar, 631 So. 2d 120 (Miss. 1993).

A pharmacist, whose license was revoked by the Board of Pharmacy, was not deprived of his right to retain counsel, in spite of his argument that he was denied procedural due process when the Board's agent implied that the charges against him were not serious in nature and thereby coerced him into not retaining counsel, where the agent merely stated that the decision to retain an attorney for the hearing was the pharmacist's choice and told him "You may just want to go down and talk to them, though," the pharmacist received notice that clearly highlighted his right to retain counsel, and the notice clearly stated that the charges could result in suspension or revocation of his pharmacy license. Duckworth v. Mississippi State Bd. of Pharmacy, 583 So. 2d 200 (Miss. 1991).

An attorney who was suspended from the practice of law following a felony conviction in the federal courts and who was disbarred 3 years later at the conclusion of his appeal of the federal conviction, was not denied equal protection or due process rights on the ground that he would be required to wait 3 years longer before reinstatement than an attorney who chose not to appeal a conviction. All disbarred attorneys are treated equally; the disparity of time arises when an attorney resists the disbarment pending his or her appellate procedures. Had the attorney accepted the disbarment following his conviction, no delay in entering a final order of disbarment would have resulted, and therefore there was no unequal treatment or denial of due process. Additionally, the attorney's disbarment was not retroactive to the date of his suspension since the attorney's initiative delayed the entry of the final order; retroactivity cannot be applied when the attorney seeks a stay of the final order. Mississippi State Bar v. Nixon, 562 So. 2d 1288 (Miss. 1990), reinstatement granted, 618 So. 2d 1283 (Miss. 1993).

Physician whose hospital staff privileges were suspended was not denied procedural due process where statutory scheme provided for appeal to the Chancery Court and to provision for appeal to Chancery Court action was improperly brought in Federal Court and had to be dismissed; 30-day period for appeal to Chancery Court in such matter did not violate Supremacy Clause of Article VI of the US Const. Caine v. Hardy, 715 F. Supp. 166 (S.D. Miss. 1989), rev'd 905 F.2d 858, reh'g 943 F.2d 1406, cert. denied 503 U.S. 936, 112 S. Ct. 1474, 117 L. Ed. 2d 618.

Section 15-1-41 does not violate the equal protection clause of the Fourteenth Amendment on the basis that it limits actions against architects and contractors but excludes similarly situated persons such as owners and suppliers. Reich v. Jesco, Inc., 526 So. 2d 550 (Miss. 1988).

Since Bar disciplinary proceedings are inherently adversarial proceedings of a quasi-criminal nature, in the course of those proceedings there is secured to the accused attorney the right to due process of law, and within such secured due process right is the right of the accused attorney to have access to compulsory process for obtaining attendance of witnesses at critical stages of the proceedings. Attorney K. v. Mississippi State Bar Ass'n, 491 So. 2d 220 (Miss. 1986).

Grandfather clause promulgated by Mississippi Board of Nursing for certification of nurse anesthetist which allows certification of nurse anesthetist without examination only for limited period of time while allowing registered nurses to become licensed at any time upon payment of fee denies nurse anesthetist equal protection. Mississippi Bd. of Nursing v. Belk, 481 So. 2d 826 (Miss. 1985).

In an action arising out of the imposition of three separate sanctions against a realtor by a non-profit professional association of realtors, the trial court erred in enjoining the association from enforcing sanctions consisting of a severe reprimand, probation for a period of six months, and suspension of membership for a period of 30 days where the disciplinary proceedings were in full compliance with the constitution and bylaws of the association and the member had been afforded every element of due process; however, imposition of a fine of $300 was properly enjoined where there was no schedule of fines set out by the constitution, by-laws or rules and regulations of the association. Before a fine can be imposed by a private association, there must be a schedule of maximum fines that may be imposed to which schedule each member has agreed to be bound by joining the association. Multiple Listing Serv., Inc. v. Century 21 Cantrell Real Estate, Inc., 390 So. 2d 982 (Miss. 1980).

Code 1972 § 25-31-1, which required district attorneys to be practicing lawyers admitted to practice in Mississippi for at least two years prior to taking office, does not violate the Voting Rights Act of 1965, does not deny the plaintiff equal protection of the law, and does not infringe upon his first amendment rights. Waide v. Waller, 402 F. Supp. 922 (N.D. Miss. 1975).

The provision of the State Bar Act which provides for automatic suspension of a member who fails to pay the required dues but gives a suspended member power to reinstate himself by payment of delinquent dues, does not violate any constitutional rights because of failure to provide for a judicial hearing. Mississippi State Bar v. Collins, 214 Miss. 782, 59 So. 2d 351 (1952).

Code 1942 §§ 8905 — 8911, establishing a class of certified public accountants, providing for their regulation and prohibiting others from holding themselves out as such, is a valid exercise of the police power of the State. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

Code 1942 § 8912, prohibiting under penalty any person other than a certified public accountant or an attorney from receiving compensation for making or preparing any tax return, is not a reasonable exercise of the police power, is not in promotion of the public welfare, and is without reasonable relation to the advancement of public convenience, health, morals, or safety, is arbitrarily discriminatory, and is an infringement of the right to pursue an occupation gainfully, and hence is in violation of the Constitution. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

Statute requiring applicant for registration as barber to pass satisfactory examination conducted by board of examiners held not unconstitutional as leaving determination of barbers' qualifications entirely to board's arbitrary discretion. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

Statute regulating practice of barbering in all municipalities of 500 or more inhabitants held not local nor invalid as making arbitrary or unreasonable classification. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

A barber cannot complain of the exemption of beauty operators from application of statute regulating practice of barbering as arbitrary and unreasonable. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

The state may prohibit physicians from practicing without a license. State v. Tucker, 102 Miss. 517, 59 So. 826 (1912).

54. Public health.

State statute requiring that all second trimester abortions be performed in general acute care facilities is unconstitutional, since it unreasonably infringes upon women's constitutional right to obtain abortion; however, requirements that pathology report be made, that minor secure parental or judicial consent, and that second physician be present are constitutional. Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983).

City ordinance requiring all second trimester abortions to be performed in hospital violates due process clause, and provisions of ordinance dealing with parental consent, informed consent, 24-hour waiting period, and disposal of fetal remains are unconstitutional. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), on remand, 604 F. Supp. 1268 (N.D. Ohio 1984), on remand, 604 F. Supp. 1275 (N.D. Ohio 1985), overruled on other grounds, Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

Plaintiff, the father of a six-year-old boy, was not entitled to an injunction against a school board compelling admission of his son to elementary school without the vaccinations required by statute, despite plaintiffs contentions that he had not permitted his son to be vaccinated due to his religious beliefs and that his son should be permitted to attend school under the religious exemption provided by the statute, since the statutory immunization requirement serves an overriding and compelling public interest and is a reasonable and constitutional exercise of the police power; further, the exemption for children of parents whose religious beliefs conflict with the immunization requirements is void since it discriminates against children whose parents have no such religious convictions, in violation of the Fourteenth Amendment to the United States Constitution. Brown v. Stone, 378 So. 2d 218 (Miss. 1979), cert. denied, 449 U.S. 887, 101 S. Ct. 242, 66 L. Ed. 2d 112 (1980).

A law creating a board with authority to quarantine and treat animals infested with cattle fever ticks does not unconstitutionally interfere with property rights. Moss v. Mississippi Live Stock San. Bd., 154 Miss. 765, 122 So. 776 (1929).

A requirement of the state board of health that all cows used in the dairy business be examined annually by a competent veterinarian does not violate the 14th Amendment. Hawkins v. Hoye, 108 Miss. 282, 66 So. 741 (1914), error overruled, 66 So. 1015 (Miss. 1915).

55. Public improvements.

The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse. Yazoo & Miss. V. Ry. v. Board of Miss. Levee Comm'rs, 188 Miss. 889, 195 So. 704 (1940), appeal dismissed, 311 U.S. 607, 61 S. Ct. 21, 85 L. Ed. 384 (1940).

Laws 1934, c 246 did not deny due process of law to abutting property owners in paving assessment proceedings thereunder. City of Clarksdale v. Fitzgerald, 181 Miss. 135, 179 So. 269 (1938).

A tax imposed to pay for road improvements on all property, real and personal, in a road improvement district on an ad valorem basis without apportionment according to benefits, is, where there is evidence warranting the finding of appreciable benefit to the taxpayer, not so palpably arbitrary or unreasonably discriminatory as to offend the due process and equal protection clauses of the Fourteenth Amendment. Memphis & C. Ry. v. Pace, 282 U.S. 241, 51 S. Ct. 108, 75 L. Ed. 315 (1931).

A statute authorizing municipal authorities to organize a special improvement district, and assess the cost thereof against the abutting property owners, would not violate the due process clause, if not providing for notice to such owners of the purpose of such authorities so to do. Swayne v. City of Hattiesburg, 147 Miss. 244, 111 So. 818, 56 A.L.R. 926 (1927), aff'd, 276 U.S. 599, 48 S. Ct. 320, 72 L. Ed. 724 (1928).

A statute does not violate the requirement of due process because authorizing abutting property to be charged with the engineering and inspection cost of special street improvement and the cost of issuance of bonds to raise funds to pay for the improvement, they being part of the actual cost of the improvement. Swayne v. City of Hattiesburg, 147 Miss. 244, 111 So. 818, 56 A.L.R. 926 (1927), aff'd, 276 U.S. 599, 48 S. Ct. 320, 72 L. Ed. 724 (1928).

Front foot street improvement assessments, being an exercise of the taxing power, do not take property without due process, even as to property so burdened more than it is benefited. Swayne v. City of Hattiesburg, 147 Miss. 244, 111 So. 818, 56 A.L.R. 926 (1927), aff'd, 276 U.S. 599, 48 S. Ct. 320, 72 L. Ed. 724 (1928).

An exercise of legislative discretion in creating local assessment districts, or a change from one system of improvement assessments to another, is not precluded by the equal protection clause. Stingily v. City of Jackson, 140 Miss. 19, 104 So. 465 (1925).

A statute giving a majority of resident owners of abutting property power to defeat a proposed street improvement does not deny equal protection to nonresidents. Union Sav. Bank & Trust Co. v. City of Jackson, 122 Miss. 557, 84 So. 388 (1920).

A public improvement statute which gives property owners the right to appear and make objections to a proposed improvement, and which provides for notice of assessment and the hearing of objections thereto, and for an appeal to the courts, affords due process. Union Sav. Bank & Trust Co. v. City of Jackson, 122 Miss. 557, 84 So. 388 (1920).

56. Railroads — In general.

Statute imposing upon railroads the duty to install and maintain gates at grade crossings whenever the public service commission shall declare the safety of the public to require it was a legitimate exercise of the police power of the state, and the fact that the statute does not provide for allocation between the railroad and a local community of the cost of installing the protective gates does not render the statute unconstitutional as a deprivation of property without due process of law. Mississippi Pub. Serv. Comm'n v. Alabama G.S.R.R., 294 So. 2d 173 (Miss. 1974).

In an action to enjoin the enforcement of public service commission order requiring plaintiff railroad to continue its passenger service between certain points, on ground that such order violated constitutional rights of the plaintiff, the crucial question before the United States District Court was not of federal jurisdiction but of comity and the usual rule of comity did not apply because there was no state court of equitable jurisdiction to which the railroad could go for equitable relief to protect its federal rights against, the confiscation of its property. Illinois Cent. R.R. v. Mississippi Pub. Serv. Comm'n, 135 F. Supp. 304 (S.D. Miss. 1955).

A statute authorizing an attachment suit against a nonresident railroad doing business in the county where a necessary defendant may be found, but where the railroad has no line of road or agent upon whom process may be served, does not deprive such nonresident railroad company of the equal protection of the laws. Clark v. Louisville & N.R. Co., 158 Miss. 287, 130 So. 302 (1930).

A statute empowering the railroad commission to order railroads to construct sidetracks, spur tracks, loop or switch tracks connecting their main line with industrial plants, at the expense of the one applying for their construction unless the commission shall otherwise order, if they can be constructed without causing undue hazard to the property or trains of the railroad company, violates the due process and equal protection clauses of the Fourteenth Amendment. McInnis v. New Orleans & N.E.R., 109 Miss. 482, 68 So. 481 (1915).

The Mississippi statute imposing a penalty of $25 for a failure to settle a claim for damages to an intrastate shipment between two points on the carrier's line within 60 days from the giving of the notice of claim does not deny due process or equal protection, where upon the trial the actual damages were assessed at the sum stated in the notice. Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 33 S. Ct. 40, 57 L. Ed. 193 (1912).

A statute requiring railroads to settle claims for lost or damaged freight between two points on the same line within 60 days from the filing of notice of loss and for freight lost or damaged between points on different lines within 90 days does not violate the equal protection clause. Mobile & O.R. Co. v. Brandon, 98 Miss. 461, 53 So. 957 (1911).

Equal protection is not denied by a law requiring railroads to establish and maintain a depot in every incorporated city, town or village through which their lines pass. Southern Ry. v. State, 95 Miss. 657, 48 So. 236, Am. Ann. Cas. 1912A,225 (1909).

The application in the case of an incorporated village on a branch operated at a loss, of a statute requiring a railroad to establish and maintain depots, does not violate the due process clause where the operation of the entire railroad in the state is not unprofitable. Southern Ry. v. State, 95 Miss. 657, 48 So. 236, Am. Ann. Cas. 1912A,225 (1909).

Railroads may be required to maintain cattle guards where their tracks run through enclosed lands. Yazoo & Miss. V. Ry. v. Harrington, 85 Miss. 366, 37 So. 1016, 3 Am. Ann. Cas. 181 (1905).

A railroad company empowered by its charter from time to time to fix, regulate, and receive the tolls and charges to be received by it for transportation, is not deprived of its property without due pro cess of law or denied the equal protection of the laws by a state statute creating a commission to provide for the regulation of freight and passenger rates, to prevent unjust discrimination, and to enforce police regulations affecting railroad companies doing business in the state. Stone v. Farmers' Loan & Trust Co., 116 U.S. 307, 6 S. Ct. 388, 29 L. Ed. 636 (1886).

The creation of a state railroad commission, charged with the duty of supervising railroads is not violative of the Fourteenth Amendment. Stone v. Yazoo & Miss. V. Ry., 62 Miss. 607, 52 Am. R. 193 (1885).

57. — Abolishing fellow-servant rule, railroads.

A statute abolishing the fellow-servant rule in action for injuries to railroad employees is not repugnant to the equality clause. Givens v. Southern Ry., 94 Miss. 830, 49 So. 180 (1909); Easterling Lumber Co. v. Pierce, 106 Miss. 672, 64 So. 461 (1914), error dismissed, 235 U.S. 380, 35 S. Ct. 133, 59 L. Ed. 279 (1914).

A statute abrogating the fellow-servant rule as to railway employees does not offend the equal protection clause because construed as applying to the foreman and a section crew charged with keeping the track in repair. Mobile, J. & Ky. C.R.R. v. Turnipseed, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78, Am. Ann. Cas. 1912A,463 (1910), aff'd Mobile, J. & K. C. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360; New Orleans, M. & C. R. Co. v. cole, 101 Miss. 173, 57 So. 556.

58. — Creating presumption of negligence, railroads.

A statute providing that proof of injury from a derailment is prima facie evidence of the railroad's want of reasonable skill and care in operation merely casts upon the railroad the duty of producing some evidence to counter the inference of negligence the statute creates, and does not violate the Fourteenth Amendment. Alabama G.S.R.R. v. Allied Chem. Corp., 501 F.2d 94 (5th Cir. 1974), on reh'g, 509 F.2d 539 (5th Cir. 1975).

The Mississippi statute under which in actions against railway companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars is made prima facie evidence of negligence, does not violate the equal protection or due process clauses. Mobile, J. & Ky. C.R.R. v. Turnipseed, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78, Am. Ann. Cas. 1912A,463 (1910), aff'd Mobile, J. & K. C. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360; New Orleans, M. & C. R. Co. v. cole, 101 Miss. 173, 57 So. 556.

59. Roads and highways.

Landowner's claim that county maintenance activities along roads within his property damaged property, did not give rise to constitutional taking claim. Taylor v. County of Copiah, 937 F. Supp. 573 (S.D. Miss. 1994), aff'd, 51 F.3d 1042 (5th Cir. 1995).

Homeowners who suffered additional damages allegedly attributable to a highway construction project a few years after the homeowners were compensated for the taking of their property by the condemning authority in an eminent domain action could not recover for the additional damages, even if those damages were not reasonably foreseeable at the time of the original eminent domain trial. King v. Mississippi State Hwy. Comm'n, 609 So. 2d 1251 (Miss. 1992).

60. Schools and school districts — In general.

School principals having constitutionally protected property interest in employment did not have constitutionally protectable property right in employment at rate provided by salary schedule, absent any evidence that application of schedule was school board policy; principals' contracts entitled them only to salary received during previous school year, schedule had been in existence at time previous year's contract had been executed and had not been used in calculating salaries, and board complied with all state statutory notice requirements. Gardner v. Coffeeville Sch. Dist., 982 F. Supp. 1221 (N.D. Miss. 1997).

Student could not complain of unconstitutional vagueness or overbreadth of school district alcohol policy as it applied to activities of third parties, but only as it applied to his own activities. Board of Trustees v. T.H. ex rel. T.H., 681 So. 2d 110 (Miss. 1996).

School district policy is not facially unconstitutionally overbroad if: there are substantial number of situations where policy may be validly applied; policy covers range of easily identifiable conduct which may be constitutionally proscribed; and policy is susceptible to narrowing interpretation. Board of Trustees v. T.H. ex rel. T.H., 681 So. 2d 110 (Miss. 1996).

School district's alcohol policy was not facially overbroad as applied to conduct of student who admitted consuming alcohol before entering school property to attend school athletic function; policy validly applied to student's conduct, district was constitutionally permitted to proscribe consumption of alcohol within limits, and policy was susceptible to narrowing interpretation. Board of Trustees v. T.H. ex rel. T.H., 681 So. 2d 110 (Miss. 1996).

The procedures surrounding a school principal's termination were not "tainted," and no violation of his due process rights occurred, even though it could have been inferred from a witness' reluctance to make a statement and from her affidavit that she felt compelled to testify or lose her job, since such "evidence' of coercion was insufficient to overcome the "presumption of honesty and integrity" in the school board members who served as adjudicators and conducted the dismissal hearing. Harris v. Canton Separate Pub. Sch. Bd. of Educ., 655 So. 2d 898 (Miss. 1995).

The fact that an attorney for a school's board of trustees participates in a dismissal hearing, advises the board and generally runs the hearing affords the employee no grounds for complaint unless it can be shown that in fact the attorney corrupted or otherwise destroyed the impartiality of the process. Hoffman v. Board of Trustees, E. Miss. Junior College, 567 So. 2d 838 (Miss. 1990).

Only those persons who, out of personal animosity, or personal or financial stake in the decision, are shown of such bias that the presumption of honesty and integrity of school board members is overcome, shall be disqualified from service on a hearing board based on due process considerations. Hoffman v. Board of Trustees, E. Miss. Junior College, 567 So. 2d 838 (Miss. 1990).

Discrimination in form of punishing non-athletes, yet purposely sparing athletes committing similar infractions, could have no rational relation to any legitimate interest of school officials; any classification must pass requirement that it be rationally related to legitimate state interest, even if it does not involve suspect class or fundamental right, which finding would merely mean that purported classification was not subject to strict scrutiny. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

Notice procedure set forth in Emergency School Leasing Authority Act, § 37-7-301, is adequate under both Mississippi and United States Constitutions. Cox v. Jackson Mun. Separate Sch. Dist., 503 So. 2d 265 (Miss. 1987).

A statute giving school boards the power to reemploy a principal without the recommendation of the superintendent does not deny the superintendent due process of law where the statute affords him ample opportunity to present evidence in support of his decision. Lamar County Sch. Bd. v. Saul, 359 So. 2d 350 (Miss. 1978).

School district's rule against employing parents of illegitimate children violated both the equal protection clause and the due process clause of the Fourteenth Amendment. Andrews v. Drew Municipal Separate School Dist., 507 F. 2d 611 (5th Cir. 1975), cert. granted 96 S. Ct. 33, 423 U.S. 820, 46 L. Ed. 2d 37, cert. dismissed

96 S. Ct. 1752, 425 U.S. 559, 48 L. Ed. 2d 169.

Section 9, Chapter 10, Laws of 1953 (§ 6271-09) prescribing additional qualification for county superintendents of public education, but also providing that no person who was serving as county superintendent of education at the effective date of the Acts should be ineligible for the office because of lack of the qualifications prescribed therein, was not invalid as containing an unreasonable discrimination in favor of incumbents, and so did not violate the equal protection and due process clauses of the Federal and State Constitutions. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

The consolidation of school districts is not lacking in due process where property owners have full opportunity to be heard and protest against the creating of the consolidated district or issuance of bonds therefor. Board of Supervisors v. Brown, 146 Miss. 56, 111 So. 831 (1927).

61. — Teacher employment and termination, schools and school districts.

The procedures followed at an administrative hearing before 3 members of the school board on a teacher's 6-month suspension violated the teacher's right to due process where, during a break in the formal proceedings, the 3 school board members told the teacher that they intended to reject suspension in favor of a formal reprimand, the teacher claimed to have relied on this information and rested her case prematurely, and the board ultimately reached a decision to suspend the teacher; although the teacher was afforded an opportunity to be heard, the school board, by its own actions, prevented her from taking full advantage of her right to present evidence in her favor by leading her to believe that there was no need to present additional evidence. Bowman v. Ferrell, 627 So. 2d 335 (Miss. 1993).

Where a suspended teacher's procedural due process rights had been violated at her hearing before the school board, the chancery court erred in ordering the teacher's reinstatement rather than a rehearing as required by § 37-9-113(4). Bowman v. Ferrell, 627 So. 2d 335 (Miss. 1993).

There is no legislative enactment providing teachers' aides with a valid claim of entitlement to continued employment. Thus, a teacher's aide's termination deprived her of no property interest, the taking of which would invoke the due process provisions of the constitution. Harrison County Sch. Bd. v. Morreale, 538 So. 2d 1196 (Miss. 1989).

Teacher's constitutional right to due process was not violated by school board despite claim that he was denied fair and impartial hearing because school board had already determined to dismiss him when it informed him of his right to public hearing, and because even though board conducted hearing through hearing officer, the ultimate decision rested with board. First, teacher had made no complaint at time of hearing about possibility of impartiality of school board, and such failure waived point. Second, where board acts both investigatively and adjudicatively, court establishes presumption of honesty and integrity in those serving as adjudicators, and in order to rebut presumption, teacher must show that board members had personal or financial stake in decision, or that there was some personal animosity toward teacher. Finally, showing that board was involved in events preceding termination is not enough, absent showing of either personal animosity, personal stake, or financial stake in decision, to overcome presumption of honesty and integrity of board members. Spradlin v. Board of Trustees, 515 So. 2d 893 (Miss. 1987).

Removal of a teacher from her position was a violation of her right to due process where the action was taken without first giving her copies of the written charges against her, or informing her of the identities of those who had preferred the charges, or affording her an opportunity to appear before the board of trustees when it considered the charges; advising the teacher after her removal of her right to a hearing failed to comply with the provisions of § 37-9-59 and § 37-9-111(4). Cantrell v. Vickers, 495 F. Supp. 195 (N.D. Miss. 1980).

School board policy prohibiting the hiring of any teacher whose own children did not attend the public schools did not violate teachers' First Amendment right to freedom of association or Fourteenth Amendment rights to due process and equal protection. Cook v. Hudson, 511 F.2d 744 (5th Cir. 1975), reh'g denied, 515 F.2d 762 (5th Cir. 1975), cert. dismissed, 429 U.S. 165, 97 S. Ct. 543, 50 L. Ed. 2d 373 (1976).

62. — Student conduct and discipline, schools and school districts.

Student was denied his due process rights during disciplinary proceedings against him where not only was the student not allowed to pose questions to the other students involved in the incident, who were not present at the hearing, he had no right to even know the names of the students who accused him; the student received absolutely no notice of the hearing in which the school district was to review the Appeals Committee's recommendation of expulsion for one year and render a final decision on the disciplinary proceeding, and a one-year expulsion required more than the minimal due process protections of notice and right to be heard. Hinds County Sch. Dist. Bd. of Trs. v. R.B., 10 So. 3d 495 (Miss. Ct. App. 2007), reversed by 10 So. 3d 387, 2008 Miss. LEXIS 606 (Miss. 2008).

A high school student was not denied due process in connection with his suspension and subsequent expulsion arising from having several bottles of beer in his truck in the school parking lot, notwithstanding that the school failed to send a notice to the student through its board attorney within 24 hours as required by its rules, where (1) the school board published and required all students and parents to acknowledge that they received a copy of a handbook which set out, inter alia, the board's policy regarding alcohol, (2) the student admitted that the beer found in his truck was his and that he was the one who had purchased the alcohol, and (3) both of the student's parents were present at the first formal hearing and the student received a second formal hearing. Covington County v. G.W., 767 So. 2d 187 (Miss. 2000).

A student was not denied due process when the school failed to provide a list of witnesses prior to the first hearing where (1) the student was apprised of the charge against him, the nature of the hearing, and that he was entitled to have counsel present, and (2) the student failed to show exactly how he was substantially prejudiced by not having the names prior to the hearing. Covington County v. G.W., 767 So. 2d 187 (Miss. 2000).

Hearsay testimony from a school official in a student disciplinary proceeding does not deprive a student of any due process rights. Covington County v. G.W., 767 So. 2d 187 (Miss. 2000).

When student admits to conduct giving rise to suspension, need for due process hearing is obviated, since purpose of hearing is to safeguard against punishment of students who are innocent of accusations against them. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

Suit alleging that school official grabbed arm of student did not show type of action calculated to cause serious injury, nor did not such act evince malice or intention to cause injury, and even if serious injuries may have resulted, nature of contact suggested that any injuries were unintended rather than calculated and that if force used was in fact excessive, it came from carelessness or excess of zeal rather than malice. Whether physical harm by state officer rises to level of constitutional deprivation depends on extent of injury inflicted, degree of force used in proportion to amount necessary under circumstances, and motives of official; bottom-line inquiry is whether official's conduct amounted to abuse of official power that shocks conscience. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

Any deprivation of student's interest in attending school must be attended by at least minimal procedural safeguards, but where suspension is for 10 days or less, due process requires only that student be given oral or written notice of charges against him, basis of accusation, and opportunity to present his side of story. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

Even assuming that hearing before school board met minimal procedural safeguards, facts did not establish that hearing given to student by board comported with more formal procedures necessary for long-term suspensions, where it was unclear from facts developed through pleadings and discovery whether or not isolation at issue involved sufficient educational deprivation to warrant being treated as equivalent of suspension; upon returning to school after 10 days suspension, student was required to remain in detention room, isolated from other students and excluded from regular classes. Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924.

A high school sophomore who, along with a schoolmate, drank 2 or 3 sips of beer at her home before leaving for school was denied procedural due process when, despite there being no school board rule prohibiting the drinking of beer by students at home, the school board took away all her school credits for the semester as punishment for drinking the beer, and, again, where procedures for a de novo hearing before the school board were ignored. Warren County Bd. of Educ. v. Wilkinson ex rel. Wilkinson, 500 So. 2d 455 (Miss. 1986).

63. — Sports and athletic programs, schools and school districts.

A high school athletic association's anti-recruiting rule, which required that a participant in interscholastic activities attend a school in the school district of which his or her parents or guardian were bona fide residents, did not impermissibly burden the constitutional right to interstate travel because no penalty was imposed as a result of exercising the right to travel; any restriction on the right to travel was incidental to the stated purpose of the rule-to deter overzealous athletic recruiting practices-and the rule was reasonably related to that purpose. Mississippi High Sch. Activities Ass'n v. Coleman ex rel. Laymon, 631 So. 2d 768 (Miss. 1994).

A high school athletic association's anti-recruiting rule, which required that a participant in interscholastic activities attend a school in the school district of which his or her parents or guardian were bona fide residents, did not violate the constitutional right to free exercise of religion since the rule did not prevent a parent or child from actively practicing their chosen religion and did not regulate the conduct of student athletes to the point of interfering with any religious practice; any interference with religious practices was incidental to the stated purpose of the rule-to deter overzealous athletic recruiting practices-and the rule was reasonably related to that purpose. Mississippi High Sch. Activities Ass'n v. Coleman ex rel. Laymon, 631 So. 2d 768 (Miss. 1994).

A high school athletic association's anti-recruiting rule, which required that a participant in interscholastic activities attend a school in the school district of which his or her parents or guardian were bona fide residents, did not violate the constitutional right to equal protection since the classifications under the rule were based on bona fide residence requirements; moreover, the stated purposes of the rule-to encourage and promote fair competition among the schools and to deter overzealous athletic recruiting tactics were legitimate, and the rule was rationally related to those purposes. Mississippi High Sch. Activities Ass'n v. Coleman ex rel. Laymon, 631 So. 2d 768 (Miss. 1994).

64. — Prayer and meditation, schools and school districts.

Miss Laws 1994, c. 609 § 1(2) (Section 37-13-4.1), permitting public school students to initiate nonsectarian nonproselytizing prayer at various compulsory and noncompulsory school events, was unconstitutional under test of Lemon v. Kurtzman, 403 US 602, where (1) its stated purpose "to accommodate the free exercise of religious rights of its student citizens in the public schools" was to advance prayer in public schools, (2) its effect was to advance religion over irreligion because it gave preferential exceptional benefit to religion that it did not extend to anything else, and (3) it excessively entangled government and religion in that government officials were allowed to lead students in prayer and punish students who left class or assemblies in order to avoid listening to prayer. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994), aff'd, 88 F.3d 274 (5th Cir. 1996), reh'g and reh'g en banc denied (5th Cir. 1996), cert. denied, 519 U.S. 965, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996).

Miss Laws 1994, c. 609 § 1(2) (Section 37-13-4.1), permitting public school students to initiate nonsectarian nonproselytizing prayer at various compulsory and noncompulsory school events, was unconstitutional under "coercion" tests where it would allow prayers to be given by any person, including teachers, school administrators, and clergy at school functions where attendance was compulsory, and students would be captive audience that could not leave without being punished by state or school board for truancy or excessive absences. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994), aff'd, 88 F.3d 274 (5th Cir. 1996), reh'g and reh'g en banc denied (5th Cir. 1996), cert. denied, 519 U.S. 965, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996).

Miss Laws 1994, c. 609 § 1(2) (Section 37-13-4.1), permitting public school students to initiate nonsectarian nonproselytizing prayer at various compulsory and noncompulsory school events, was unconstitutional endorsement of religion where it allowed school officials in their capacity as representatives of state to lead students in prayer, and it set aside special time for prayer that it did not set aside for anything else. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994), aff'd, 88 F.3d 274 (5th Cir. 1996), reh'g and reh'g en banc denied (5th Cir. 1996), cert. denied, 519 U.S. 965, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996).

Miss Laws 1994, c. 609 § 1(2), permitting public school students to initiate nonsectarian nonproselytizing prayer at various compulsory and noncompulsory school events, was constitutional to extent that it allowed students to solemnize their graduation ceremonies with student-initiated, nonproselytizing and nonsectarian prayer given by student. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994), aff'd, 88 F.3d 274 (5th Cir. 1996), reh'g and reh'g en banc denied (5th Cir. 1996), cert. denied, 519 U.S. 965, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996).

Injunction permanently barring the Mississippi High School Activities Association, Inc. from placing the Hattiesberg High School on one year probation after the high school's baseball team was required to forfeit a baseball game in the 1984 South AA Baseball Tournament was improperly granted in an action brought by the high school baseball team members and their parents, because the parties bringing the action were not third-party beneficiaries to the contract between the high school and the activities association, had no constitutional protected property interests in playing interscholastic sports, and had no standing to assert the due process rights of the high school. Mississippi High Sch. Activities Ass'n v. Farris ex rel. Farris, 501 So. 2d 393 (Miss. 1987).

65. Taxation —In general.

Limited only by such constitutional concepts as equal protection and due process, legislature may levy tax in any manner it deems advisable. Mississippi Power & Light Co. v. Mississippi State Tax Comm'n, 704 So. 2d 1343 (Miss. Ct. App. 1997), reh'g denied 704 So. 2d 475, cert. denied.

Limited only by such constitutional concepts as equal protection and due process, legislature may levy tax in any manner it deems advisable. Mississippi Power & Light Co. v. State Tax Comm'n, 700 So. 2d 1185 (Miss. Ct. App. 1997).

The four criteria that a taxing statute must satisfy to withstand a challenge under the commerce clause and due process clause of the United States Constitution are: (1) the tax must be applied to an activity with a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to services provided by the taxing state; the failure to meet any one prong of the test renders the tax invalid. Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).

A chancery court abused its discretion in overruling taxpayers' motion for leave to amend their complaint to assert a 42 USCS § 1983/equal protection claim since state courts have concurrent jurisdiction with the federal courts over claims brought under § 1983 for violations of rights secured by the Constitution and laws of the United States, the federal judiciary had declared that it had no subject matter jurisdiction, and justice demanded that the taxpayers' justiciable claim be heard and decided on its merits. Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

In an action by a property owner to enjoin the county board of supervisors from levying and collecting a two-mill ad valorem tax for garbage collection and disposal, the property owner failed to carry his burden of proving that the legislative enactment authorizing the creation of such tax was violative of the due process and equal protection guarantees of the United States Constitution, notwithstanding the contention that there was no reasonable basis for classifying the county by itself separate from the state's other counties, where a sanitary condition requiring prompt attention existed in the county and where it could not be said that such condition was a common characteristic or constituted a classification for every other county in the state. Harris v. Harrison County Bd. of Supvrs., 366 So. 2d 651 (Miss. 1979).

The tax levied by Code 1972 § 27-55-313 [repealed] on diesel fuel used by contractors in the performance of state contracts is not limited in its application to diesel fuel used in motor vehicles, but applies to all diesel fuel used by such contractors regardless of the specific use made of the fuel; That other fuels, notably propane, are not subject to the disputed tax when used as a heating agent does not constitute discrimination violative of the equal protection clause. Sharpe v. Standard Oil Co., 322 So. 2d 457 (Miss. 1975), appeal dismissed, 425 U.S. 947, 96 S. Ct. 1720, 48 L. Ed. 2d 191 (1976).

Fact that decision of federal court declaring Mississippi poll tax law unconstitutional was handed down on day which was deadline for filing protest petitions against issuance of state aid road bonds, thereby increasing the number of electors in county from 8855 to 13510 and making total number of signatures on petitions insufficient to prevent board of supervisors from issuing bonds without calling election therefor, did not deprive petitioners of their constitutional rights, for the decision of the federal court was a fact beyond the power of the board to alter, but of which they were bound to take cognizance. Ratliff v. Board of Supvrs., 193 So. 2d 137 (Miss. 1966).

Where a theater operator collected a tax from purchasers of the picture show tickets and turned the money over to state treasury, and kept no record of individual purchasers, to allow the movie operator to recover the tax would violate the doctrine against unjust enrichment. State v. Paramount-Gulf Theatres, 226 Miss. 404, 84 So. 2d 403 (1956).

Statute imposing manufacturer's tax under which tax rate imposed against manufacturers of some products was different from that imposed against manufacturers of other products held not invalid as denial of equal protection. Southern Package Corp. v. State Tax Comm'n, 195 Miss. 864, 15 So. 2d 436 (1944), error overruled, 195 Miss. 874, 16 So. 2d 856 (1944).

Classification, for purposes of taxation, to be obnoxious to constitutional guaranty of equal protection of laws, must be manifestly arbitrary and unreasonable and not possibly so. Southern Package Corp. v. State Tax Comm'n, 195 Miss. 864, 15 So. 2d 436 (1944), error overruled, 195 Miss. 874, 16 So. 2d 856 (1944).

The equal protection clause of Federal Constitution does not prevent a State from adjusting its system of taxation in a reasonable manner, nor compel a State to adopt an ironclad rule of equal taxation. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

Mere inequalities or exemptions in matter of State taxation are not forbidden by Federal Constitution. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

The equal protection clause does not prevent State from adjusting its system of taxation in all proper and reasonable ways. Mathison v. Brister, 166 Miss. 67, 145 So. 358 (1933).

Classification for tax purposes, if not wholly unreasonable and arbitrary, and if the statute is uniform in operation, does not deny equal protection. Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

Female dogs may, consistently with the equal protection clause, be taxed at a higher rate than male dogs. State v. Widman, 112 Miss. 1, 72 So. 782 (1916).

66. — Chain store tax.

The chain store taxing statutes do not violate the concepts of due process and equal protection of the law embodied in the Mississippi and United States Constitutions and did not, in this case, deny equal protection of the law to a corporate retailer operating a chain of stores within and without the state. Interco, Inc. v. Rhoden, 220 So. 2d 290 (Miss. 1969), appeal dismissed, 396 U.S. 7, 90 S. Ct. 26, 24 L. Ed. 2d 7 (1969).

A statute imposing an additional three per cent on each dollar of gross revenue derived from the sale of admission to any moving picture show belonging to a chain or group of more than ten shows does not violate the equal protection clause of the Fourteenth Amendment to the Federal Constitution. State v. Paramount-Gulf Theatres, 226 Miss. 404, 84 So. 2d 403 (1956).

The imposition of an additional tax on the operators of more than five stores, by Mississippi Laws of 1930, c 90, imposing a tax, based upon gross income, on the privilege of selling goods at retail, does not violate the equal protection or due process clauses of the Fourteenth Amendment. Penny Stores, Inc. v. Mitchell, 59 F.2d 789 (S.D. Miss. 1932), appeal dismissed, 287 U.S. 672, 53 S. Ct. 122, 77 L. Ed. 580 (1932).

67. — Income taxes.

Federal retirees who were state residents were entitled to refunds of state income taxes paid under the state's unconstitutional tax scheme which taxed federal retirees while exempting the state's own retired employees. Marx v. Broom, 632 So. 2d 1315 (Miss. 1994).

The plain language of § 27-7-313 states that any overpayment of Mississippi taxes for any reason shall be refunded to the taxpayer; thus, § 27-7-313 provided for refunds of state income taxes to federal retirees who paid taxes under the state's unconstitutional tax scheme which taxed federal retirees while exempting the state's retired employees. Marx v. Broom, 632 So. 2d 1315 (Miss. 1994).

The 1990 amendment to § 27-7-313 stripped federal retirees of the right to file for a refund of income taxes paid under the state's unconstitutional tax scheme, which taxed federal retirees while exempting the state's retired employees, without providing them any means of protecting those rights, and thus violated the retirees' constitutional right to due process; moreover, the amendment was unconstitutionally discriminatory because the only persons affected were former federal employees as opposed to state or private sector employees. Marx v. Broom, 632 So. 2d 1315 (Miss. 1994).

Income of a business operating in interstate commerce is not immune from a fairly apportioned state taxation. However, for a state to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution require that the tax must be applied to an activity with a substantial nexus with the taxing state, the tax must be fairly apportioned, the tax must not discriminate against interstate commerce, and the tax must be fairly related to services provided by the taxing state. Marx v. Truck Renting & Leasing Ass'n, 520 So. 2d 1333 (Miss. 1987).

Section 27-65-23, which provides for a 6 percent tax on the gross income of a business which rents "transportation equipment with a situs within or without the State to common, contract or private commercial carriers," and is taxed on that part of the income derived from use within the State, violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution because the tax is imposed on an activity without a substantial nexus within Mississippi. Marx v. Truck Renting & Leasing Ass'n, 520 So. 2d 1333 (Miss. 1987).

A legislative delegation to the tax commission of the duty to determine the portion of taxable income of a given person or corporation which should be allocated to sources within the state is a delegation of a fact-finding duty, and where the legislature provided the standard to be followed in evaluating the taxpayer's earned income in Mississippi, as distinguished from its earned income from other sources, such a delegation is not unconstitutional. Columbia Gulf Transmission Co. v. Barr, 194 So. 2d 890 (Miss. 1967).

A state income tax law does not deny to a citizen the equal protection of the laws in including income earned from sources outside the state in determining his taxable income while excluding it in determining the taxable income of domestic corporations, where there is nothing to negate the possible existence of just grounds for the difference, and it appears that the state has adopted, generally, a policy of avoiding double taxation of the same economic interest in corporate income by taxing either the income of the corporation or the dividends of its stockholders, but not both, and in the case of corporate income and dividends attributable to business done outside the state and received by stockholders of domestic corporations, the stockholders are taxed. Lawrence v. State Tax Comm'n, 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A.L.R. 374 (1932).

A graduated income tax does not deny the equal protection of the laws. State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

68. — Inheritance taxes.

Classification of property for inheritance tax purposes, according to decedent's residence, is permissible. Enochs v. State, 133 Miss. 107, 97 So. 534 (1923).

69. — Privilege taxes generally.

A statute that imposed a fee on professional bail bondsmen for each bond conditioned upon the appearance at trial of a person charged with a criminal offense did not violate the equal protection rights of a licensed professional bail bondsmen, since it did not discriminate within those designated in the class, since it served a legitimate state interest in that moneys collected therefrom were earmarked for correctional facilities, and since the means chosen to effectuate the state's interests were reasonable. Peterson v. Sandoz, 451 So. 2d 216 (Miss. 1984).

Code 1942 § 10108, imposing tax on every person engaged in the business of selling tangible property, does not constitute double taxation, and does not violate the equal and uniform clauses of the State and Federal Constitutions. Peterson v. Sandoz, 451 So. 2d 216 (Miss. 1984).

A privilege tax (Laws 1944, chap 137, § 143) imposed on persons taking photographs in the state for development of the same outside the state, when construed as a tax only on the person who actually takes the picture, is not unconstitutionally discriminatory in favor of local photographers by reason of the slight difference in the amount of tax as between the two classes. Craig v. Mills, 203 Miss. 692, 33 So. 2d 801 (1948).

Assuming that a Mississippi privilege tax imposed on persons and corporations doing a business of purchasing commercial paper secured by means thereof was invalid because it exempted banks and local merchants from the payment of the tax, the invalidity of the exemption would not render the statute unconstitutional as to the tax levied against a particular finance company in view of the general rules for construction of statute and an express provision in the privilege tax act that if any provisions thereof should be found invalid, that fact would not render the remaining provisions of the statute void. Stone v. General Contract Purchase Corp., 193 Miss. 301, 7 So. 2d 806, 140 A.L.R. 1029 (1942).

A privilege tax which is prohibitive in amount denies equal protection. Riley v. Ayer & Lord Tie Co., 147 Miss. 105, 113 So. 214 (1927).

The discrimination against a person beginning a new business by a statute imposing a liability unless he pays a privilege tax before beginning business, while permitting one in an old business to escape such liability by renewing the privilege tax at any time during the month in which it is due, is not unreasonable. Robertson v. Southeastern Express Co., 130 Miss. 305, 94 So. 210 (1922), affirmed 264 U.S. 535, 44 S. Ct. 421, 68 L. Ed. 836 (1924).

The exemption of Confederate soldiers and of persons over 60 years of age who have lost a limb or an eye and whose taxable property is less than $500, from a privilege tax on peddlers, renders the taxing statute violative of the equal protection clause. Adams v. Standard Oil Co. of Kentucky, 97 Miss. 879, 53 So. 692 (1910).

A privilege tax may not constitutionally be imposed on persons carrying on a plumbing business without employing assistants. Wilby v. State, 93 Miss. 767, 47 So. 465 (1908).

An exception of sawmill operators who do not ship timber or lumber out of the state from a privilege tax on timber buyers renders the tax invalid under the commerce clause. Adams v. Mississippi Lumber Co., 84 Miss. 23, 36 So. 68 (1904).

70. — Property taxes.

Irrebuttable presumption that taxpayer's property was used for nonagricultural purposes based solely upon fact that subdivision plat had been recorded, rather than upon present use of property, denied taxpayer constitutional right to equal protection of law. Riley v. Jefferson Davis County, 669 So. 2d 748 (Miss. 1996).

Property valuation may consider the gross income generated by the property as an indicator of value. It is not, therefore, a constitutional violation to value differently otherwise identical property if the disparate values result from disparate revenue-generating capabilities. Rebelwood, Ltd. v. Hinds County, 544 So. 2d 1356 (Miss. 1989).

The constitutional requirement of uniformity and equality in taxation is satisfied when, in establishing the true value of property, the public assessor considers all factors affecting the value of the property and employs the same assessment ratio as is applied to other like properties. Thus, where the assessor considered the amount of federal subsidies received by a taxpayer as the owner of the property, § 112 of the Mississippi Constitution and the Equal Protection Clause of the United States Constitution afforded the taxpayers no right to relief absent a showing that other federally subsidized housing projects were treated differently or that the assessor did not consider all factors affecting value. Rebelwood, Ltd. v. Hinds County, 544 So. 2d 1356 (Miss. 1989).

Assessment of a national bank's property at full value where other property is assessed at 65% of value, does not deny equal protection. First Nat'l Bank v. Board of Supvrs., 157 Miss. 197, 127 So. 686 (1930), cert. denied, 282 U.S. 856, 51 S. Ct. 32, 75 L. Ed. 758 (1930).

The requirement of the state constitution that the assessment of property for taxation be uniform and equal, must, in view of the equal protection clause of the 14th Amendment, prevail over another constitutional requirement of assessment at true value. Knox v. Southern Paper Co., 143 Miss. 870, 108 So. 288 (1926).

The classification of property for purposes of assessment and taxation is permissible so long as there is no discrimination between property of the same class; and thus the capital of banks may be taxed at its full value while other property is assessed at only a percentage of its value. Magnolia Bank v. Board of Supvrs., 111 Miss. 857, 72 So. 697, 3 A.L.R. 1365 (1916), error dismissed, 248 U.S. 546, 39 S. Ct. 135, 63 L. Ed. 414 (1919).

71. — Motor vehicle taxes.

Classification of motor vehicles according to carrying capacity or on mileage basis or putting of passenger vehicles and freight vehicles into separate classes for taxation purposes is not arbitrary or violative of equal protection clause of Federal Constitution. State ex rel. Rice v. Evans-Terry Co., 173 Miss. 526, 159 So. 658 (1935), aff'd, 296 U.S. 538, 56 S. Ct. 126, 80 L. Ed. 383 (1935), reh'g denied, 296 U.S. 663, 56 S. Ct. 177, 80 L. Ed. 473 (1936).

Statute imposing privilege tax on motor vehicles used partially on streets of "municipalities" which are governmental units of the State held not to deny equal protection, though no part of tax is returned to municipalities. State ex rel. Rice v. Evans-Terry Co., 173 Miss. 526, 159 So. 658 (1935), aff'd, 296 U.S. 538, 56 S. Ct. 126, 80 L. Ed. 383 (1935), reh'g denied, 296 U.S. 663, 56 S. Ct. 177, 80 L. Ed. 473 (1936).

Statute imposing mileage tax in addition to flat tag tax on motor vehicles traveling more than 6,000 miles upon public highways, except trucks of less than 2 1/2 tons, passenger automobiles, taxicabs, motor vehicles used solely to transport school teachers and children, forest and dairy products, material for road purposes, and motor vehicles used in lieu of street cars between municipalities or by hotels or United States or the State, held not to deny equal protection. State ex rel. Rice v. Evans-Terry Co., 173 Miss. 526, 159 So. 658 (1935), aff'd, 296 U.S. 538, 56 S. Ct. 126, 80 L. Ed. 383 (1935), reh'g denied, 296 U.S. 663, 56 S. Ct. 177, 80 L. Ed. 473 (1936).

72. — Gross receipts tax.

No due process objection exists to a state tax measured by gross receipts from the operation of a pipe line wholly within the state. Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949), reh'g denied, 338 U.S. 839, 70 S. Ct. 32, 94 L. Ed. 513 (1949).

73. — Sales and use taxes.

The imposition of use and excise taxes pursuant to § 27-67-7 et seq. on a pipeline company's use of natural gas taken from its interstate gas pipeline as fuel for its compressor engines located along the pipeline was permissible under the commerce clause and the due process clause of the United States Constitution since the activity taxed the consumption of natural gas in compressor stations located in Mississippi had a sufficient nexus with the State to justify the tax, the tax was fairly apportioned to assess only local activities and did not discriminate against interstate commerce by subjecting interstate taxpayers to a double taxation where similarly situated intrastate taxpayers would be subject to only single taxation, and the tax was fairly related to the benefits provided by the State to the pipeline company. Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).

Decision on former appeal of same case that Use Tax Law of this state is unconstitutional in its requirement that foreign seller collect and pay use tax on goods sold to Mississippi residents when seller is non-domesticated foreign corporation having no place of business or any agent in this state, its only intrastate activity being sending into state of non-resident solicitors to take orders effective only when approved at home office and sales being completed by delivery of goods to common carrier in foreign state, will be adhered to on subsequent appeal, and case does not become new case because state of Tennessee, from which state goods are shipped, is claimed to have relevant Sales Tax Law; because coming to rest in this state feature of original law has been eliminated; or because two salesmen of seller happen to reside in Mississippi for their own personal convenience and not that of employer, since principles controlling law of case doctrine are more binding upon courts than law of precedent. Stone v. Reichman-Crosby Co., 43 So. 2d 184 (Miss. 1949), appeal dismissed, cert. denied, 339 U.S. 917, 70 S. Ct. 625, 94 L. Ed. 1342 (1950).

Use tax statute violates due process clause of both State and Federal Constitution in requiring foreign seller, non-domesticated foreign corporation, having no place of business or any agent in this state, its only intra-state activity being sending into State of non-resident solicitors and two resident solicitors to take orders effective only when approved at home office, to become collecting agent for use tax on goods sold by corporation on orders taken as stated, when sales are completed by delivery of goods to common carrier in foreign state. Stone v. Reichman-Crosby Co., 43 So. 2d 184 (Miss. 1949), appeal dismissed, cert. denied, 339 U.S. 917, 70 S. Ct. 625, 94 L. Ed. 1342 (1950).

Laws 1948, Ch 457, amending Code 1942 § 10148, levying Use Tax, by eliminating provision that tax imposed shall not apply to use of article of tangible personal property sold or processed outside of state until transportation is ended and article commingled with property within state does not affect former decision that statute is unconstitutional in its requirement that foreign seller must collect and pay tax on goods sold on orders given to nonresident solicitors, effective only when approved at home office, sales being completed by delivery to common carrier in foreign state by non-domesticated foreign corporation, having no place of business in this state. Stone v. Reichman-Crosby Co., 43 So. 2d 184 (Miss. 1949), appeal dismissed, cert. denied, 339 U.S. 917, 70 S. Ct. 625, 94 L. Ed. 1342 (1950).

Use Tax Law, Chapter 120, Laws of 1942 (Code 1942 §§ 10146-10167), is unconstitutional as to its requirement that a non-resident seller shall collect and pay tax on sales consummated in Tennessee by delivery of property to a common carrier for transportation to purchasers in Mississippi, when the non-resident seller is not doing business in Mississippi and property was sold on orders taken by non-resident salesmen, as it violates the commerce clause by imposing a burden on interstate commerce and denies to seller equal protection and due process of law. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

Where assessments or returns of additional sales taxes were made by the chairman of the state tax commission from the best information available where the taxpayer's records were found to be inadequate, and notice was given to the taxpayer setting out the basis for the commissioner's findings supporting such additional assessment, which assessments were approved by the tax commission and the taxpayer was given an opportunity both by the chairman of the commission and by the tax commission itself to negative by evidence the facts on which the assessments were based, the order of the tax commission approving such assessment did not violate the due process clause, since it was not necessary for the tax commission to set forth the facts on which the assessments were made in its order, as against the contention that orders of quasi judicial commissions and bodies must be supported by a finding of basic fact. Viator v. State Tax Comm'n, 193 Miss. 266, 5 So. 2d 487 (1942), cert. denied, 316 U.S. 643, 62 S. Ct. 1036, 86 L. Ed. 1728 (1942).

The statute imposing tax on sales of retail merchants and requiring them to collect tax from customers is not unconstitutional as violative of due-process clauses of State and Federal Constitutions. State ex rel. Rice v. Allen, 180 Miss. 659, 177 So. 763 (1938).

A sales tax statute imposing a tax in greater amount on retail merchants than on wholesalers and exempting sales of school books and agricultural products held not to impose arbitrary classification violating due process. Notgrass Drug Co. v. State ex rel. Rice, 175 Miss. 358, 165 So. 884 (1936).

Statute imposing tax of six cents per gallon on gasoline sold for use on highways in internal combustion engines or for any commercial purposes held not unconstitutional as denying equal protection. State ex rel. Rice v. Louisiana Oil Corp., 174 Miss. 585, 165 So. 423 (1936).

74. — Tobacco taxation.

A tobacco tax statute requiring a retailer purchasing from a wholesaler having no permit to present tobacco to wholesaler having permit to have stamps affixed does not discriminate in favor of a wholesaler within State, since wholesaler outside State may procure stamps and affix them to merchandise. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

Statute requiring retail dealer purchasing tobacco from wholesaler having no permit to present tobacco to wholesaler having permit to have tax stamps affixed does not discriminate against retailer in town some distance from wholesaler and who buys from wholesaler outside State. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

Tobacco tax statute requiring retailers purchasing from wholesalers not having permit to present tobacco to nearest wholesaler having permit to have stamps affixed held not unconstitutional as imposing arbitrary and unreasonable restriction on lawful business and as being without legitimate basis of classification. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

75. — Insurance companies, taxation.

State statute taxing out-of-state insurance companies at higher rate than domestic insurance companies has no legitimate state purpose which would justify differing treatment in satisfaction of equal protection clause. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), reh'g denied 471 U.S. 1120, 105 S. Ct. 2370, 86 L. Ed. 2d 269, on remand 479 So. 2d 41.

Where there was no domestic mutual casualty insurance company licensed and doing business of such character in the State, foreign mutual casualty insurance company admitted into and doing such business in State could not question constitutionality of statute imposing tax on foreign, but not on domestic, mutual casualty insurance companies on ground statute violated equal-protection clause of Federal Constitution. Gulley v. Lumbermen's Mut. Cas. Co., 176 Miss. 388, 166 So. 541 (1936), error overruled, 176 Miss. 404, 168 So. 609 (1936).

Statutes exempting domestic insurance companies from ad valorem taxes do not violate the privileges and immunities clause, or make an arbitrary and unreasonable classification. Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

76. — Railroads and other carriers, taxation.

A railroad has no just cause of complaint because of the fact that it was called on to pay an ad valorem and an acreage tax on its land in common with other landowners, and in addition thereto a tax on the privilege of operating its railroad, since the two taxes were separate and distinct. Yazoo & Miss. V. Ry. v. Board of Miss. Levee Comm'rs, 188 Miss. 889, 195 So. 704 (1940), appeal dismissed, 311 U.S. 607, 61 S. Ct. 21, 85 L. Ed. 384 (1940).

The imposition of a privilege tax on railroad property by levee commissioners was not a denial of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States where the tax in question applied equally to all of the same class of persons or corporations subject thereto and there was nothing in the evidence or judicially known to the court to indicate that it imposed an unreasonable burden on the railroad, and the fact that taxation was on a mileage basis was not objectionable, nor did the fact that the only other railroad in the levee district had a smaller amount of mileage and consequently paid a much smaller tax than the defendant railroad make the tax objectionable. Yazoo & Miss. V. Ry. v. Board of Miss. Levee Comm'rs, 188 Miss. 889, 195 So. 704 (1940), appeal dismissed, 311 U.S. 607, 61 S. Ct. 21, 85 L. Ed. 384 (1940).

An ordinance imposing a privilege tax upon excursion boats carrying passengers from city and back held not unreasonable because not applying to other carriers. Mayor of Vicksburg v. Streckfus Steamers, 167 Miss. 856, 150 So. 215 (1933).

A state statute taxing railroads within a levee district at $350 per mile but providing that the tax on a railroad having less than 25 miles of main line within the district will be $50 per mile, is not so arbitrary and unreasonable as to violate the due process and equal protection clauses. Columbus & G. Ry. v. Miller, 283 U.S. 96, 51 S. Ct 392, 75 L. Ed. 861 (1931).

A statute imposing a privilege tax upon express companies at various rates per mile according to the class of railroad over which the express company operates is not denied the equal protection of the laws because it is not accorded a hearing as to the classification of the railroads which is accorded to the railroads. Southeastern Express Co. v. Robertson, 264 U.S. 535, 44 S. Ct. 421, 68 L. Ed. 836 (1924).

An express company is not denied the equal protection of the laws by reason of the fact that it is subject to a penalty for beginning business over any road before paying a privilege tax while persons and corporations already in business when the taxing day arrives are granted a number of days in which to pay the tax. Southeastern Express Co. v. Robertson, 264 U.S. 535, 44 S. Ct. 421, 68 L. Ed. 836 (1924).

The imposition of an additional privilege tax on railroads claiming exemption, under charter, from state rate control, violates the due process clause. Gulf & S.I.R.R. v. Adams, 90 Miss. 559, 45 So. 91 (1907).

A statute providing for the assessment of back taxes against railroads by the state railroad commission, held not to involve any deprivation of property without due process, or denial of the equal protection of the laws. Yazoo & Miss. V. Ry. v. Adams, 77 Miss. 764, 25 So. 355 (1899).

77. — Tax sales and enforcement, taxation.

Taxpayers' claim that special agents of Mississippi State Tax Commission singled them out for punitive action and treated them differently from other similarly situated taxpayers failed to set forth equal protection claim, absent specific facts showing disparate treatment and absent information from which court could infer existence of classification. Smith v. Luther, 973 F. Supp. 601 (N.D. Miss. 1997).

State law requiring only posting of notice of pending tax sale in county courthouse and publication of notice once per week for three consecutive weeks is inadequate to give mortgagee sufficient notice and is therefore violative of Fourteenth Amendment due process clause. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983).

Sales tax statutes making the place of business, including the permanent fixtures used in such business, liable to seizure and sale when taxes accrued upon the business conducted on the premises should become due and unpaid, even though it did not expressly provide that the tax should be a lien upon the property of the owner of such place of business and fixtures, or that the tax should constitute a debt due and owing by the lessor, was not a violation of due process of law, in view of provisions therein permitting any person improperly charged with any tax and required to pay the same to recover it in any proper action or suit and entitling the lessor of the premises and fixtures to petition for a hearing if desired upon receipt by him of a demand from the commissioner to pay the delinquent taxes due by the lessee. Standard Oil Co. v. Stone, 191 Miss. 897, 2 So. 2d 155 (1941).

Sales tax statute in rendering liable and subject to seizure and sale the premises and fixtures of a lessor to satisfy the unpaid sales tax due on retail sales made in the conduct of a business when the premises are equipped with permanent fixtures so that no other commodity than that sold by the lessor of such premises can be sold and handled thereat, is not unconstitutionally discriminatory as being applicable only to gasoline filling stations, since there was a reasonable basis for the distinction in such situation and in not rendering liable and subject to seizure and sale the premises and fixtures of the average landlord, for instance, who leases his store building and fixtures to a merchant engaged in selling general commodities thereat other than those sold by the owner of such premises. Standard Oil Co. v. Stone, 191 Miss. 897, 2 So. 2d 155 (1941).

The satisfaction of a tax upon one parcel of property by resort to other parcels of property within the state owned by the same person, though he be a nonresident, does not deny due process. Nickey v. State, 167 Miss. 650, 145 So. 630 (1933), error overruled, 167 Miss. 684, 146 So. 859 (1933), motion overruled, 167 Miss. 689, 147 So. 324 (1933), aff'd, 292 U.S. 393, 54 S. Ct. 743, 78 L. Ed. 1323 (1934).

Statute providing that action attacking validity of tax sale of land to State must be brought within two years, after sale or forfeiture to State, and that limitation shall not apply to land sold prior to January 1, 1928, held not unconstitutional as violating equal protection provision. Russell Inv. Corp. v. Russell, 182 Miss. 385, 182 So. 102 (1938).

Statute fixing date for payment of license taxes and imposing penalty for failure to timely pay taxes does not violate due-process clause or any other provision of Constitution. Texas Co. v. Dyer, 179 Miss. 135, 174 So. 80 (1937), appeal dismissed, 301 U.S. 670, 57 S. Ct. 945, 81 L. Ed. 1334 (1937).

Statutory provision permitting sheriff to seize and sell automobile when owner has not paid highway privilege tax, without providing for inquiry thereinto or notice to owner, held void as denying due process. Holloway v. Jordan, 170 Miss. 99, 154 So. 340 (1934).

Unconstitutionality of provision permitting sheriff to seize and sell automobile for nonpayment of highway privilege tax without notice to owner, held separable from remainder of statute. Holloway v. Jordan, 170 Miss. 99, 154 So. 340 (1934).

Statute making tax a debt due by taxpayer for which action may be brought held not invalid as depriving taxpayer of property without due process of law. Nickey v. State, 167 Miss. 650, 145 So. 630 (1933), error overruled, 167 Miss. 684, 146 So. 859 (1933), motion overruled, 167 Miss. 689, 147 So. 324 (1933), aff'd, 292 U.S. 393, 54 S. Ct. 743, 78 L. Ed. 1323 (1934).

A statute making every tax lawfully levied a debt against the taxpayer, recoverable by action in which the assessment roll shall be prima facie evidence of its correctness, does not deny due process, though not providing for personal service on taxpayer of notice of assessment.

George County Bridge Co. v. Catlett, 161 Miss. 120, 135 So. 217 (1931).

78. Unemployment compensation.

Denial to a union member benefits under the Unemployment Compensation Act because of his refusal to accept nonunion employment is not a denial of a property right in violation of the due process and equal protection clauses of the Constitutions of the United States and the State of Mississippi. Mills v. Mississippi Emp. Sec. Comm'n, 228 Miss. 789, 89 So. 2d 727, 56 A.L.R.2d 1010 (1956).

Statute (Code 1942 § 7440), defining an employer subject to the provisions of the Unemployment Compensation Act (subsection h(1) and (4)), as applied to a corporation which did not employ the minimum of 8 persons required by the Act, but which was controlled by another corporation owning a majority of the stock, both corporations being controlled by the same interests, and both corporations, together, having more than 8 nonexempt employees, did not violate the equal protection clauses of the state and Federal constitutions. Warren Brokerage Co. v. Mississippi Unemployment Comp. Comm'n, 194 Miss. 855, 13 So. 2d 227 (1943), Followed in Warren Credit Corp. v. Mississippi Unemployment Comp. Commission, 13 So. 2d 228.

Determination that drug business employing six persons and dairy business employing four persons were under a common control so as to be within the application of the Mississippi Unemployment Compensation Act did not deprive the defendant of his property without due process of law or deny him the equal protection of the laws, where such determination was based upon evidence that defendant deeded the dairy to his wife to evade liability for benefits under such act, that although proceeds of the dairy were used by the wife for remodeling and furnishing their home, defendant retained control over the dairy business, and both businesses were really operated for the benefit of defendant and his family. Mississippi Unemployment Comp. Comm'n v. Avent, 192 Miss. 85, 4 So. 2d 296 (1941), error overruled, 192 Miss. 94, 4 So. 2d 684 (1941), appeal dismissed, 316 U.S. 641, 62 S. Ct. 947, 86 L. Ed. 1727 (1942).

A statute which for the avowed purpose of relieving unemployment and providing for the processing of raw materials found and produced in the state, with a view to balancing agriculture with industry, authorizes municipalities to construct factories which may be leased to operators on terms which will insure their continued operation, does not violate the due process clause. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

78. Warranty law.

Section 75-1-105 authorizes application of Mississippi substantive law on privity, disclaimers and limitations of remedies in warranty action only when transaction giving rise to warranty claim bears some reasonable and appropriate relationship to Mississippi, and in absence of such relation, application of Mississippi substantive warranty law violates constitutional guarantees. Price v. International Tel. & Tel. Corp., 651 F. Supp. 706 (S.D. Miss. 1986).

79. Welfare laws.

State statutes that deny welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years violated the equal protection clause of the Fourteenth Amendment and conflict with overriding national policies including the right of an alien lawfully within the country to enter and abide in any state on an equality of legal privileges with all citizens under nondiscriminatory laws in areas which have been constitutionally entrusted to the federal government. Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971).

80. Workers' compensation.

Award of workers' compensation benefits to an employee was overturned where, as a result of the Mississippi Workers' Compensation Commission's departure from its own procedural rules, certain medical records were entered into evidence that erroneously provided medical causation relating the employee's focal dystonia to the employee's work as a card dealer for the employer; the mandates of due process were not adhered to by the commission. Robinson Prop. Group v. Newton, 975 So. 2d 256 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 284 (Miss. 2008).

Workers' compensation claimants challenging constitutionality of workers' compensation system failed to show that they suffered inordinate delays in resolution of their benefits claims, and, thus, failed to show state-caused due process deprivation arising out of delays in system, where many of delays complained of by claimants were result of their own or their attorneys' action or inaction. Warren v. Mississippi Workers' Comp. Comm'n, 700 So. 2d 608 (Miss. 1997).

Purposes and objectives of Workers Compensation Act has rationale basis and furthers valid state purpose, even though it precludes recovery by certain parties, such as non-dependents. Dependents of Nosser v. Natchez Jitney Jungle, Inc., 511 So. 2d 141 (Miss. 1987).

Under Mississippi and Federal Constitutions, there is no due process violation by virtue of exclusive remedy provisions of Workers' Compensation Act, § 71-3-9, precluding action by wife of injured employee for loss of consortium, even though cause of action for loss of consortium is generally recognized under § 93-3-1. West v. Plastifax, Inc., 505 So. 2d 1026 (Miss. 1987).

The exemption of school districts from mandatory worker's compensation coverage has rational basis, and does not impinge upon the equal protection rights of injured school district employees. Adams v. Petal Mun. Separate Sch. Sys., 487 So. 2d 1329 (Miss. 1986).

Where, under the law of Georgia where its contract was made, the workmen's compensation carrier was not obligated to pay to any person any benefit under any compensation law except the Georgia Act, the liability of the carrier could not be extended by application of the Mississippi Workmen's Compensation Act contrary to the express terms of the policy, since to do so would violate the due process clause of the United States Constitution. Mandle v. Kelly, 229 Miss. 327, 92 So. 2d 246 (1957).

81. Zoning.

Amendment of a county zoning ordinance was proper where the ordinance was not arbitrary or capricious; therefore, due process rights were not violated, U.S. Const. amend. XIV. Miss. Manufactured Hous. Ass'n v. Bd. of Supervisors, 878 So. 2d 180 (Miss. Ct. App. 2004).

Landowner was denied procedural due process by city board of alderman's failure to provide him with notice that petition opposing his request for zoning variance would be presented at regularly scheduled board meeting and that decision on his appeal would be made at that time. Petition of Carpenter Zoning Variance v. City of Petal, 699 So. 2d 928 (Miss. 1997).

Substantive due process requirements are met if zoning ordinance serves public purpose, means adopted are reasonably necessary to accomplish that purpose, and regulation is not unduly oppressive. Petition of Carpenter Zoning Variance v. City of Petal, 699 So. 2d 928 (Miss. 1997).

If question of existence of legitimate reason for zoning ordinance is at least debatable, there is no denial of substantive due process. Petition of Carpenter Zoning Variance v. City of Petal, 699 So. 2d 928 (Miss. 1997).

Ordinance prohibiting placement of mobile home units outside of approved mobile home parks could not be upheld, over substantive due process challenge, based on claims that restriction was necessary to protect property values in surrounding residential areas and that landowner who sought to place mobile home on farm could obtain permit to establish mobile home park on property. Petition of Carpenter Zoning Variance v. City of Petal, 699 So. 2d 928 (Miss. 1997).

A property owner's claim of ownership under color of title by virtue of his adverse possession of the property after he purchased the property at a tax sale but before the redemption period had ended and he had the right of possession, was sufficient to apply the "doctrine of relation" back to the date of the tax sale purchase for the purpose of challenging a subsequent zoning ordinance by asserting a pre-existing non-conforming use. In the balancing of public benefit against private property losses, a landowner's constitutional right under the due process clause prevails. Barrett v. Hinds County, 545 So. 2d 734 (Miss. 1989).

Any violation of the county's regulations regarding notice of non-compliance with the county's subdivision ordinance did not deprive a developer and lot owners of their due process right with respect to the county's action for declaratory and injunctive relief to bring the lot into compliance with the ordinance since such a procedure was not a prerequisite to the filing and prosecution of the lawsuit. Additionally, the rights of the developer and the lot owners in the premises was reasonable advance notice of the lawsuit and the opportunity to appear and be heard. Johnson v. Hinds County, 524 So. 2d 947 (Miss. 1988).

Decision of city fathers in drawing and maintaining line past which commercial development would not be allowed was not arbitrary, capricious, or unreasonable, where there was substantial evidence supporting both sides of rezoning application, thus making ultimate decision fairly debatable; same reasoning applied to denial of assertion that zoning restriction amounted to confiscatory taking in violation of due process of law under constitution because that issue is intertwined with review of whether zoning decision is arbitrary, capricious, or unreasonable. Saunders v. City of Jackson, 511 So. 2d 902 (Miss. 1987).

The due process rights, if any, guaranteed to objectors of a rezoning proposal is reasonable advance notice of the substance of the rezoning proposal together with the opportunity to be heard at all critical stages of the process. Thrash v. Mayor & Comm'rs of Jackson, 498 So. 2d 801 (Miss. 1986).

82. Racial discrimination — In general.

A mother whose parental rights were terminated failed to show that § 93-15-103 violated her right to equal protection under the Fourteenth Amendment on the ground that a proportionally higher number of blacks' parental rights are terminated than are whites', since the statute is racially neutral on its face and there was no evidence that the purpose of the statute was anything other than the protection of the children of Mississippi. Vance v. Lincoln County Dep't of Pub. Welfare ex rel. Weathers, 582 So. 2d 414 (Miss. 1991).

In a prosecution for armed robbery, the trial court properly refused to quash the indictment on the ground that there had never been a black grand jury foreman in the county, where defendant did not establish a prima facie case of discrimination; since defendant did not introduce any statistical evidence of the proportion of blacks in the total population of the county, there was no basis of comparison between the proportion of blacks in the total population to the proportion called to serve as foreman over a significant period of time. White v. State, 374 So. 2d 843 (Miss. 1979).

Classifications based on alienage, nationality, or race are inherently suspect and subject to close judicial scrutiny; aliens as a class are a prime example of a minority for whom it is appropriate that heightened judicial solicitude be shown. Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971).

Where racial classifications are involved, the equal protection and due process clauses of the Fourteenth Amendment command a more stringent standard in revealing discretionary acts of state or local officers. Hawkins v. Town of Shaw, 303 F.Supp. 1162 (N.D. Miss. 1969), rev'd 437 F.2d 1286, on reh'g 461 F.2d 1171.

It is true that since the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from a state's official sources, racial classifications are constitutionally suspect, subject to the most rigid scrutiny, and they are in most circumstances irrelevant to any constitutionally acceptable legislative purpose. Hawkins v. Town of Shaw, 303 F.Supp. 1162 (N.D. Miss. 1969), rev'd 437 F.2d 1286, on reh'g 461 F.2d 1171.

The equal protection clause reaches the exercise of state power however manifested, whether exercised directly or through the subdivisions of the state. Hawkins v. Town of Shaw, 303 F.Supp. 1162 (N.D. Miss. 1969), rev'd 437 F.2d 1286, on reh'g 461 F.2d 1171.

Where a municipality by ordinance detaches a portion of a recently annexed area on the ground of public convenience and necessity and the physical and financial difficulties present in attempting to afford city services to the detached area, the detachment does not affect the regularity of the city's boundaries, and there is no evidence that it was accomplished for the purpose of excluding Negroes or was made along racial lines, the municipality's action is proper and does not violate the Fourteenth and Fifteenth Amendments to the United States Constitution. Marshall v. Mayor of McComb City, 251 Miss. 750, 171 So. 2d 347 (1965), cert. denied, 382 U.S. 836, 86 S. Ct. 83, 15 L. Ed. 2d 79.

In a prosecution of a Negro for the rape of a white woman the conclusion of the trial judge, in passing upon the issue of fact presented by a motion to quash the indictment, that there had been no systematic, intentional, deliberate discrimination on account of race, was not manifestly wrong in view of the evidence. Cameron v. State, 233 Miss. 404, 102 So. 2d 355 (1958).

Colored persons are not denied the equal protection of the laws by the Mississippi Constitution and laws which make no discrimination against the colored race in terms but which grant a discretion to certain officers which can be used to the abridgement of the right of colored persons to vote and serve on juries, when it is not shown that their actual administration is evil, but only that evil is possible under them. Williams v. Mississippi, 170 U.S. 213, 18 S. Ct. 583, 42 L. Ed. 1012 (1898), aff'g, 73 Miss. 820, 19 So. 826 (1896).

83. — Clubs and associations, racial discrimination.

Sponsorship of single-race clubs by state agricultural extension service does not violate Fourteenth Amendment where racial imbalance was result of voluntary choice of private individuals. Bazemore v. Friday, 478 U.S. 385, 106 S.Ct. 3000, 92 L. Ed. 2d 315 (1986), on remand 848 F.2d 476.

84. — Segregation of facilities or discontinuance of services, racial discrimination.

Under the Batson test, the prosecutor satisfied the burden of articulating a nondiscriminatory reason for striking a black juror where he explained that he struck the juror because the juror had long unkempt hair, a mustache and a beard, since the wearing of beards and long unkempt hair are not characteristics that are particular to any race. Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), reh'g denied, 515 U.S. 1170, 115 S. Ct. 2635, 132 L. Ed. 2d 874 (1995), on remand, 64 F.3d 1195 (8th Cir. Mo. 1995).

Prosecutor's use of peremptory challenges to exclude blacks from jury trying black defendant may serve as basis for equal protection claim for purposeful discrimination. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

A city council's closing of the city's public swimming pools after their operation on a racially segregated basis was declared unconstitutional did not violate either the Thirteenth or the Fourteenth Amendment, even though there was some evidence supporting the conclusion that the closing was because of some ideological opposition to racial integration in swimming pools, where (1) there was substantial evidence supporting the conclusion that the council felt that the pools could not be operated safely and economically on an integrated basis, and (2) there was no evidence that the city was covertly aiding the maintenance of swimming pools private in name only, or that there was any state action affecting blacks differently from whites. Palmer v. Thompson, 403 U.S. 217, 91 S. Ct. 1940, 29 L. Ed. 2d 438 (1971).

Where the evidence failed to show segregation of municipal facilities was forced upon residents of the community, a class action by Negro residents against county and city officials seeking to enjoin such discrimination was dismissed. Coleman v. Aycock, 304 F. Supp. 132 (N.D. Miss. 1969).

A class action for Negro citizens seeking injunctive relief against the officials of a town charging racial discrimination in provision of municipal facilities and services will be dismissed in the absence of proof that such discrimination in fact existed. Hawkins v. Town of Shaw, 303 F.Supp. 1162 (N.D. Miss. 1969), rev'd 437 F.2d 1286, on reh'g 461 F.2d 1171.

If any one or more of state statutes should be construed to permit or encourage the denial to the plaintiffs of the use of public recreational facilities, including public libraries, on an integrated and equal basis solely on the grounds of race and color, then the statute would be so plainly unconstitutional as not to require a federal three-judge court. Clark v. Thompson, 204 F. Supp. 30 (S.D. Miss. 1962).

85. — Jury list, racial discrimination. There is no constitutional right to have a jury mirror any particular community; thus, a capital murder defendant, who was granted a change of venue because of pretrial publicity, was not improperly denied a second change of venue to a county in which the racial makeup more closely reflected that of the county where the crime occurred where the jury that tried the defendant was selected in a nondiscriminatory manner, and there was no evidence that the jurors were not impartial. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The trial court in a narcotics prosecution did not err in overruling defendant's motion to quash the indictment and petit venire, which motion alleged that the statutory exclusion of persons 18, 19 and 20 years of age to serve on grand and petit juries violated defendant's federal constitutional rights and systematically excluded black persons from grand and petit juries; the fact that such age group has been permitted to register and vote by amendment to the US Constitution did not qualify persons under 21 to serve as jurors under state law. Fermo v. State, 370 So. 2d 930 (Miss. 1979).

Where it was shown that the voters who were registered by federal registrars were added to the list of registered voters used to prepare master jury lists and coded "FR" such facts required quashing of the venire when considered together with a disproportionate number of whites on the jury list, and required reversal of a criminal conviction based on a jury verdict. Chinn v. State, 248 So. 2d 801 (Miss. 1971).

Where a county was 72 percent nonwhite and the number of nonwhites on the master jury list during the period in question was about 28 percent of the total, such facts established a prima facie case of discrimination which was not sufficiently rebutted by evidence that the county supervisors prepared master lists from voter registration books without regard to race, creed, or color. Chinn v. State, 248 So. 2d 801 (Miss. 1971).

A wide disparity shown between percentage of Negro population in the district and the percentage of Negroes on jury lists during the period in question was a prima facie showing of purposeful discrimination on the part of the state which the state was required to rebut in proceedings on an accused's motion to quash the indictment, jury panel and venire. Caston v. State, 240 So. 2d 443 (Miss. 1970).

Evidence that a jury selection system was based on a list of registered voters coded as to race and sex of the individuals, that the names of persons registered by federal registrars, most of which persons were Negroes, were not included in the list, and that the jury list showed 2.97% Negro men and 4.31% Negro women in the year in which the defendant was indicted, tried and convicted, while the Negro population of the county was 36.2%, was sufficient to make a prima facie case of discrimination against Negroes, placing the burden on the state to show that the underrepresentation resulted from factors other than purposeful discrimination. Spencer v. State, 240 So. 2d 260 (Miss. 1970).

Jurors are not to be summoned because of their race, but rather summoned without discrimination from all persons qualified as jurors, and where a record does not show a systematic exclusion of Negroes from jury service, the state has met the burden of proof necessary to show that there is no systematic exclusion of Negroes from the jury. Smith v. State, 229 So. 2d 551 (Miss. 1969).

Where defendant's proof showed that a disproportion between Negroes and whites on the jury lists had existed over a long period of time, he had made out a prima facie case of the systematic exclusion of Negroes from the jury which indicted him, and it was incumbent upon the state to show that there was no systematic exclusion of Negroes from the grand jury and that defendant's constitutional rights were not infringed by the manner and procedure in which the grand jurors were drawn, and in the absence of such rebuttal testimony on the part of the state, the presumption of purposeful prior exclusion stands and the motion to quash the indictment should have been sustained. Reeves v. Reeves, 210 So. 2d 780 (Miss. 1968).

Laws relating to the selection of juries must be followed in accordance with decisions of the United States Supreme Court, and when such laws are not followed, due process under the Fourteenth Amendment is denied to defendants. Watts v. State, 196 So. 2d 79 (Miss. 1967).

Where evidence established the existence of a policy of systematic exclusion of Negroes from jury lists in the county in which a Negro defendant was tried, the indictment returned against him was necessarily quashed. Shinall v. State, 187 So. 2d 840 (Miss. 1966).

In a county where the jury lists were made from the roster of qualified, registered voters, and the registrar had been enjoined by a federal court from discriminating against Negroes in their attempts to register and he did not deny that the injunction had been properly granted, such fact of itself was evidence that Negroes had been systematically excluded as jurors. Shinall v. State, 187 So. 2d 840 (Miss. 1966).

Any action of the state, whether through its legislative body, its courts, its executive or administrative officers, discriminating against people in regard to jury service, solely because of race or color, denies the equal protection of laws, and violates the Fourteenth Amendment of the United States Constitution. Shinall v. State, 187 So. 2d 840 (Miss. 1966).

In the absence of any evidence of long continued systematic exclusion of Negroes from jury service the burden of proof did not shift to the State of Mississippi to refute systematic discrimination, but it remained the burden of the defendant. Dunning v. State, 251 Miss. 766, 171 So. 2d 315 (1965), cert. denied, 386 U.S. 993, 87 S. Ct. 1310, 18 L. Ed. 2d 339 (1967).

Long continued omission of Negroes from jury service establishes a prima facie case of systematic discrimination, and the burden of proof is then upon the state to refute it. Dunning v. State, 251 Miss. 766, 171 So. 2d 315 (1965), cert. denied, 386 U.S. 993, 87 S. Ct. 1310, 18 L. Ed. 2d 339 (1967).

The question of systematic exclusion of Negroes from jury duty poses a factual situation that must be determined by the particular facts of each case as they arise from the various counties of the state. Dunning v. State, 251 Miss. 766, 171 So. 2d 315 (1965), cert. denied, 386 U.S. 993, 87 S. Ct. 1310, 18 L. Ed. 2d 339 (1967).

In a prosecution of a Negro for the rape of a white victim, the lower court erred in overruling a motion to quash the indictment and the special panel where it was shown by witnesses that, to their knowledge, Negroes had never served on juries in the county where accused was tried, and although there were some Negroes qualified electors in the county, and some names of Negroes had been placed in jury box where they could be drawn as jurors, there were, in the year in which the crime was committed and the defendant was tried and convicted, no names of Negroes in the jury box. Gordon v. State, 243 Miss. 750, 140 So. 2d 88 (1962).

The complete exclusion from jury service, of negroes in a county in which they are a majority, violates the constitutional rights of a negro charged with crime. United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), cert. denied, 361 U.S. 838, 80 S. Ct. 58, 4 L. Ed. 2d 78 (1959), 361 U.S. 850, 80 S. Ct. 109, 4 L. Ed. 2d 89 (1959).

Petitioner's allegation in an application for writ of habeas corpus that his conviction constituted a deprivation of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution because of the systematic exclusion of members of his race from the lists from which grand and petit juries were selected in the county where he was indicted and convicted, and because of his ignorance and circumstances of his arrest and incarceration, and as a consequence of the law of Mississippi he was not able to challenge the competency of the grand jury, together with a showing of the speed in which the petitioner was tried following his indictment, were sufficient to entitle the petitioner to a hearing on the question of whether he had adequately safeguarded his constitutional rights during his trial for murder. United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), cert. denied, 361 U.S. 838, 80 S. Ct. 58, 4 L. Ed. 2d 78 (1959), 361 U.S. 850, 80 S. Ct. 109, 4 L. Ed. 2d 89 (1959).

In a prosecution of negro defendant for felonious assault of white person where the evidence failed to disclose any reason for the absence of the names of negroes in the jury boxes other than the mere fact that supervisors just did not place their names in the box, and no reason was given for the absence of the names of the negroes in the jury boxes, the conviction of the defendant will be reversed. Seay v. State, 212 Miss. 712, 55 So. 2d 430 (1951).

The proof by a negro defendant on a charge for an offense against a white person, that no negro had served on a grand jury for the past thirty years is very strong evidence of purposeful racial discrimination in violation of the Fourteenth Amendment to the Constitution of the United States, which the state has the burden of disproving by showing that the names of negroes were not placed in the jury box for some other reason than the fact that they are negroes. Seay v. State, 212 Miss. 712, 55 So. 2d 430 (1951).

Motion to quash indictment against Negro on ground that there were no Negro names listed or placed in jury-box from which grand jury was drawn is properly overruled when it appears that there were only two Negroes in county who were qualified electors and who could have served on either grand or petit juries at time juries were empanelled. Flowers v. State, 209 Miss. 86, 41 So. 2d 352 (1949), appeal dismissed, cert. denied, 339 U.S. 946, 70 S. Ct. 800, 94 L. Ed. 1360 (1950).

Where record disclosed that local officers, pursuant to the admonitions of the supreme court to comply with constitutional requirements, combed the meager roster of qualified Negroes who had seen fit to register, resulting in a ratio of Negroes on the grand jury higher than the ratio of Negroes on the registration list, contention as to continuance of a prior situation of systematic and deliberate exclusion of Negroes from the jury lists resulting in void indictment in homicide case was without foundation. Patton v. State, 207 Miss. 120, 40 So. 2d 592 (1949), error overruled, 207 Miss. 134, 41 So. 2d 55 (1949), appeal dismissed, 338 U.S. 855, 70 S. Ct. 104, 94 L. Ed. 523 (1949).

The equal protection of the laws required by the Fourteenth Amendment is denied negro defendants in criminal cases in state courts by the exclusion of negroes from grand and petit juries solely because of their race, regardless of whether the discrimination is embodied in statute or is apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights is "ingenious or ingenuous." Patton v. State, 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76, 1 A.L.R.2d 1286 (1947), conformed to, 203 Miss. 265, 33 So. 2d 456 (1948).

Testimony of public officials, involved in selecting the jury list, that the prior systematic exclusion of Negroes from jury lists had been abandoned, corroborated by public records and substantial evidence revealing that there were in fact three Negroes on the grand jury which brought in the indictment against accused, and that there was a Negro on the special venire granted accused from which to select a petit jury, negatived the contention that there was systematic exclusion of Negroes from the list of qualified jurors from which the list of grand and petit juries were drawn. McGee v. State, 40 So. 2d 160 (Miss. 1949), cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487 (1949), reh'g denied, 339 U.S. 958, 70 S. Ct. 977, 94 L. Ed. 1369 (1950).

Where evidence disclosed that no negroes were on the grand jury that indicted a negro, and that no negroes had served on the grand and petit juries of the county for a long number of years, although there were at all times in the county negroes who were qualified for jury service, the indictment should be quashed, since State failed to meet its burden of showing that negroes were not excluded from a jury list because of race by testimony of members of the Board of Supervisors that they, in preparing the jury list, put the names of persons on the list who were qualified for jury service without regard to and without knowing whether they were members of the white or negro race. McGee v. State, 203 Miss. 592, 33 So. 2d 843 (1948).

A negro is entitled under the equal protection clause to a grand jury from which negroes have not been purposely excluded. Farrow v. State, 91 Miss. 509, 45 So. 619 (1908).

86. — Jury selection, racial discrimination.

In a capital murder case, defendant's rights under the Equal Protection Clause were violated by the state's continuous striking of African-American jurors, whose views on the death penalty were virtually indistinguishable from those of similarly situated white jurors who went unchallenged by the state, thereby raising an inference of racial discrimination. Flowers v. State, 947 So. 2d 910 (Miss. 2007).

In defendant's capital murder case, the striking of an African-American juror was suspect because there was no evidence in the record to show that she had any connection with members of defendant's family, despite the fact that she had previously worked at the same business as those family members. Flowers v. State, 947 So. 2d 910 (Miss. 2007).

In defendant's capital murder case, the striking of an African-American juror was suspect because his opposition to the death penalty was not as strong as that of two white jurors who served, and the genuineness of the juror's prior jury service as a reason for the state to strike him was questionable since the state failed to voir dire other white jurors concerning their prior jury service. Flowers v. State, 947 So. 2d 910 (Miss. 2007).

State's actions in striking an African American juror in a capital murder case were specious as there was no evidence in the record to support the state's proffered reason for striking her, and it appeared that the state fabricated a supposedly race-neutral reason in an attempt to strike yet another African American juror. Flowers v. State, — So. 2d —, 2006 Miss. LEXIS 356 (Miss. June 29, 2006), opinion withdrawn by 2007 Miss. LEXIS 97 (Miss. Feb. 1, 2007), opinion withdrawn by, substituted opinion at, remanded by 947 So. 2d 910, 2007 Miss. LEXIS 24 (Miss. 2007).

In defendant's trial for the sale of cocaine, the prosecutor's reasons for striking two potential African-American jurors, based on age and marital status in one instance, and because a juror had had regular contact with defendant in a second instance, were sufficiently race-neutral to survive defendant's Batson challenges. Rogers v. State, 891 So. 2d 268 (Miss. Ct. App. 2004).

Where four African-Americans were struck from jury, the State's arguments that it had prosecuted many defendants in area with their last names, that one was related to a prior defendant who made accusations against the judicial system, and one was unemployed and failed to complete questionnaire, the reasons were sufficiently race neutral to survive defendant's Batson challenge. Clay v. State, 881 So. 2d 354 (Miss. Ct. App. 2004).

In an aggravated assault case, there was no error in the trial court's decision that the State provided race-neutral reasons for its peremptory challenges, based on the response by two jurors to a question of whether any family member or close friend had ever been charged with a crime, and another juror's friendship with defendant. Robinson v. State, 870 So. 2d 669 (Miss. Ct. App. 2004).

Mississippi Supreme Court has held that the trial judge is afforded great deference in determining if the expressed reasons for exclusion of a venire person from the challenged party is in fact race neutral. Murphy v. State, 868 So. 2d 1030 (Miss. Ct. App. 2003), writ of certiorari denied by 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

One of the reasons the trial court is granted such deference in a Batson issue is that the demeanor of the attorney making the challenge is often the best evidence on the issue of race neutrality; the judge is in the best position to assess the overall credibility of the statements made in voir dire and by presenters of the peremptory strikes. Murphy v. State, 868 So. 2d 1030 (Miss. Ct. App. 2003), writ of certiorari denied by 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

Where defense counsel exercised peremptory strikes on two white jurors, and in response to the State's Batson challenge, counsel stated he had a "bad feeling" about the jurors due to their demeanor, the trial court's denial of the peremptory strikes on grounds that this was not a race-neutral reason was not clearly erroneous. Murphy v. State, — So. 2d —, 2003 Miss. App. LEXIS 683 (Miss. Ct. App. Aug. 5, 2003), opinion withdrawn by, substituted opinion at 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003).

The defendant failed to make a prima facie showing as to the number of African Americans in the jury pool where he asserted that out of the 50 venire persons present to participate in the jury selection process only four (or eight percent) were African American and that the percentage of eligible African Americans in the county was several times eight percent, but there were no indicia of prejudice or fraud in the method used by the clerk of the lower court in the selection of venire persons. Wilks v. State, 811 So. 2d 440 (Miss. Ct. App. 2001).

Evidence presented by defendant did not satisfy pre-*Batson*. *Swain* test for equal protection challenge to state's use of peremptory challenge to exclude all black jurors from both of defendant's juries where defendant failed to allege or prove that during relevant time period no black persons served on any juries in cases involving same prosecutors; fact that prosecutors identified certain jurors by their race did not prove that prosecutors intended to strike all of those jurors from panel because of race. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

In order to prove that state used peremptory challenges in unconstitutional manner, defendant had to show that he was a member of cognizable racial group, that prosecutor exercised peremptory challenges to excuse venireperson of defendant's case, and that there was an inference that the venirepersons were excluded on account of their race; burden thereafter shifts to state to come forward with race-neutral explanation for challenging jurors, but prosecutor's explanation need not rise to level of challenge for cause. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

One factor in determining whether prosecutor's race-neutral explanation for challenge to juror is pretextual is relationship with the reason to the actual facts of the case. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's stated reason for peremptory challenge against juror, that juror stated that there was nothing she could do about the fact that her sister had been accused of but not charged with killing her brother and that the Lord would take care of it, was sufficiently related to murder prosecution so as not to be deemed pretextual, as her statement could be viewed as placing punishment of wrongdoer in the hands of the Lord. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's basis for peremptory challenge against juror, that defense counsel had stated "I love her to death," was sufficiently race-neutral. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. Colosimo v. Senatobia Motor Inn, Inc., 662 So. 2d 552 (Miss. 1995), reh'g denied.

A prosecutor's race-neutral explanation for peremptorily striking a potential juror need not rise to the level of justifying the exercise of a challenge for cause. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134

L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A trial court in a capital murder prosecution did not abuse its discretion by refusing to grant the defendant's motion for individual sequestered voir dire of the entire venire where the court asked the collective venire about the effect of pretrial publicity or information received about the case, and the court later asked if there was any reason that a juror felt that he or she could not be fair and impartial, and anyone who responded affirmatively was questioned individually in chambers. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge that the juror indicated she would have difficulty finding suitable child care during the trial was sufficiently race-neutral. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The trial court in a capital murder prosecution erred by not requiring the State to give racially-neutral reasons for exercising peremptory challenges against 7 out of 13 black jurors on the venire, even though there was no showing that the defendant was of a minority class, and therefore the case would be remanded for a hearing on whether the Batson criteria were violated by the State's exercise of its peremptory challenges. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

The reasons proffered by the State for using 5 of its 7 peremptory challenges against black jurors were sufficient to withstand a Batson challenge where the reasons given were (1) the juror had a brother in the penitentiary; (2) the juror had attended high school with the defendant; (3) the juror wore dark glasses in the courtroom; (4) the juror was employed in a company in which there had been a riot which was quelled by the police; and (5) the juror shared a last name with many persons in the penitentiary and the prosecutor believed he was related to an inmate, and the defense made no attempt to show that the reasons proffered were pretextual, of disparate impact, or not true. Henderson v. State, 641 So. 2d 1184 (Miss. 1994).

Some acceptable race-neutral reasons for challenging a juror are: (1) involvement in criminal activity; (2) unemployment; (3) employment history; (4) relative of juror involved in crime; (5) low income occupation; (6) juror wore gold chains, rings and watch; and (7) dress and demeanor. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

The State's reasons for using 4 of its 5 peremptory challenges against black jurors were sufficiently race-neutral where the first juror had a pending civil lawsuit, the second juror had worked with a defense witness and the prosecution objected to his age and demeanor, the third juror had previously sat on 2 criminal juries which resulted in one "not guilty" verdict and one mistrial, and the prosecutor was unable to make eye contact with the fourth juror while the juror continuously made eye contact with the defendant. Harper v. State, 635 So. 2d 864 (Miss. 1994).

A trial judge is required to make an on-the-record factual determination that each reason proffered by the State for exercising a peremptory challenge is, in fact, race neutral; this requirement is to be prospective in nature. Hatten v. State, 628 So. 2d 294 (Miss. 1993).

The State successfully rebutted a black defendant's Batson challenge to the State's exercise of peremptory challenges to eliminate four black venire members where 2 of the venire members were challenged because they were of an age to be employed and had no occupation, and the other 2 were challenged because they were acquainted with the defendant or her family. Porter v. State, 616 So. 2d 899 (Miss. 1993).

The Batson rule applies to both a prosecutor's and a defendant's peremptory challenges. Griffin v. State, 610 So. 2d 354 (Miss. 1992).

A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in the defendant's case; a defendant may establish a prima facie case of purposeful discrimination in selection of the jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Griffin v. State, 607 So. 2d 1197 (Miss. 1992).

A white defendant had standing to object to the State's use of 5 of its 6 peremptory challenges to strike black jurors; however, the defendant failed to establish a prima facie case of discrimination where the State offered race neutral reasons for striking each individual black juror and the defendant's attorney offered no evidence to rebut the State's reasons for striking the jurors. Green v. State, 597 So. 2d 656 (Miss. 1992).

A defendant failed to establish a prima facie case of racial discrimination in jury selection, even though the defendant was black and the prosecution exercised peremptory challenges to eliminate 3 black jurors, where the jurors were excluded because they were acquainted with the defendant; while excluding jurors on the ground that they were acquainted with the defendant might have had a discriminatory effect since the defendant's acquaintances were primarily black, the law does not proscribe the mere incidental exclusion of blacks from a jury. Govan v. State, 591 So. 2d 428 (Miss. 1991).

A county's jury venire selection did not systematically exclude blacks in violation of a black defendant's constitutional equal protection rights, even though there were only 2 blacks out of 12 on the jury which rendered a verdict against the defendant when 37 percent of the county was black, where the jury selection was based upon voter registration lists of the county without regard to race. Harris v. State, 576 So. 2d 1262 (Miss. 1991).

The reasons given by a district attorney for exercising a peremptory challenge to excuse a black juror were sufficiently race-neutral where the district attorney stated that the juror was a truck driver "which may or may not mean he's a transient," the juror wore overalls with a black T-Shirt in the courtroom, and he was unmarried and did not have children "which shows that he doesn't have a stake in the community like somebody that's established." Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

A murder defendant's argument that the jury was patently flawed because the jury was white and the defendant was black was without merit. The mere fact that a jury is white and a defendant is black does not violate Batson, but rather it is the racially discriminatory exercise of peremptory challenges to strike black jurors from the jury that violates the Batson rule. Sudduth v. State, 562 So. 2d 67 (Miss. 1990).

Defendant in capital case involving interracial crime is constitutionally entitled to have prospective jurors informed of race of victim and questioned on racial bias. Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1989).

Defendant in criminal case must timely object to prosecution's racially discriminatory use of peremptory challenges in order to preserve constitutional claim. Thomas v. Moore, 866 F. 2d 803 (5th Cir. 1989), cert. denied 110 S. Ct. 124, 493 U.S. 840 107 L. Ed. 2d 85.

Defendant was barred from asserting claim of state's abuse of its peremptory challenges to exclude all blacks from defendant's jury, which allegedly deprived him of his right to representative jury and to due process of law, where record failed to reflect that defendant had made contemporaneous objection to prosecuting attorney's use of peremptory challenges. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert.

denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Under Batson v Kentucky (1986) 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct 1712, defendant raising claim must show (1) he is member of "cognizable racial group;" (2) prosecutor has exercised peremptory challenges toward elimination of veniremen of his race; and (3) facts and circumstances infer that prosecutor used his peremptory challenges for purpose of striking minorities. These components constitute prima facie showing of discrimination necessary to compel state to come forward with neutral explanation for challenging black jurors. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Jury selection was properly conducted and jurors were not excluded on basis of race where black jurors were excluded for following race-neutral reasons: (1) 22-year-old laborer with eleventh-grade education was stricken because his youth, marital status, and educational level appeared to prosecutor to indicate instability; (2) 49-year-old minister/bus driver was stricken because he was preacher; (3) 35-year-old housewife was removed because she did not reveal her brother's conviction for armed robbery; (4) 38-year-old cafeteria hostess was challenged because of her concerns about sequestration due to having to care for invalid mother; and (5) 25-year-old was stricken from panel because he wore hat into courtroom and his general demeanor suggested to prosecutor that he was unstable, unconcerned, and had no respect for proceedings. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Claim that court erred in permitting state to systematically exclude black veniremen by peremptory challenge, where no objection was raised either during trial or on motion for new trial, was waived and counsel's excuse for waiving claim at trial, that under prior law he felt he would be unsuccessful on point, was insufficient. Jones v. State, 517 So. 2d 1295 (Miss. 1987), vacated 108 S. Ct. 2891, 487 U.S. 1230, 101 L.Ed.2d 925, on remand 602 So. 2d 1170.

Statement by prosecuting attorney that State denied systematically excluding blacks from jury panel and that record should reflect that state had used peremptory challenge on an individual male who was white was inadequate response under Batson v. Kentucky (1986) 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712, where record established that prosecutor did use peremptory strikes in manner resulting in removal of all black persons from jury panel. Case was remanded to give prosecuting attorney opportunity to explain peremptory challenges because Batson was decided after instant case had already been completed. Williams v. State, 507 So. 2d 50 (Miss. 1987).

Absence of black jurors on jury panel after peremptory challenge by state of only black person who has been called as prospective juror does not violate defendant's right to impartial jury and equal protection where no request has been made for evidentiary hearing and there is nothing to indicate willful, systematic exclusion of black persons from jury. Belino v. State, 465 So. 2d 1043 (Miss. 1985).

The issue of whether a capital murder conviction should be reversed because the prosecutor improperly used all of his peremptory challenges to exclude all blacks from the jury was not preserved for review, where the record did not reflect the race of the jurors who had been peremptorily challenged by the prosecutor. Booker v. State, 449 So. 2d 209 (Miss. 1984), cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984), vacated, 472 U.S. 1023, 105 S. Ct. 3493, 87 L. Ed. 2d 626 (1985), on remand, 511 So. 2d 1329 (Miss. 1987).

Discriminatory exclusion of Negroes from the venire is in violation of a defendant's rights under the Fourteenth Amendment. Watts v. State, 196 So. 2d 79 (Miss. 1967).

Although it is settled law that systematic and discriminatory exclusion of Negroes from jury service is unconstitutional, this Amendment does not require proportionate representation of the races on a jury, or even that members of a particular race must be on a particular jury, but, as a practical matter, what is required is that county officials must see to it that the jurors are in fact and in good faith selected without regard to race. Harper v. State, 251 Miss. 699, 171 So. 2d 129 (1965).

Peremptory challenge exercised by the state against one African American juror in a capital murder case was clearly pretextual as there was no basis in the record for two of the grounds proffered by the state, and the state's third ground was predicated on the jury's acquaintance with defendant's sister 10 years prior, a tenuous relationship at best. Flowers v. State, — So. 2d —, 2006 Miss. LEXIS 356 (Miss. June 29, 2006), opinion withdrawn by 2007 Miss. LEXIS 97 (Miss. Feb. 1, 2007), opinion withdrawn by, substituted opinion at, remanded by 947 So. 2d 910, 2007 Miss. LEXIS 24 (Miss. 2007).

87. — Race-neutral exercise of peremptory challenges, impartial jury.

Defendant's equal protection rights were not violated because, although defendant, who was an African-American, was tried by an all-white jury, the State of Mississippi provided race neutral reasons for exercising peremptory challenges on African-American jurors, the death-qualification process itself did not disproportionately impact African-American venire persons, and the trial court did not abuse its discretion in denying defendant's challenges to jurors for cause. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

If a prosecutor's distrust of a venire member is a race-neutral reason, then a defendant's distrust must be as well, and a trial court cannot deprive defendants of their right to a peremptory strike unless the trial judge properly conducts the analysis outlined in Batson; the Batson analysis has three steps, and it is imperative that a trial judge follow those steps accordingly, and when a trial judge erroneously denies a defendant a peremptory strike by failing to conduct the proper Batson analysis, prejudice is automatically presumed, and a court will find reversible error. Hardison v. State, 94 So. 3d 1092 (Miss. 2012).

Trial could erroneously denied defendant a peremptory strike by holding that a juror's previous service on a jury in a criminal case was not a race-neutral reason for the strike because defendant's reason for the peremptory challenge, that the juror's responses about a prior jury experience indicated he could be pro-prosecution, qualified as race-neutral; the trial could never addressed the issue of pretext but simply held that the stated reason was not race-neutral, and the denial of defendant's peremptory challenge without a proper Batson analysis constituted reversible error. Hardison v. State, 94 So. 3d 1092 (Miss. 2012).

Defendant's right to a fair trial under Batson was not violated by the prosecutor's use of peremptory strikes because a large number of potential jurors knew defendant, defendant's mother, defendant's family, potential witnesses in the case, or the attorneys; the other peremptory challenges by the state were used against a juror whose son was a witness, two jurors who were close friends of the family, and another juror who had a close family member prosecuted by the same district attorney's office. Fisher v. State, 989 So. 2d 893 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 429 (Miss. 2008).

Where defendant raised a Batson challenge during voir dire, the prosecutor gave gender as her race-neutral reason for striking an African-American juror; allowing the state to exclude the potential juror based on his gender was a violation of the equal protection clause; the entire judicial process was infected, warranting a new trial. McGee v. State, 953 So. 2d 211 (Miss. 2007).

In a capital murder case, defendant's Batson challenge was meritless because the prosecution set forth race-neutral reasons for its use of peremptory strikes on African-American jury pool members; a failure to understand the proceedings, service on a prior jury that acquitted, reluctance to serve due to employment, lack of belief in the death penalty, and a failure to complete a jury questionaire were all race-neutral reasons. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Trial court overruled defendant's Batson challenge because two white jurors were challenged by the State and the State had two remaining peremptory challenges which it did not exercise, which would indicate that the State did not attempt to exclude jurors on a racial basis. Because defendant did not establish a prima facie case that the State excluded jurors on the basis of race, there was no need for the State to present race-neutral reasons for its peremptory strikes. Moore v. State, 914 So. 2d 185 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 745 (Miss. 2005).

Defendant failed to prove that the State used its peremptory strikes in a discriminatory manner as defendant (1) failed to preserve the record for the voir dire; and (2) did not show the racial composition of the venire, the jury, or the county. However, the record showed that the State used peremptory strikes against three African-Americans and that four African-Americans were seated on the jury, but, on those bare facts, defendant did not show a reasonable inference of purposeful discrimination or that the State attempted to systematically remove African-Americans from the venire; therefore, defendant's Batson challenge failed. Jones v. State, 904 So. 2d 149 (Miss. 2005).

In a capital murder case, no racial bias was found in the use of peremptory strikes against minority jurors because the prosecutor cited race-neutral reasons as to each juror, including the desire to get off the jury, employment hardship, the prosecutor's past professional difficulties with a juror, physical disability, and unemployment. Lynch v. State, 877 So. 2d 1254 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1299, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1592, 73 U.S.L.W. 3495 (2005).

Included among the reasons accepted as race neutral are: age, demeanor, marital status, single with children, prosecutor distrusted juror, educational background, employment history, criminal record, young and single, friend charged with crime, unemployed with no roots in community, posture and demeanor indicating juror was hostile to being in court, juror was late, short term employment; the Mississippi Supreme Court has also accepted demeanor as a legitimate, race neutral basis for a peremptory challenge. Murphy v. State, 868 So. 2d 1030 (Miss. Ct. App. 2003), writ of certiorari denied by 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

Because defense counsel, at the very least, had notice of the fact that the mental examination would take place as he signed off on the examination order, the trial court did not err in failing to suppress the inmate's confessions. Crawford v. State, 867 So. 2d 196 (Miss. 2003), writ of certiorari denied by 543 U.S. 866, 125 S. Ct. 205, 160 L. Ed. 2d 110, 2004 U.S. LEXIS 6519, 73 U.S.L.W. 3210 (2004).

88. — Voting rights, racial discrimination.

Plaintiffs who showed that challenged statutes either impinged upon their protected rights to register to vote or burdened organizational efforts to assist prospective voters in registering had standing to sue to challenge Mississippi's dual registration requirement and prohibition on satellite registration as violative of their rights and all persons similarly situated. Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd sub nom. Mississippi State Chapter, Operation Push v. Mabus, 932 F.2d 400 (5th Cir. 1991).

Code 1972 § 21-3-7 is a purposeful device conceived and operated to further racial discrimination in the voting process, and is therefore violative of the Fourteenth and Fifteenth Amendments to the United States Constitution. Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975).

89. — Election districts, racial discrimination.

Georgia's congressional redistricting plan violated the equal protection clause of the Fourteenth Amendment where (1) the legislature subordinated traditional race-neutral districting principles to racial considerations such that race was the predominant, overriding factor explaining the legislature's determination of district boundaries, and (2) under strict scrutiny, it could not be shown that the redistricting plan was narrowly tailored to serve a compelling governmental interest. Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995), on remand 922 F. Supp. 1552, on remand 922 F. Supp. 1556.

In formulating a state legislative reapportionment plan for a state, a Federal District Court should, with respect to legislative districts in areas having concentrations of Negro population, either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished. Connor v. Finch, 431 U.S. 407, 97 S. Ct. 1828, 52 L. Ed. 2d 465 (1977).

Use of 1982 reapportionment plan, which had been found unconstitutional, rather than court-drawn plan or plan proposed by parties, was constitutional and could properly be used on interim basis in order that primary and general elections for state legislature could take place as scheduled prior to implementation of valid, permanent plan, despite fact that 1982 plan did not maximize members of majority black districts; because of swiftness with which population changes, and high cost of creating new election districts, and in view of lack of sufficient time to conduct full hearings and fact that proponents of one proposed plan failed to show that plan cured objections by United States Attorney General, and since possibility of corrective relief at later date existed, use was appropriate. Watkins v. Mabus, 771 F. Supp. 789 (S.D. Miss. 1991), aff'd in part, vacated in part 502 U.S. 954, 116 L. Ed. 2d 433.

A city's annexation of a particular area was constitutionally valid, where the population of the annexed area was roughly 50 percent white and 50 percent black, and where the annexation left the overall population and the voting age population in roughly the same racial makeup as it had been prior to the annexation, notwithstanding the allegation that a particular area had been excluded from the annexation on the basis that all its residents were black. Enlargement of Boundaries v. Yazoo City, 452 So. 2d 837 (Miss. 1984).

The fact that a black had never won an at-large election in a city in which blacks comprised a majority of its total population as well as a majority of its voting age population was not sufficient in itself to prove an unconstitutional dilution of black voting strength in an action challenging the apportionment of the city's municipal wards. Canton Branch, NAACP v. City of Canton, 472 F. Supp. 859 (Miss. 1978).

90. — Schools and school districts, racial discrimination.

Actions on part of state officials conclusively demonstrated they were fulfilling their affirmative duty to disestablish former dejure segregated system of higher education by adopting race-neutral policies and procedures in areas of student administration and recruitment, faculty and staff hiring, and resource allocation; they had also undertaken substantial affirmative efforts in areas of other-race student and faculty-staff recruitment, funding, and facility allocation. Differentiations made by officials with respect to each of individual institutions in designation of institutional missions were reasonable and not motivated by discriminatory purpose. Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987), reversed 893 F.2d 732, rehearing granted 898 F.2d 1014, on rehearing 914 F.2d 676, cert. granted in part 111 S. Ct. 1579, 499 U.S. 958, 113 L. Ed. 2d 644, vacated 112 S. Ct. 2727, 505 U.S. 717, 120 L. Ed. 2d 575, on remand 970 F.2d 1378.

The only authority that a federal court has to order desegregation or busing in a local school district arises from the Federal Constitution, but state courts are free to interpret the state constitution to impose more stringent restrictions on the operation of a local school board. Bustop, Inc. v. Board of Educ., 439 U.S. 1380, 99 S. Ct. 40, 58 L. Ed. 2d 88 (1978).

Though a school district had recently been desegregated, the process had been accomplished without problems by the time of non-rehire of plaintiff, a black high school teacher, and her employment rights thus were properly measured by general principles of contract and state law; the district had in fact hired more white than black replacement teachers, explaining that the disparity was due to greater turnover among white teachers, and it was cautioned henceforth to employ teachers, and to consider plaintiffs application for re-employment, solely on objective criteria and without regard to any fixed racial hiring ratio. McCormick v. Attala County Bd. of Educ., 407 F. Supp. 586 (N.D. Miss. 1976), vacated 541 F.2d 1094, on remand 424 F. Supp. 1382.

Ability grouping of students, which resulted in all-black sections within each grade, was enjoined in a formerly segregated district until the district has operated as a unitary system without such assignments for a sufficient period of time to assure that the under-achievement of the slower groups is not due to prior educational disparities; the bar may be lifted when the district can show that steps taken to bring disadvantaged students to peer status have ended the educational disadvantages caused by prior segregation. McNeal v. Tate County School Dist., 508 F.2d 1017 (5th Cir. 1975).

Where evidence showed that the county supervisors had leased unused school buildings located on "sixteenth section land" to a civic association in good faith and without any knowledge that it would subsequently be used to house a private segregated school, such lease was not set aside; however, the sublease by the civic association to the whites-only private academy had a "chilling effect" on the operation of recently desegregated public schools and was set aside. United States v. State, 499 F.2d 425 (5th Cir. 1974).

Although a county board of supervisors is entitled to lease sixteenth section land for a nominal sum, it is well established that the state, acting through its various local bodies, is charged with the affirmative duty to take whatever steps might be necessary to bring about a unitary educational system free of racial discrimination, and where the state is the lessor of a former public school converted into a segregated private school, located on property specifically designated for the benefit of the public schools, there is a state involvement with such schools, and under such circumstances the proscriptions of the Fourteenth Amendment against racial discrimination by the state must be complied with by the lessee and sublessee as certainly as though they were binding covenants written into the agreement itself. United States v. State, 476 F.2d 941 (5th Cir. 1973), reh'g granted 484 F.2d 956, opinion vacated on rehearing 499 F.2d 425.

Coahoma counties school board's proposed plan that all white students in grades 7 through 12 in the district, would be assigned to the county junior-senior high school attendance center, and that sufficient number of students would be assigned so that the student body would be composed of 80 percent white and 20 percent black children, and that the remaining black students in grades 9 through 12 would attend the county agricultural high school, and black students in 7 and 8 would attend neighborhood schools, would not be sufficient to eliminate a dual school system and was constitutionally impermissible. Taylor v. Coahoma County Sch. Dist., 330 F. Supp. 174 (N.D. Miss. 1970), aff'd, 444 F.2d 221 (5th Cir 1971).

A plan for desegregating the schools of Coahoma County, Mississippi, would be adopted which would assign students in the first eight grades to neighborhood schools, after which the district would be zoned for the assignment of students in grades 9 through 12 to the county high school operated by the school district, and to the county agricultural high school operated by the junior college district. Taylor v. Coahoma County Sch. Dist., 330 F. Supp. 174 (N.D. Miss. 1970), aff'd, 444 F.2d 221 (5th Cir 1971).

The statute providing for state financial assistance in the form of tuition grants to students attending private schools encourages, facilitates, and supports the establishment of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools, and such state tuition grants tend in a determinative degree to perpetuate segregation, thereby violating the equal protection clause of the Fourteenth Amendment. Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969).

A statute authorizing the establishment of an agricultural high school, to be supported by a tax on all taxable property in the county, for the instruction of the white youth of the county, denies to negroes the equal protection, and abridges the equal privileges, guaranteed by the Fourteenth Amendment. McFarland v. Goins, 96 Miss. 67, 50 So. 493 (1909).

91. — Correctional facilities, racial discrimination.

Prison inmates are protected from racial discrimination in job assignments by the equal protection clause of the Fourteenth Amendment. Terrell v. State, 573 So. 2d 732 (Miss. 1990).

The district court's findings that the policy of segregating inmates in housing facilities at the Mississippi State Penitentiary, unrelated to prison security and discipline, was in violation of the equal protection clause of the Fourteenth Amendment, and the relief therein granted, were affirmed. Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).

92. Administrative proceedings.

In a case involving a certificate of need, procedural due process rights were not violated where all of the steps under Miss. Code Ann. § 41-7-197 were followed; no parties to the proceeding, no health care facilities in the same health care service area, and no others originally noticed, appeared to request a new hearing. The issue of import to satisfy the requirements of the Mississippi State Health Plan was not the specific route, but rather the number of procedures, and notice of a new route was given. Miss. State Dep't of Health v. Baptist Mem. Hospital-DeSoto, Inc., 984 So. 2d 967 (Miss. 2008).

Trial court erred in overturning a board's denial of an application for a funeral service license where the applicant stated that he planned to do his training in Mississippi, but actually worked in Tennessee; at the board's hearing, the applicant was allowed to present witnesses and other forms of evidence, and his due process concerns were adequately addressed. Miss. State Bd. of Funeral Servs. v. Coleman, 944 So. 2d 92 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 730 (Miss. 2006).

There was no due process violation with respect to doctors on the Mississippi Public Employees' Retirement System Medical Board examining claimants, making a diagnosis and recommendation, and then voting as members of the Medical Board on the disability claims; therefore, the denial of a disability claim was upheld. Flowers v. Public Emples. Ret. Sys., — So. 2d —, 2006 Miss. App. LEXIS 247 (Miss. Ct. App. Apr. 4, 2006), opinion withdrawn by, substituted opinion at 952 So. 2d 972, 2006 Miss. App. LEXIS 778 (Miss. Ct. App. 2006).

Since attorney disciplinary proceedings are not criminal in nature, the complaint tribunal erred in applying the factors set forth. Mississippi Bar v. An Att'y, 636 So. 2d 371 (Miss. 1994), reh'g denied.

The Rules of Discipline for the Mississippi State Bar do not violate due process or § 33 of the Mississippi Constitution; attorney disciplinary proceedings are an integral part of the functioning of the judicial branch and thus are not subject to the "legislative power" vested in § 33. Hall v. Mississippi Bar, 631 So. 2d 120 (Miss. 1993).

There is no suggestion of partiality or impropriety in the use of an assistant attorney general as a hearing officer in a hearing before the Department of Natural Resources Permit Board; the attorney general's office affords counsel to state agencies and there is no conflict or suggestion of unfairness in this arrangement. Thus, an environmental organization, which objected to a modified air emissions permit and was afforded an administrative hearing before the Natural Resources Permit Board, was not denied due process of law on the ground that the hearing officer who sat with the Board was a special assistant attorney general. Furthermore, the environmental organization waived any objections it might have had where it made no objection before the Board and proceeded through the hearing without objection, and the organization admitted having knowledge of the identity of the hearing officer as an assistant attorney general well before the hearing and in time to object if any legitimate objection existed. United Cement Co. v. Safe Air for The Env't, Inc., 558 So. 2d 840 (Miss. 1990).

A litigant is not shut off from all remedies for discovery merely because the rules of civil procedure do not apply to administrative proceedings or because the rules of the administrative agency do not promote it. In appropriate cases, a "pure bill for discovery" will lie and statutory remedies may be available to the end that due process be afforded. State Oil & Gas Bd. v. McGowan, 542 So. 2d 244 (Miss. 1989).

93. Civil practice and procedure — In general.

Where Louisiana auto dealer's radio ads reached into Mississippi, dealer sold autos to Mississippi residents, and contracted with plaintiff bank in Mississippi, its contacts with Mississippi, though minimal, allowed that state to exercise personal jurisdiction over the dealer; moreover, since the dealer's facilities were not far from the forum, it was not unfair to force it to defend in Mississippi. BankPlus v. Toyota of New Orleans, 851 So. 2d 439 (Miss. Ct. App. 2003).

Due process clause requires that named plaintiff in class action at all times adequately represent interests of absent class members. Larry James Oldsmobile-Pontiac-GMC Truck Co. Inc. v. GMC, 175 F.R.D. 234 (N.D. Miss. 1997).

Where named plaintiff demonstrates so little knowledge of and involvement in case that class representative is unable to protect class interests from possibly competing class counsel interests, due process concerns require finding of inadequacy of class representation. Larry James Oldsmobile-Pontiac-GMC Truck Co. Inc. v. GMC, 175 F.R.D. 234 (N.D. Miss. 1997).

To establish "cause" for procedural default, party is required to show that some objective external factor impeded defense counsel's ability to comply with state's procedural rules or to show prior determination of ineffective assistance of counsel. Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

A chancellor's refusal to grant a motion to set aside judgment pursuant to MRCP 60(b)(6) was an abuse of discretion where the record was devoid of any notice to the defendant as to the date of the trial; notice, whether of the time and place of a hearing, the contents of a complaint, or of the specific nature of a criminal charge, is the essence of due process. Johnson v. Weston Lumber & Bldg. Supply Co., 566 So. 2d 466 (Miss. 1990), but see Koerner v. Crittenden, 635 So. 2d 833 (Miss. 1994).

The state sequestration statutes, under which property could be impounded and put beyond use during the pendency of litigation on an alleged debt, all by a writ of sequestration issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer, violated due process both facially and as applied. Keelon v. Davis, 475 F. Supp. 204 (N.D. Miss. 1979).

There is entire absence of any undue restrictions placed by trial judge upon acts of counsel in trial of case where counsel was directed to refrain from delay and to get on with trial and there was delay and docket of court was crowded, and there was no prejudicial impropriety in judge's comment upon excessive consumption of time, when counsel was not unduly restricted or his knowledge challenged or his motives impugned. Vail v. City of Jackson, 206 Miss. 299, 40 So. 2d 151 (1949).

Disqualification of a justice of the peace to try a case does not affect the constitutionality of a judgment on a trial de novo in a circuit court. Hitt v. State, 149 Miss. 718, 115 So. 879 (1928).

94. — Venue, civil practice and procedure.

Mississippi federal district court held that USCS Const. Amend. 14 due process principles were not offended by its finding that venue in Mississippi was proper in a Mississippi attorney's breach of contract diversity suit against out-of-state attorneys because defendants had approached plaintiff in Mississippi to perform the multi-district litigation services upon which the suit was based. Street v. Smith, 456 F. Supp. 2d 761 (S.D. Miss. 2006).

Section 11-11-5 [repealed], a venue statute permitting suits against power companies in any county in which a company may have a power line, is constitutional despite its provision for discretion to try a case in one of several counties, since Art III § 14 of Miss Const of 1890 and the Fourteenth Amendment of the United States Constitution (both, inter alia, imposing due process requirements), though safeguarding fundamental rights, do not extend to the forum which a state may designate for protection of such rights. Evans v. State Farm Fire & Cas. Co., 336 So. 2d 753 (Miss. 1976).

Foreign corporations are not unconstitutionally discriminated against by a statute providing that civil action shall be commenced in a county in which some defendant is found and, if defendant is a domestic corporation in the county, within which such corporation is domiciled. Hercules Powder Co. v. Tyrone, 155 Miss. 75, 124 So. 74 (1929), error overruled, 155 Miss. 90, 124 So. 475 (1929).

To permit an individual sued out of the county of his residence to have the venue changed to such county while denying the privilege to a corporation, does not violate the equal protection clause. Morrimac Veneer Co. v. McCalip, 129 Miss. 671, 92 So. 817 (1922).

95. —Long arm jurisdiction, civil practice and procedure.

In a medical-malpractice action, the circuit court did not err in finding that traditional notions of fair play and substantial justice were not offended in exercising personal jurisdiction over the doctor because nothing in the record suggested that the trial court was an inefficient method of resolving the dispute or that it imposed an undue burden to have the doctor defend the suit in Mississippi. Dunn v. Yager, 58 So. 3d 1171 (Miss. 2011).

In a negligence action by property owners in Mississippi regarding flooding, Mississippi had a strong interest in adjudicating the dispute because Mississippi residents were injured, Mississippi property was destroyed, and the City of Mobile, Alabama, and the Board of Water & Sewer Commissioners of the City of Mobile continued to release water from the subject reservoir. Also, the interest of the hundreds of other Mississippi property owners in obtaining convenient and effective relief was furthered by keeping the suit in Mississippi because their property was located in the county where the suit was filed; maintenance of the suit did not offend "traditional notions of fair play and substantial justice," and application of the "long-arm" statute in the case did not violate the United States Constitution. Horne v. Mobile Area Water & Sewer Sys., 897 So. 2d 972 (Miss. 2004), writ of certiorari denied by 544 U.S. 922, 125 S. Ct. 1652, 161 L. Ed. 2d 479, 2005 U.S. LEXIS 2480, 73 U.S.L.W. 3555 (2005), writ of certiorari denied by 544 U.S. 922, 125 S. Ct. 1662, 161 L. Ed. 2d 480, 2005 U.S. LEXIS 2484, 73 U.S.L.W. 3555 (2005).

The defendant nonresident corporation was entitled to dismissal of the complaint because the court had no basis for asserting personal jurisdiction over it, notwithstanding that the alleged tort was committed partly in Mississippi where the plaintiff was residing when he discovered an allegedly erroneous credit report by the defendant, since the defendant did not have minimum contacts with Mississippi and did not purposely avail itself of the benefits and privileges of the state. Shaw v. Excelon Corp., 167 F. Supp. 2d 917 (S.D. Miss. 2001).

In an action involving a contract between the plaintiff Mississippi corporation and the defendant Tennessee corporation involving the purchase of the defendant's assets, the defendant was subject to personal jurisdiction in Mississippi since the defendant entered into a contract with a resident of Mississippi and that agreement was to be performed in whole or in part in Mississippi. Willowbrook Found., Inc. v. Visiting Nurse Ass'n., 87 F. Supp. 2d 629 (N.D. Miss. 2000).

Where the defendant initiated contact with a corporation in Mississippi and placed an order for goods to be manufactured in Mississippi for sale to it, long arm jurisdiction over the defendant was constitutional. American Cable Corp. v. Trilogy Communs., Inc., 1999 Miss. App. LEXIS 566 (Miss. Ct. App. Sept. 14, 1999), opinion withdrawn by, substituted opinion at 754 So. 2d 545, 2000 Miss. App. LEXIS 5 (Miss. Ct. App. 2000).

The exercise of long arm jurisdiction over the defendants was appropriate where the plaintiffs alleged, and the defendants failed to rebut, that the defendants maintained ongoing business relationships within Mississippi related to the present causes of action, i.e., that the defendant private investigators conducted several investigations in Mississippi, including an investigation concerning the plaintiffs. Wells v. Taylor, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 17891 (N.D. Miss. Oct. 25, 1999).

Exercise of personal jurisdiction over nonresident defendant comports with due process principles only when two requirements are met: nonresident defendant must have purposefully availed himself of benefits and protections of forum state by establishing minimum contacts with that forum state, and exercise of personal jurisdiction over nonresident defendant must not offend traditional notions of fair play and substantial justice. Allred v. Moore & Peterson, 117 F.3d 278 (5th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S. Ct. 691, 139 L. Ed. 2d 637 (1998).

Mississippi long-arm statute is not coextensive with federal due process, requiring analysis of scope of reach of statute itself. Allred v. Moore & Peterson, 117 F.3d 278 (5th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S. Ct. 691, 139 L. Ed. 2d 637 (1998).

State court or federal court sitting in diversity may assert personal jurisdiction if: state's long-arm statute applies, as interpreted by state's courts; and due process is satisfied under Fourteenth Amendment. Allred v. Moore & Peterson, 117 F.3d 278 (5th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S. Ct. 691, 139 L. Ed. 2d 637 (1998).

For court's exercise of personal jurisdiction to comport with due process, defendant must have certain minimum contacts with forum, such that maintenance of suit does not offend traditional notions of fair play and substantial justice. Cappaert v. Walker, Bordelon, Hamlin, Theriot & Hardy, 680 So. 2d 831 (Miss. 1996).

For court's exercise of personal jurisdiction to comport with due process, defendant's contacts with forum must be such that he should reasonably anticipate being haled into court there. Cappaert v. Walker, Bordelon, Hamlin, Theriot & Hardy, 680 So. 2d 831 (Miss. 1996).

Joint venturer's contacts with Louisiana, as state where radio station was purchased pursuant to joint venture agreement and where funds which joint venturer advanced were used in operating station, were sufficient to permit Louisiana courts to exercise personal jurisdiction in action brought by law firm which provided legal services to another member of venture to hold joint venturer liable on debt; lawsuit arose out of joint venturer's contacts with forum, and even assuming that it did not, joint venturer's contacts were systematic and continuous enough, extending over multiyear period when station was in operation, to satisfy due process. Cappaert v. Walker, Bordelon, Hamlin, Theriot & Hardy, 680 So. 2d 831 (Miss. 1996).

A nonresident defendant must do more than merely place its product in the "stream of commerce" before its actions will be deemed "purposefully directed" at Mississippi for purposes of due process analysis. Sorrells v. R & R Custom Coach Works, Inc., 636 So. 2d 668 (Miss. 1994).

A nonresident manufacturer's placement of its product into the stream of commerce did not constitute an act "purposefully directed" toward Mississippi where there was no evidence of any activity by the manufacturer indicative of an intent to serve the Mississippi market;

thus, the limitations of the due process clause prevented utilization of § 13-3-57 to gain personal jurisdiction over the manufacturer. Sorrells v. R & R Custom Coach Works, Inc., 636 So. 2d 668 (Miss. 1994).

In determining whether exercise of long arm jurisdiction under state statute comports with due process requirements, court must determine whether defendant has established sufficient contacts with forum state indicating purposeful availment of privilege of conducting activities within forum and thereby invoking benefits and protection of its laws, with focus of inquiry at this stage being upon nature of underlying litigation. Falco Lime, Inc. v. Tide Towing Co., 779 F. Supp. 58 (N.D. Miss. 1991).

Mississippi's long arm statute's contract provision served to confer personal jurisdiction over Illinois corporation which had entered into charter agreement with Mississippi corporation seeking damages for loss of use of barges which allegedly ran aground as result of Illinois corporation's negligent maintenance and operation of tug. Falco Lime, Inc. v. Tide Towing Co., 779 F. Supp. 58 (N.D. Miss. 1991).

State's long-arm statute relating to tort actions did not authorize jurisdiction over foreign corporation which had entered into charter agreement with Mississippi corporation seeking damages for loss of use of barges which allegedly went aground as result of Illinois corporation's negligence in maintaining and operating tug. Falco Lime, Inc. v. Tide Towing Co., 779 F. Supp. 58 (N.D. Miss. 1991).

Under particular facts, it would not be unfair or offend due process for Mississippi court to exercise jurisdiction in suit by Mississippi corporation against Illinois corporation which had agreed to move Mississippi corporation's barges which had become stranded in river; defendant's activities in Mississippi were such that it could reasonably foresee being hailed into court in Mississippi. Falco Lime, Inc. v. Tide Towing Co., 779 F. Supp. 58 (N.D. Miss. 1991).

In deciding whether federal court sitting in diversity has jurisdiction over nonresident defendant, reach of long arm statute should be determined before considering whether exercise of jurisdiction would comport with due process, for if service was defective under state statute, constitutional issue should not even be considered. Falco Lime, Inc. v. Tide Towing Co., 779 F. Supp. 58 (N.D. Miss. 1991).

Nonresident defendant is amenable to personal jurisdiction in federal diversity case to extent permitted by state court in state in which federal court sits. Falco Lime, Inc. v. Tide Towing Co., 779 F. Supp. 58 (N.D. Miss. 1991).

A husband had sufficient minimum contacts with Mississippi so that requiring him to submit to an adjudication of his rights in a divorce proceeding did not offend "traditional notions of fair play and substantial justice," where the husband was physically present in Mississippi at the time he was personally served, and he was domiciled in Mississippi for years and left the state incident to separation from his spouse and family. Chenier v. Chenier, 573 So. 2d 699 (Miss. 1990).

In an action brought by a donor to set aside gifts of land, the donee "purposefully availed herself of the privilege of conducting activities" within Mississippi for purposes of due process and personal jurisdiction where she had the donation document notarized at the Chancery Clerks' office by an official of the State. Anderson v. Sonat Exploration Co., 523 So. 2d 1024 (Miss. 1988).

Mississippi resident who traveled to Tennessee to contract with placement service and asked that firm to seek employment for him in any one of 3 states, including Tennessee, had purposely availed himself of privilege of conducting business within Tennessee such that due process was not offended by Tennessee's assertion of in personam jurisdiction, and such that Mississippi trial judge erred in dismissing suit seeking enforcement of Tennessee judgment on ground that Tennessee did not have personal jurisdiction over defendant. Educational Placement Services v. Wilson, 487 So. 2d 1316 (Miss. 1986).

In an action brought by a bank to foreclose its deed of trust executed by corporation and secured by the personal guarantees of five of the corporation's stockholders, in which defendant stockholder filed a motion to dismiss, the trial court properly held that use of the state's long-arm statute to obtain in personam jurisdiction over the non-resident defendant stockholder met the due process requirements of the Fourteenth Amendment since the defendant visited the property involved at least twice a month during the latter part of the year, since the plaintiff conferred with the defendant at least twice in the latter part of the year, and since the non-resident defendant personally guaranteed the loan from the bank to the corporation. First Miss. Nat'l Bank v. S & K Enters., Inc., 460 So. 2d 839 (Miss. 1984).

In a diversity action assertion of jurisdiction over the defendant must be consistent with the due process clause of the Fourteenth Amendment, a requirement that is controlled by federal law, even though the defendant must be amenable to service under the long arm statute of the forum state, a requirement that is controlled by the law of the forum state. Brown v. Flowers Indus., Inc., 688 F.2d 328 (5th Cir. 1982), reh'g denied, 691 F.2d 502 (5th Cir. 1982), cert. denied, 460 U.S. 1023, 103 S. Ct. 1275, 75 L. Ed. 2d 496 (1983).

Where the Associated Press sent a dispatch from Louisiana to its Mississippi members incorrectly indicating that plaintiff, a Mississippi resident, had been convicted of marijuana possession, the district court had jurisdiction of plaintiffs libel action under the terms of the amended Mississippi long-arm statute; the AP's contacts with Mississippi were sufficient to justify, under the due process clause, Mississippi's exercise of its jurisdiction. Edwards v. Associated Press, 512 F.2d 258 (5th Cir. 1975).

There is no defect under federal constitutional standards for limiting the long-arm statute to resident plaintiffs, since the state is not obligated to make its courts available to nonresidents, who themselves are not doing business in the state, to sue other nonresidents. American Int'l Pictures, Inc. v. Morgan, 371 F. Supp. 528 (N.D. Miss. 1974).

Nonresident who engages in business in this state which is subject to state control is subject to suit for damages in this state on cause of action accruing here out of business transacted in this state and is properly brought into court by service of process upon secretary of state in manner provided by Code 1942 § 1438, and statutes so providing do not violate due process or immunities and privileges clauses of federal constitution. Condon v. Snipes, 205 Miss. 306, 38 So. 2d 752 (1949).

Nonresident engaging in business of termite eradication and control in this state under license from State Plant Board authorizing him to conduct such business is subject to action for damages in this state for breach of termite eradication and control contract entered into and to be performed in this state and may be brought into court by service of process upon secretary of state in manner provided by Code 1942, § 1438. Condon v. Snipes, 205 Miss. 306, 38 So. 2d 752 (1949).

Question as to what constitutes doing business in this state, territorial jurisdiction and due process of law is judicial, and court is not bound by legislative declaration or definition as to what constitutes doing business, territorial jurisdiction or due process of law, unless such declaration or definition is sanctioned or authorized by constitutional limitations. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

To subject a foreign corporation to the jurisdiction of the state courts would violate due process of law contrary to this section, unless its business in the state is of such nature and character as to warrant the inference that it has subjected itself to the local jurisdiction and is present within the state through duly authorized officers or agents within the sense of doing business as defined by the decisions of the Federal Supreme Court in its application of this provision. Lee v. Memphis Pub. Co., 195 Miss. 264, 14 So. 2d 351, 152 A.L.R. 1428 (1943).

96. — Summons or legal appearance, civil practice and procedure.

Father was subject to the chancery court's continuing jurisdiction and received notice of the trial date; the document which gave the father notice of the hearing was a Miss. R. Civ. P. 81 summons and it listed the time and date for the father to appear, which he did, and he was present when the case was transferred to the other chancellor, such that the father had every opportunity to check with the chancery clerk's office and the mother's attorney regarding the case's status. Vincent v. Griffin, 852 So. 2d 620 (Miss. Ct. App. 2003), reversed by, remanded by 872 So. 2d 676, 2004 Miss. LEXIS 501 (Miss. 2004).

Judgment or decree is void against defendant unless there has been legal summons or legal appearance, although defendant has full and definite knowledge of existence of action against him and his action under that knowledge is immaterial. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195 (1949).

No man can be condemned or divested of his right until he has an opportunity of being heard and no judgment, order or decree is valid or binding upon a party who has had no notice of proceeding against him. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195 (1949).

Code 1942 § 1852, providing method of summoning non-resident defendant in proceeding in chancery court, is jurisdictional and is one method provided by law to meet requirement of due process clause of Constitution. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195 (1949).

97. — Service of process, civil practice and procedure.

Where defendant denied being served with process, there was no return of service in the record, and no entry in the docket book indicating that there ever was a return, defendant's due process rights were violated and a judgment finding him in contempt and ordering him to pay educational expenses was void. Morrison v. Miss. Dep't of Human Servs., 863 So. 2d 948 (Miss. 2004).

For purposes of subsequent suit against nonresident defendants for malicious prosecution and abuse of process, nonresident defendants' proper service-by-mail on Mississippi resident of process issued in prior Louisiana lawsuit, absent any other Mississippi nexus, provided insufficient contact with Mississippi to support exercise of personal jurisdiction, by federal district court in Mississippi, under constraints of due process clause. Allred v. Moore & Peterson, 117 F.3d 278 (5th Cir. 1997), cert. denied, 522 U.S. 1048, 118 S. Ct. 691, 139 L. Ed. 2d 637 (1998).

Complete absence of service of process offends due process and cannot be waived. Mansour v. Charmax Indus., Inc., 680 So. 2d 852 (Miss. 1996).

Extent of jurisdiction of federal court over nonresident defendant depends on whether defendant is amenable to service of process under forum state's long arm statute and whether such exercise of jurisdiction would comport with dictates of due process. Falco Lime, Inc. v. Tide Towing Co., 779 F. Supp. 58 (N.D. Miss. 1991).

The application of the long-arm statute did not deny defendants due process of law where, inter alia, the execution of the contract at issue occurred largely in Mississippi, following telephone negotiations initiated in the state, and where defendant partially performed its part of the contract in Mississippi. Sheridan, Inc. v. C.K. Marshall & Co., 360 So. 2d 1223 (Miss. 1978).

A judgment obtained against a foreign corporation which owned no property and did no business in Mississippi under an attempted personal service upon an employee designated as a superintendent of the defendant corporation but who was employed by another corporation, and received no compensation from the defendant corporation, would be in violation of the due process of law clause of § 1 of Article 14 of the Constitution of the United States. Alabama, Tenn. & N.R. Co. v. Howell, 244 Miss. 157, 141 So. 2d 242 (1962).

Due process of law requires personal service to support a personal judgment, and, when the proceeding is strictly in personam brought out to determine the personal rights and obligations of the parties, personal service within the state or a voluntary appearance in the case is essential to acquisition of jurisdiction so as to constitute compliance with the constitutional requirement of due process. American Cas. Co. v. Kincade, 219 Miss. 653, 69 So. 2d 820 (1954).

Statute (Laws 1940, ch 246, §§ 1437-1440) providing for service on non-residents by service of process on Secretary of State and making provision for reasonable notice and opportunity to defend, as applied to corporate citizen of another state engaged in levy construction work of large proportions in Mississippi, employing many men to operate trucks and other heavy and cumbersome machinery and equipment, is not unconstitutional as denying to such non-resident equal protection of the law, due process of law, or privileges and immunities afforded to residents. Sugg v. Hendrix, 142 F.2d 740 (5th Cir. 1944).

98. — Jury trial, civil practice and procedure.

Mississippi's exemption of jurors who are illiterate or under 21 years of age, pursuant to § 13-5-1, or over 65 years of age, pursuant to § 13-5-25, did not violate the defendant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Turner v. State, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

Where proceedings involved determination of both paternity and child support, defendant would be entitled to a jury trial on the issue of paternity, even though the child support statute did not require a jury trial. Metts v. State Dep't of Pub. Welfare, 430 So. 2d 401 (Miss. 1983).

A defendant appealing a conviction of rape did not have standing to raise the issue as to whether failure to include women as qualified jurors was in violation of his rights under the Fourteenth Amendment of the Constitution. Smith v. State, 229 So. 2d 551 (Miss. 1969).

The Fourteenth Amendment is not applicable on the issue as to whether or not women will be required to serve as jurors in a state court, the power to prescribe the qualifications of jurors being in the legislature, which may include or exclude women from jury duty. Smith v. State, 229 So. 2d 551 (Miss. 1969).

The defendant was not deprived of due process of law and equal protection of the laws in violation of this amendment because women were totally excluded from the juries which indicted and convicted him. Reeves v. Reeves, 210 So. 2d 780 (Miss. 1968).

Unlike classification by race, classification of persons eligible for jury duty on the basis of sex, applicable alike to all races, is not unconstitutional. Cobb v. City of Greenville, 187 So. 2d 861 (Miss. 1966), cert. denied, 385 U.S. 1011, 87 S. Ct. 704, 17 L. Ed. 2d 548 (1967).

99. — Continuances, civil practice and procedure.

Trial court is not in error in refusing to grant delays and continuances in civil action to party who testifies that he has made no attempt whatsoever to gain any information which was made basis for request for delays and who has had approximately two months in which to obtain information which he desired to prepare for trial during which period no effort was made to obtain information readily available. Vail v. City of Jackson, 206 Miss. 299, 40 So. 2d 151 (1949).

100. — Contempt, civil practice and procedure.

Chancellor did not err finding the attorney in contempt for failing to appear at the January 9 hearing where since there was no requirement that the attorney's conduct be willful under Miss. Unif. Ch. Ct. R. 1.05, there was no merit to her argument that the contempt judgment had to be set aside for lack of willfulness on her part; it was not a violation of the Due Process Clause of the Fourteenth Amendment to hold contempt hearings in youth court abuse proceedings out of the public eye and the chancellor did not become substantially involved with the prosecution of the contempt charge. In re Spencer, 985 So. 2d 330 (Miss. 2008), writ of certiorari denied by 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600, 77 U.S.L.W. 3324 (2008).

A contemnor was denied due process of law where the show cause hearing for the contempt charges was conducted by the same judge who presided over the divorce proceedings and the related motion for recusal from which the alleged contempt originated, the contemnor was charged with a course of conduct that was committed, for the most part, outside the presence of the court, his conduct associated with the divorce proceedings involved the judge personally, and the judge chose to set a show cause hearing at a date subsequent to the alleged contemptuous conduct. Purvis v. Purvis, 657 So. 2d 794 (Miss. 1994), on rehearing (Miss. Apr. 27, 1995).

An award of attorney's fees in a contempt proceeding against the husband in a divorce action was improper where the only evidence presented regarding attorney's fees was an affidavit, with attached attorney time sheets, setting out the hours worked, the hourly rates, and costs, for a total fee of $4,450, and the husband was not present when the evidence was presented and was not given the opportunity to examine witnesses and to question the reasonableness of the award. Griffin v. Griffin, 579 So. 2d 1266 (Miss. 1991).

In an action against a husband for contempt for failing to abide by the terms of a divorce decree, the husband was deprived of due process where, after the husband was held in contempt, the chancellor did not allow him to present evidence in support of his motion for a new trial in order to prove that he had abided by the terms of the divorce decree, and the chancellor then dispensed with the husband's motion for a new trial by denying it without hearing the additional evidence. Weeks v. Weeks, 556 So. 2d 348 (Miss. 1990).

Due process rights of defendant were met and judge was not disqualified from acting summarily on direct contempt charge committed in his presence in order to preserve integrity of court; for direct contempt the offender may be punished instantly without necessity of any proof, and judge may act upon what he has seen and heard. Varvaris v. State, 512 So. 2d 886 (Miss. 1987).

Where speaker uttered vulgar, profane and indecent language concerning the presiding judge while the judge was in his retiring room, and where the court took testimony of deputy sheriff who heard the remarks and then took testimony of the speaker who denied making those remarks and thereafter found the speaker guilty of direct contempt and sentenced him, the presiding judge exceeded his authority in punishing the speaker without filing of an information or other definite charge against the speaker and without giving him notice of the charge and reasonable opportunity to defend himself. Ex parte Wisdom, 223 Miss. 865, 79 So. 2d 523 (1955).

Where words are spoken concerning the presiding judge which were both contemptuous and insulting but they were spoken when the judge had retired to his chambers following the announcement of the decision, the court could not proceed to punish the speaker upon his full knowledge of facts but there had to be a hearing and the court had to rely upon the testimony of the witnesses and the speaker should have been given reasonable notice of the charges by attachment, citation or otherwise so that he may know the nature and the cause of accusation against him and that he may have a reasonable opportunity to be heard and also the speaker should have the right to obtain assistance of counsel and the right to make a record on which an order may be reviewed on appeal. Ex parte Wisdom, 223 Miss. 865, 79 So. 2d 523 (1955).

Where language spoken concerning the presiding judge was both contemptuous and insulting and where the language had been spoken within the actual presence and hearing of the court, it merited some punishment which the court would have had the right to inflict without notice, rule to show cause, or other process. Ex parte Wisdom, 223 Miss. 865, 79 So. 2d 523 (1955).

101. — Limitation of actions, civil practice and procedure.

Retroactive application of § 81-5-105, limiting the personal liability of a former officer of a failed federal savings and loan association to gross negligence, intentional tortious conduct, intentional breach of the duty of loyalty, and corporate waste, did not violate due process as expressed in the federal and state constitutions because a vested property right in the tort action did not arise under Mississippi law until the claim was reduced to judgment; where a plaintiff has no vested right in tort claims, abrogation of those claims by legislative enactment does not constitute a deprivation of property in violation of due process. Resolution Trust Corp. v. Scott, 887 F. Supp. 937 (S.D. Miss. 1995).

Statute of limitations for Mississippi landowner's claims asserting due process taking violations, equal protection violations, and discrimination on account of race was Mississippi's 3-year residual statute of limitations. Taylor v. County of Copiah, 937 F. Supp. 573 (S.D. Miss. 1994), aff'd, 51 F.3d 1042 (5th Cir. 1995).

Section 15-1-41, which limits the time within which an action may be brought to recover damages for injuries arising from the design or construction of an "improvement to real property," does not violate the constitutional guarantee of equal protection, even though it does not apply to actions for wrongful death but applies to all other actions for damages caused by negligent construction. Phipps v. Irby Constr. Co., 636 So. 2d 353 (Miss. 1993), reh'g denied.

Section 15-1-25 is not unconstitutional as violative of equal protection in that it provides only 4 years in which to file a claim against an estate while other tort victims have the benefit of the general 6-year statute of limitations, since the legislature's interest in finality with respect to estates is a legitimate governmental interest and the statute of limitations is a rational means of serving that specific interest. Townsend v. Estate of Gilbert, 616 So. 2d 333 (Miss. 1993).

It is not unconstitutional to allow wrongful death plaintiffs a better statute of limitations than that applied to personal injury plaintiffs under § 15-1-41. Fluor Corp. v. Cook, 551 So. 2d 897 (Miss. 1989).

An amendatory provision in a sales tax statute (Code 1942 § 10122, as amended) reducing from six years to three years the time within which suit may be brought to recover the tax is not violative of the due process clause. Stone v. McKay Plumbing Co., 200 Miss. 792, 30 So. 2d 91 (1947).

A retroactive provision in a sales tax statute changing the limitation on the right of the taxpayer to sue to recover taxes paid is invalid in so far as it undertakes to compel a court to set aside a prior judgment in taxpayer's favor, since the judgment conferred a vested right which could not be taken away without due process of law. Stone v. McKay Plumbing Co., 200 Miss. 792, 30 So. 2d 91 (1947).

The state of Mississippi may not, without violating the due process clause, apply to an employee's fidelity insurance contract entered into in another state its own statute annulling any contractual limitation of the time for giving notice of claim, although the default occurred after the removal of the insured and his employee to the state. Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928 (1934), reh'g denied, 292 U.S. 607, 54 S. Ct. 772, 78 L. Ed. 1468 (1934).

Shortening a limitation period without giving reasonable time for the preservation of existing rights violates the due process clause. Bell v. Union & Planters' Bank & Trust Co., 158 Miss. 486, 130 So. 486 (1930), motion denied, 161 Miss. 275, 131 So. 257 (1930).

102. — Damages, civil practice and procedure.

Mississippi's system for awarding punitive damages is not unconstitutional, and therefore the imposition of punitive damages did not violate a defendant's constitutional right to due process. Ciba-Geigy Corp. v. Murphree, 653 So. 2d 857 (Miss. 1994).

The statutory assessment of five per cent damages in specified cases when the judgment or decree of the lower court is affirmed on appeal does not violate the due process requirements of the Fourteenth Amendment since all unsuccessful appellants in such cases, whether plaintiff or defendant, are subject to its terms. Wallace v. Jones, 360 So. 2d 932 (Miss. 1978).

103. — Appeals, civil practice and procedure.

Action of chancery court in proceeding, at appellee's request, with the hearing upon the merits of the cause at the time set therefor in the absence of appellant, without justifiable excuse, did not deprive appellant of his property without due process of law, nor was he denied the equal protection of the law, where it appeared that not only had the appellant been granted repeated continuances, but had also been fully advised as to the date of the hearing. Webb v. Bonner, 232 Miss. 153, 98 So. 2d 143 (1957).

A statute limiting the right to appeal from the circuit court to the Supreme Court in cases originating in justice of the peace, municipal, or police court, does not make an unreasonable classification. Worley v. Pappas, 161 Miss. 330, 135 So. 348 (1931).

The trial of a remanded case without the benefit of a revised opinion subsequently handed down by the appellate court, does not involve any denial of due process. Adams v. Yazoo & Miss. V.R. Co., 77 Miss. 194, 24 So. 200 (1898), motion denied, 77 Miss. 302 , 24 So. 317 (1898), aff'd, 180 U.S. 1, 21 S. Ct. 240, 45 L. Ed. 395 (1901), reh'g denied, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901).

104. — Reversal on issue of damages only, civil practice and procedure.

Reversal of a personal injury action under the Federal Employers' Liability Act on the issue of damages only does not deny due process. St. Louis-San Francisco Ry. v. Bridges, 159 Miss. 268, 131 So. 99 (Miss. 1930), cert. denied 283 U.S. 848, 51 S. Ct. 494, 75 L. Ed. 1456.

Failure to remand cause for a new trial on issue of liability as well as of damages, on holding the verdict excessive, is not a denial of due process or equal protection. New Orleans & N.E.R. Co. v. Snelgrove, 148 Miss. 890, 115 So. 394 (1927), cert. denied, 277 U.S. 596, 48 S. Ct. 559, 72 L. Ed. 1006 (1928).

105. Juvenile practice and procedure.

Where police chief, who had apprehended students after responding to report of fight on or near school property, noticed single profanity written in dust on his car when he arrived at police station with four of students, and made several of them wash it and several other vehicles, students were entitled to partial summary judgment that their Fourteenth Amendment Rights were violated by being forced to wash car; and although no physical harm occurred, violation was not de minimis, considering plaintiff's age and fact that exercise took place in view of passersby and of news media; "punishment" of pretrial detainees is prohibited and although regulatory restraints incident to detention are permissible, they must be reasonably related to legitimate goal, and in instant case were not. C-1 ex rel. P-1 v. City of Horn Lake, 775 F. Supp. 940 (N.D. Miss. 1990).

Minors were entitled to some form of due process prior to being placed in a detention center that placed extensive restrictions on its residents. In re M.I., 519 So. 2d 433 (Miss. 1988).

The juvenile laws were not of such "irrational disparity" in the treatment of offenders as to violate the Fourteenth Amendment, despite the defendant's argument that if he had been charged with assaulting his victim with the intent to rape, maim, or even murder her, rather than with rape, he would have been remitted to custody for rehabilitation as a juvenile offender rather than prosecuted as an adult. Smith v. State, 229 So. 2d 551 (Miss. 1969).

An order waiving Youth Court jurisdiction over a 15-year-old minor charged with the offense of burglary which does not affirmatively show that a hearing was had in the presence of the minor and his parents, that the minor was represented by counsel, or that the right to counsel was properly waived, is fatally defective. Hopkins v. State, 209 So. 2d 841 (Miss. 1968).

The hearing and trial provided for in statutory provisions relating to delinquent children afford due process. Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325 (1928).

106. Domestic relations action, generally.

Visitation was properly awarded to paternal grandparents because the Mississippi Grandparents' Visitation Statute, Miss. Code Ann. §§ 93-16-1 to 93-16-7 was not unconstitutional under United States Supreme Court law. Woodell v. Parker, 860 So. 2d 781 (Miss. 2003).

Spouse was not denied due process in marital dissolution proceeding, even though court made its decision regarding marital property division based upon spouses' unrebutted, uncross-examined affidavits, where spouses made knowing and intelligent waiver of their respective rights to cross-examination and agreed to allow court to rely upon their affidavits in reaching decision. Sandlin v. Sandlin, 699 So. 2d 1198 (Miss. 1997).

Award to wife of alimony and child support where such is not sought in pleadings is error, because it deprives husband of due process, although such judgments are not void; therefore, where husband paid alimony and child support for 3 years before complaining about due process violation, decree is final and due process right has been waived. Miller v. Miller, 512 So. 2d 1286 (Miss. 1987).

The fixing of a lien upon real and personal property belonging to a former husband who had failed to pay alimony and child support as required by a divorce decree did not deny the husband his constitutional right to due process where the lien had been imposed after a full hearing and where such lien had been necessary to ensure that the husband pay to the wife the support owing to her under the agreement embodied in the decree. Morgan v. Morgan, 397 So. 2d 894 (Miss. 1981).

107. Probate practice and procedure.

Miss. Code Ann. § 91-1-15 does require certain criteria, including an option to prove paternity of any illegitimate children within a restricted period after the putative father's death, Miss. Code Ann. § 91-1-15 (2004); these requirements place a higher burden on illegitimate children to inherit from their fathers than legitimate children. However, the State has a legitimate interest in protecting the family and the estates of the deceased by requiring adjudication of paternity within a reasonable timeframe; the purpose of § 91-1-15 in the context of intestate succession is to (1) avoid litigation of stale or fraudulent claims, (2) cause fair and just disposal of property, and (3) facilitate repose of title to real property. In re Estate of McCullough v. Yates, 32 So. 3d 403 (Miss. 2010).

Appellants failed properly to adjudicate themselves as the illegitimate children of their putative father in the time prescribed by Miss. Code Ann. § 91-1-15 and as such, the petition to be determined heirs of the decedent was barred by the time provision of § 91-1-15; additionally, § 91-1-15 did not violate the Equal Protection Clause or the Due Process Clause of the United States Constitution. Further, appellants were not deprived of either their procedural or substantive due process rights as Mississippi had a legitimate state interest in the legislation propounded in § 91-1-15, therefore, the statute did not violate any substantive due process rights; in addition, appellants had notice of the putative father's death and would have been afforded a hearing for adjudication of paternity, however, they failed to make such a petition within the statutory limits of § 91-1-15. In re Estate of McCullough v. Yates, 32 So. 3d 403 (Miss. 2010).

The administrator of an estate is required to provide actual notice to known or reasonably ascertainable legitimate children who are potential heirs and whose claims would be barred by the running of the 90-day period from the notice of publication to creditors under the nonclaim statute, § 91-1-15(3)(c). To hold otherwise would encourage administrators and executors to benefit as heirs at law by setting in motion the shortest filing period which, unbeknownst to the potential heir, has significantly shortened the time for the potential heir to meet with the statutory requirements to inherit as an heir. Smith ex rel. Young v. Estate of King, 579 So. 2d 1250 (Miss. 1991).

108. Real property actions and proceedings.

Absent proof of a significant impact on the values of the neighbors' property, no property interest existed for which some process was due as a matter of constitutional right; the property owner's first request to the city to split her lot was made in 1999, and notice was given on April 6, 2001 that the matter would be considered on April 9, so constitutional process was not due, as no property deprivation existed and there was no defect in notice. Hinds v. City of Ocean Springs, 883 So. 2d 111 (Miss. Ct. App. 2004), writ of certiorari denied by 883 So. 2d 1180, 2004 Miss. LEXIS 1251 (Miss. 2004).

Replevin statute (§ 11-37-101) violates Due Process Clause of Fourteenth Amendment because statute states that judge "shall" grant whatever is presented, leaving no discretion to judge to deny writ of replevin on presentation of complaint in proper form. Wyatt v. Cole, 710 F. Supp. 180 (S.D. Miss. 1989).

The statutory procedure for the attachment of realty, under which attachment could be invoked without any showing of a particularized need, so long as defendant debtor was a nonresident, was violative of due process both facially and as applied to the breach of contract action at issue. MPI, Inc. v. McCullough, 463 F. Supp. 887 (N.D. Miss. 1978).

Failure to make one, claiming title to tax forfeited land under a quitclaim deed of the record owner and by adverse possession, a party to plaintiff's action against the state to confirm the validity of the patent from the state to such land does not constitute a denial of due process of law, for the reason that the alleged fraud claimed by defendant that the patent was issued for a grossly inadequate consideration was a defense which only the state could raise, and the confirmation decree did not purport to affect defendant's claims of title. Comfort v. Landrum, 52 So. 2d 658 (Miss. 1951).

109. Torts.

In an action by a Mississippi plaintiff alleging various torts arising from a Missouri defendant's repair and replacement of the plaintiff's diesel engines, the defendant was not subject to personal jurisdiction in Mississippi, although the tort prong of Mississippi's long arm statute (§ 13-3-57) applied because the engines malfunctioned in Mississippi, where, inter alia, the defendant was not qualified to do business in Mississippi, had never done business in Mississippi, owned no property in Mississippi, had no place of business in Mississippi, did not advertise or sell products in Mississippi, and was careful to protect its distribution agreement, which forbid it from providing any sales and services outside Kansas and part of Missouri; exercise of jurisdiction under the long-arm statute would not comport with the dictates of Fourteenth Amendment. Fava Custom Applicators, Inc. v. Cummins Mid-America, Inc., 907 F. Supp. 224 (N.D. Miss. 1995).

In a diversity action the district court improperly concluded that one long-distance telephone call that was alleged to constitute a tort committed "in whole or in part" in Mississippi was insufficient under the due process clause to subject the defendants to in personam jurisdiction, since the number of contacts with the forum state is not, by itself, determinative, and since what is more significant is whether the contacts suggest that the nonresident defendant purposefully availed himself of the benefits of the forum state. Brown v. Flowers Indus., Inc., 688 F.2d 328 (5th Cir. 1982), reh'g denied, 691 F.2d 502 (5th Cir. 1982), cert. denied, 460 U.S. 1023, 103 S. Ct. 1275, 75 L. Ed. 2d 496 (1983).

Mississippi's wrongful death statute which does not permit an illegitimate child to sue for or recover damages for the wrongful death of his father where the father has not acknowledged the child, did not deny an illegitimate son who had not been acknowledged by the deceased equal protection of the laws. Sanders v. Tillman, 245 So. 2d 198 (Miss. 1971).

110. Criminal practice and procedure — In general.

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Defendant's motion for change of venue was properly denied because there was no evidence in the record to indicate that the jurors were not fair and impartial; the trial judge took appropriate steps, through voir dire, jury instruction, and sequestration, to ensure that defendant's right to a fair trial was preserved. Welde v. State, 3 So. 3d 113 (Miss. 2009).

Where no errors raised warranted granting post-conviction relief, defendant was not deprived of a fair trial due to the cumulative effect of the alleged errors. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Indictment explicitly stated that defendant was being charged with motor vehicle theft under Miss. Code Ann. § 97-17-42; there was no evidence presented that defendant was surprised or that he did not not know, to his prejudice, that he was being prosecuted under § 97-17-42 for motor vehicle theft; therefore, there being no prejudice or surprise, the trial judge did not abuse his discretion in permitting an on-the-record amendment of the indictment. Mixon v. State, 921 So. 2d 275 (Miss. 2005).

Appellant was properly denied post-conviction relief, because he was not denied due process when he entered his guilty plea for murder and aggravated assault, as appellant had stated at the plea hearing that he understood that he was waiving the rights he would have during a trial, and there was dialogue between appellant and the court discussing self-defense. Jackson v. State, 872 So. 2d 708 (Miss. Ct. App. 2004).

The defendant's due process rights were not violated when he was tried in absentia on two traffic citations. Wheeler v. Stewart, 798 So. 2d 386 (Miss. 2001).

Due process requires State to prove each element of offense charged in indictment beyond reasonable doubt. Hennington v. State, 702 So. 2d 403 (Miss. 1997).

There is no discovery violation as to an officer's notes, taken in the presence of witnesses and destroyed in good faith. Thus, the destruction of original handwritten notes of a defendant's statement, which were transcribed into a typed statement, and admission of the typed statement into evidence, did not deprive the defendant of his rights to a fair and impartial trial and adequate defense as provided by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Woodward v. State, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

Refusal to provide indigent criminal defendant with free transcript of prior trial which ended in mistrial does not violate equal protection where defendant makes no showing that transcript would be useful or necessary to case or that alternative devices are unavailable. Ruffin v. State, 481 So. 2d 312 (Miss. 1985).

The fact that in certain counties of the state local officials have openly refused to enforce the laws prohibiting the sale and possession of intoxicating liquor is not evidence of purposeful or intentional discrimination against a defendant charged with unlawful possession of liquor in a county where officers have made a determined and largely successful effort to enforce such laws, and for that reason such a defendant cannot assert that he has been denied equal protection and due process under the Fourteenth Amendment to the US Constitution. State v. Wood, 187 So. 2d 820 (Miss. 1966).

Courts should jealously guard constitutional right of individuals, including suspected or actual criminals, but should not strain themselves into hypercritical condemnation of reasonable and time-tried police methods in discharge of their duties, by police officers, seeking to protect peace and safety of law-abiding people against anti-social characters. Miller v. State, 207 Miss. 156, 41 So. 2d 375 (1949), appeal dismissed, cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

111. — Prospective or retroactive applicability, criminal practice and procedure.

Having no retroactive effect, the decisions of the United States Supreme Court in Miranda and Escobedo could not in any way affect the proceedings incident to a jury trial for murder which ended on February 28, 1964. Yates v. Breazeale, 266 F. Supp. 360 (N.D. Miss. 1967), aff'd and remanded 402 F.2d 113, vacated in part 408 U.S. 934, 92 S. Ct. 2850, 33 L. Ed. 2d 746, conformed to 466 F.2d 500.

Even if it could be said in any way that the principles announced by the United States Supreme Court in Escobedo, Miranda, or Johnson applied to defendant's second trial for murder, reliance thereon would have been ineffective in view of the record made at the first trial where, after entering a plea of guilty, the death sentence was imposed by the jury. Yates v. Breazeale, 266 F. Supp. 360 (N.D. Miss. 1967), aff'd and remanded 402 F.2d 113, vacated in part 408 U.S. 934, 92 S. Ct. 2850, 33 L. Ed. 2d 746, conformed to 466 F.2d 500.

112. — Prejudice, criminal practice and procedure.

To establish due process violation under *Brady*, defendant must show that: (1) evidence was suppressed; (2) suppressed evidence was favorable to defense; and (3) suppressed evidence was material either to guilt or to punishment. United States v. Dixon, 132 F.3d 192 (5th Cir. 1997), cert. denied, 522 U.S. 1061, 118 S. Ct. 721, 139 L. Ed. 2d 661, 523 U.S. 1096, 118 S. Ct. 1581, 140 L. Ed. 2d 796 (1998).

Without a showing of prejudice, defendant cannot make out claim of due process violation. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

A judge who had served as the prosecutor at the time of the defendant's indictment should have disqualified himself; the very functions involved in the performance of the positions of judge and prosecutor are contradictory and no person can be considered to be impartial while that person is also acting as a partisan. Since the judge failed to disqualify himself, the defendant was deprived of due process, which includes a fair and impartial trial. Jenkins v. State, 570 So. 2d 1191 (Miss. 1990).

Individual has right under Fourteenth Amendment due process clause to determination that probable cause to prosecute exists before proceedings are instituted against him, and state officials who undermine that right by maliciously giving false testimony to person or body charged with making probable cause determination can be held liable in § 1983 cause of action for malicious prosecution. Rhodes v. Mabus, 676 F. Supp. 755 (S.D. Miss. 1987).

Prosecuting attorney's display to jury of deformed hands of murder victim, pickled in jar of formaldehyde, is so prejudicial as to deprive defendant of fair trial. Hickson v. State, 472 So. 2d 379 (Miss. 1985).

A conviction obtained through use of false evidence or perjured testimony violates the due process rights of an accused, regardless of whether the prosecution wilfully procured the perjured testimony, entitling a defendant to relief. Pearson v. State, 428 So. 2d 1361 (Miss. 1983).

One accused of crime is entitled to another trial when his constitutional right to fair and impartial trial has been violated, regardless of fact that evidence on first trial may have shown him to be guilty beyond every reasonable doubt, and until he has had a fair and impartial trial within the meaning of Constitution he is not to be deprived of his liberty by sentence in state penitentiary. Scarbrough v. State, 204 Miss. 487, 37 So. 2d 748 (1948).

113. — Public trial, criminal practice and procedure.

A defendant's Sixth Amendment right to a public trial was not violated by the exclusion of the public from his rape trial during the victim's testimony where the trial judge held an evidentiary hearing and made findings sufficient to exclude members of the public during the victim's testimony, and where the court officials, the defendant, legal counsel and the jury were never excluded from the courtroom. Lee v. State, 529 So. 2d 181 (Miss. 1988).

Criminal processes should be open to public scrutiny, and exceptions can be made only for good cause; however, right to public trial belongs to accused, and no one else. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

Circuit Court's closure order in capital murder case was reasonable regulation of time, place, and manner of newspaper's enjoyment of its First Amendment right; desire of press to inform public about important criminal proceedings can result in publication of matter that can deprive defendant of his right to fair trial; access of press to trial and pretrial processes may be qualified, and record amply supported Circuit Court's finding that unrestricted access to trial process would result in substantial likelihood of defendant being denied fair trial; additionally, newspaper was not being denied access to pre-trial proceeding in perpetuity, because closure order expired once jury was sequestered and trial began; once that point was reached, newspaper would be granted access to complete transcript of all closed, pre-trial proceedings. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

Closure order in criminal trial did not violate newspapers' right of access to public records because that right is not of constitutional dimensions, instead being derived from common law and applicable statutes. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

114. — Admissions to private persons, criminal practice and procedure.

Letters written by defendant to accomplice after he had asserted his constitutional rights to silence and to counsel were properly admitted into evidence in capital murder prosecution; accomplice did not produce letters in attempt to get favorable treatment from state given that state was not aware of their existence until after accomplice had pled guilty, there was no evidence that accomplice was acting as agent of state when letters were received, and there was no evidence that accomplice deliberately attempted to elicit incriminating statements from defendant. Brown v. State, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Law enforcement officers' use of defendant's wife as confidential informant did not violate defendant's right to due process, where neither wife nor officer with whom she spoke testified at trial. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Where, pursuant to an offer by the defendant to theft victim to obtain the return of his stolen property for a payment of $200, the defendant met the victim in a place where he was under the observation of a police detective, produced the stolen articles and received the $200 which the detective took from defendant's hand when he placed him under arrest for receiving stolen property, there was no violation of defendant's right of privacy or right of due process, and a search warrant was unnecessary for the stolen articles were seen in defendant's possession prior to his arrest. Bennett v. State, 211 So. 2d 520 (Miss. 1968), appeal dismissed, cert. denied, 393 U.S. 320, 89 S. Ct. 555, 21 L. Ed. 2d 515 (1969).

115. — Compensation of judiciary, etc., criminal practice and procedure.

Key to whether judicial compensation plans which include alleged financial incentives to convict defendants are unconstitutional as a deprivation of due process to a defendant is the presence or absence of judicial power in the person compensated. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

Fee compensation plan for circuit clerks did not create unconstitutional incentive to convict defendants where circuit clerk's role was prescribed by statute, circuit clerk made no decisions affecting the outcomes of cases, and thus circuit clerk had no judicial power. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

116. — Arrest, criminal practice and procedure.

A murder defendant's confession was not the product of an illegal arrest, since conflicting statements regarding the events surrounding the killing related by the defendant to law enforcement officers provided probable cause for his arrest; moreover, the defendant's confession was not the product of the arrest, since he gave his confession only after incriminating physical evidence was found by the officers, and the discovery of the physical evidence was the result of separate questioning of another witness and was therefore unconnected with the arrest. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

There are "degrees" of detainments which fall short of an arrest which requires probable cause; detainments which would become an arrest depending on the outcome of a pending investigation are permissible, though police officers do not have unlimited authority, and may not be clothed with the authority to detain where they are not diligently investigating in such a way which will resolve the matter. Haddox v. State, 636 So. 2d 1229 (Miss. 1994), modified on denial of rehearing, 1994 Miss. LEXIS 323 (Miss. June 16, 1994).

A defendant's arrest for driving while intoxicated was legal, and therefore the subsequent intoxilyzer test was not tainted, even though the arresting officer did not observe the defendant driving, where the defendant admitted to the arresting officer that he had been driving an automobile which was involved in an accident, and the defendant was publicly intoxicated in the presence of the officer and others in violation of § 97-29-47. Goforth v. City of Ridgeland, 603 So. 2d 323 (Miss. 1992).

In his trial for murder of a police officer, defendant's contention that the homicide was justifiable because he was resisting an unlawful arrest and reasonably believed himself to be in imminent danger of great bodily harm was not supported by the evidence, where the law officers had sufficient grounds to believe that fugitives for whom they had arrest warrants were located in the house in which defendant was staying and fired gas into the house only after a reasonable time had elapsed following the announcements requesting the occupants to vacate the house; failure of the occupants to exit as requested demonstrated their refusal to cooperate with the arresting officers who had identified themselves and stated their purpose, and the officers were warranted in using reasonable force and means to execute the arrest warrants. Norman v. State, 302 So. 2d 254 (Miss. 1974), cert. denied, 421 U.S. 966, 95 S. Ct. 1956, 44 L. Ed. 2d 453 (1975).

Discretion vested in an officer as to whether to arrest a traffic violator or merely to issue him a summons is not in and of itself a violation of equal protection guarantees so long as such discretion is not exercised on the basis of an impermissible standard such as race, despite the fact that an officer is more likely to arrest a nonresident violator than a resident violator. Baldwin v. State, 297 So. 2d 157 (Miss. 1974), cert. denied 419 U.S. 1090, 95 S. Ct. 681, 42 L. Ed. 2d 682.

117. — Bail, criminal practice and procedure.

Discretion vested in an officer as to whether to arrest a traffic violator or merely to issue him a summons is not in and of itself a violation of equal protection guarantees so long as such discretion is not exercised on the basis of an impermissible standard such as race, despite the fact that an officer is more likely to arrest a nonresident violator than a resident violator. Lee v. Lawson, 375 So. 2d 1019 (Miss. 1979).

A bail system based on monetary bail alone would violate the federal equal protection and due process rights of indigent pretrial detainees. Lee v. Lawson (Miss. 1979) 375 So.2d 1019.

118. — Guilty plea, criminal practice and procedure.

Because defendant was not informed of the elements of the charge as to his guilty plea, the appellate court reversed and remanded for a hearing as to whether defendant had the elements explained to him prior to pleading guilty, and whether there was a factual basis for the plea. Jones v. State, 936 So. 2d 993 (Miss. Ct. App. 2006).

Record indicated that the trial court, at sentencing, had some evidence that defendant committed the offense, and whether such evidence was substantial was difficult to ascertain; there was some question whether the plea following the second colloquy was knowing, intelligent and voluntary, and the supreme court could see additional facts which raised doubt as to the voluntariness of her plea. Hannah v. State, — So. 2d —, 2006 Miss. LEXIS 365 (Miss. July 20, 2006), opinion withdrawn by, substituted opinion at, remanded by 943 So. 2d 20, 2006 Miss. LEXIS 578 (Miss. 2006).

Post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine because his guilty plea was voluntary; defendant stated in his petition to enter a plea of guilty that he was entering the plea freely, voluntarily, and of his own accord, with full understanding of all matters set forth in the indictment. Defendant also acknowledged in the petition that he could receive a sentence of zero to 60 years if convicted for the sale of cocaine as an enhanced offender, and that by pleading guilty he could receive a sentence of zero to 30 years. Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006).

Record clearly demonstrated that defendant was informed that should he plead guilty to the crime, his plea of guilty would act as a waiver to a direct appeal to the Mississippi Supreme Court pursuant to Miss. Code Ann. § 99-35-101. Further, it could not be said that counsel's brief moment of confusion regarding which charges the State would pursue, rose to the level of ineffective assistance of counsel and the record clearly indicated that the trial judge explained to defendant the terms of the plea agreement; thus, defendant was not denied either due process or effective assistance of counsel. Sykes v. State, 895 So. 2d 191 (Miss. Ct. App. 2005).

Where a guilty plea was entered, an inmate's request for post-conviction relief based on a denial of due process under the

Fourteenth Amendment and Miss. Const. Art. 3, § 14 was denied because those issues were waived by the entry of the plea. Kelley v. State, 913 So. 2d 379 (Miss. Ct. App. 2005).

Trial court's failure to advise defendant of maximum and minimum sentences when defendant pled guilty did not implicate fundamental constitutional right sufficient to except post-conviction case from procedural bar created by defendant's failure to file petition within 3 years of guilty plea. Bevill v. State, 669 So. 2d 14 (Miss. 1996).

A trial court's failure to inform a defendant of the mandatory minimum sentence for the crime charged did not render the defendant's guilty plea involuntary where no misrepresentation as to the mandatory minimum sentence was made to the defendant, he did not expect to receive the mandatory minimum sentence, he did not claim that there was a misrepresentation of the sentence which he was to receive, he was fully apprised and understood the consequences of the sentence the State intended to recommend, and he did not allege that the failure to be informed of the minimum sentence induced him to enter his guilty plea. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

The constitutional standard for voluntariness of a guilty plea does not mention knowledge of the mandatory minimum sentence as an essential element; instead, it merely states that the accused should understand the effects of a guilty plea. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A defendant's claim that he blindly entered a plea of guilty because his attorney told him that his mother advised him to do so was not sufficient to render his plea involuntary. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A plea is voluntary if not induced by fear, violence, deception or improper inducements. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A defendant's plea of guilty to 2 counts of forgery was not involuntarily entered, even though the trial court did not personally advise the defendant of the minimum and maximum penalties provided by law for the crimes of forgery, where the defendant's attorney explained to him the maximum and minimum penalties for the charges, the defendant made no claim about the sentence he expected to receive or his belief as to the minimum sentence for the offense charged, and he did not claim that his alleged ignorance was the basis for his guilty plea. Banana v. State, 635 So. 2d 851 (Miss. 1994).

Although Rule 3.03(3)(B), Miss. Unif. Crim. R. Cir. Ct. Prac. only requires a judge to inquire and determine whether the defendant understands the maximum and minimum penalties when he or she wishes to plead guilty to the offense charged, trial judges should inform criminal defendants on the record of the minimum and maximum penalties for the charged offense in order to insure that no question ever be raised. Banana v. State, 635 So. 2d 851 (Miss. 1994).

A trial court's failure to inform a defendant, who pled guilty to possession of cocaine with intent to distribute, that a $1,000.00 fine was the minimum penalty for the crime was harmless error where the record contained the defendant's written waiver of indictment, his petition to enter a plea of guilty, and a 12-page transcript of the circuit judge's interrogation of the defendant before accepting the plea. Eley v. State, 631 So. 2d 787 (Miss. 1994).

In § 99-15-26 proceedings, the trial court never accepts the guilty plea and never imposes a sentence if the defendant fulfills the court-imposed conditions; where a guilty plea is accepted and a suspended sentence is imposed, the court cannot later impose a period of incarceration exceeding the original suspended sentence where the defendant fails to maintain a standard of good behavior because to do so would expose the defendant to double jeopardy. Wallace v. State, 607 So. 2d 1184 (Miss. 1992).

A defendant was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether his guilty plea was entered voluntarily and intelligently where the transcript of the defendant's plea hearing did not reflect that he was advised concerning the rights of which he alleged he was ignorant; the State would be entitled to prove at the evidentiary hearing that the defendant learned of the rights in question, either from the trial judge or from some other source, prior to pleading guilty. Alexander v. State, 605 So. 2d 1170 (Miss. 1992).

A guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights. A plea is voluntary if the defendant knows what the elements are of the charge against him or her, including an understanding of the charge and its relation to him or her, what effect the plea will have, and what the possible sentence might be because of the plea. Where a defendant is not informed of the maximum and minimum sentences he or she might receive, his or her guilty plea has not been made either voluntarily or intelligently. A complete record should be made to ensure that the defendant's guilty plea is voluntary. While a transcript of the proceeding is essential, other offers of clear and convincing evidence which prove that the defendant entered a guilty plea voluntarily are sufficient. For example, where an evidentiary hearing has established that a defendant's guilty plea was entered voluntarily, the fact that a record was not made at the time the plea was entered will not be fatal. Wilson v. State, 577 So. 2d 394 (Miss. 1991).

A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial, including the right to a speedy trial, whether of constitutional or statutory origin. Anderson v. State, 577 So. 2d 390 (Miss. 1991).

A guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial, and the right that the prosecution prove each element of the offense beyond a reasonable doubt. Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

Defendant was entitled to a hearing on his petition for leave to withdraw his guilty plea, on the asserted basis that he had received incorrect advice from counsel regarding the length of his sentence and the terms of his plea bargain. Tiller v. State, 440 So. 2d 1001 (Miss. 1983).

A plea of guilty constitutes a waiver of some of the most basic rights of free Americans, those secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Miss Const, Art 3, §§ 14 and 26. Tiller v. State, 440 So. 2d 1001 (Miss. 1983).

There was no violation of due process in the acceptance of defendant's plea of guilty where his attorney stated to the court that he had discussed the question fully with the defendant and his parents and they all concurred in the entry of a guilty plea, and the defendant, after hearing his attorney's statement, in response to a query by the court affirmatively adopted the statement. Yates v. State, 253 Miss. 424, 175 So. 2d 617 (1965), cert. denied 382 U.S. 931, 86 S. Ct. 321, 15 L. Ed. 2d 342.

119. — Plea bargaining, criminal practice and procedure.

The State's plea bargain with a codefendant which was conditional upon his testimony at the defendant's trial did not violate due process where there was no indication that the codefendant's plea reduction was made conditional upon "false or specific testimony or a specific result," and the defendant's attorney cross-examined the codefendant extensively on the plea bargain; the practice of the State's withholding its end of a plea bargain until a codefendant has testified is permissible and does not result in tainted and inadmissible testimony, but rather the existence of a plea bargain is to be considered by the trier of fact in determining the credibility of the codefendant's testimony. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A trial court's imposition of a sentence of 49 ½ years imprisonment upon finding that the defendant had violated a plea agreement which provided that the charges against the defendant would be dismissed following restitution and 3 years of good behavior pursuant to § 99-15-26, in spite of the defendant's argument that the maximum sentence he should have received was 3 years since the plea bargain required him to "go straight" for only 3 years as a condition of dismissal, since the defendant had not been adjudged guilty or sentenced for the original charges until the date when the 49 ½ year sentence was imposed, and therefore the 3-year period of conditional good behavior did not amount to a sentencing ceiling for double jeopardy purposes. Wallace v. State, 607 So. 2d 1184 (Miss. 1992).

Upon a prima facie showing of the existence of an advance plea agreement between the state and a codefendant who was state's principal witness, whereby in exchange for testifying for the state the codefendant would receive a lenient sentence for armed robbery, a defendant, who had been convicted for the same robbery as accessory before the fact, may be entitled to post-conviction relief where the agreement had not been disclosed prior to his trial, although the defense had made a general discovery request for exculpatory material, and the existence of any such agreement had been denied by the codefendant while testifying at the defendant's trial. Case would be remanded to circuit court for evidentiary hearing. Malone v. State, 486 So. 2d 360 (Miss. 1986).

Criminal defendant has no constitutional right to specifically enforce plea bargain proposed by prosecutor which is withdrawn before defendant enters plea of guilty where defendant neither makes claim of nor shows detrimental reliance on proposed bargain. Allen v. State, 465 So. 2d 1088 (Miss. 1985).

In a prosecution for arson, the trial court properly overruled defendant's motion to suppress his statement, where defendant himself had initiated an agreement whereby he would not have to serve any time if he would give a truthful statement implicating those responsible for the fires and if he would testify against those persons in court, where defendant had insisted that his own terms be followed, where defendant had been represented by counsel at all times during the process, where defendant had been warned of the result of renigging on the agreement, and where defendant had freely and voluntarily given a statement as part of the agreement that he later chose to reject. King v. State, 451 So. 2d 765 (Miss. 1984).

120. — Venue, criminal practice and procedure.

Transfer of venue for jury selection purposes based on racial demographics did not violate defendant's rights to impartial jury or equal protection in prosecution for murder of black leader of civil rights organization, where transferee county had same or similar racial composition as county where defendant was indicted. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

No equal protection violation resulted from transfer of capital murder prosecution, due to pretrial publicity, to county with 51 percent non-white population, even though transferring county had minority population of 61 percent; defendant failed to show that jury did not represent a fair cross-section of the community from which it was selected. Jackson v. State, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant has both federal and state constitutional right to be tried in county where offense was committed. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

Venue of murder was sufficiently established as being in First Judicial District of Jones County, Mississippi, by evidence showing that decedent was last seen alive by accused in Jones County, near place where body was found in such county, and that he had received a blow on head breaking the skull, small fragments of which were lying on the ground. Poore v. State, 205 Miss. 528, 37 So. 2d 3 (1948), suggestion of error overruled, 205 Miss. 554, 37 So. 2d 357 (1948), cert. denied, 336 U.S. 922, 69 S. Ct. 656, 93 L. Ed. 1084 (1949), reh'g denied, 336 U.S. 947, 69 S. Ct. 810, 93 L. Ed. 1104 (1949).

121. — Medical testing and treatment, criminal practice and procedure.

There was no law requiring labs to be licensed or accredited prior to conducting DNA tests at the time of defendant's trial for rape and murder, besides which a second set of tests was conducted after the subject laboratory received national certification; further, the record showed that the laboratory followed the protocols set forth under Polk v. State regarding the admissibility of DNA evidence at all times; therefore, defendant was not denied due process by the admission of said test results. Morris v. State, 887 So. 2d 804 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 158 (Miss. 2005).

No constitutional requirement existed that certain investigative procedures be performed at each scene of a suspicious death or that the investigation rise to a certain level of expertise; the sufficiency or insufficiency of a police investigation went to the weight of the evidence, and it was for a jury to decide what evidence to believe, and the jury believed the State's witnesses testimony that the investigation was adequate. Cox v. State, 849 So. 2d 1257 (Miss. 2003).

Trial court did not abuse its discretion in deciding to exclude state's serology evidence in murder prosecution instead of granting defendant a continuance and funds to conduct DNA testing; this compromise, which was proposed by defense counsel, was equitable and did not result in manifest injustice or render defendant's trial fundamentally unfair, as DNA would not have been particularly helpful under facts of case. Coleman v. State, 697 So. 2d 777 (Miss. 1997).

Under Rule 803(6), Miss. R. Ev., a custodian of the records of the Mississippi Crime Lab may introduce laboratory reports in a narcotics possession or sale case, except where the defendant objects on the ground that his or her Sixth Amendment right to confront the person who prepared the test is being violated. Kettle v. State, 641 So. 2d 746 (Miss. 1994).

Involuntary treatment of the criminally accused with antipsychotic medication is permissible only where medically appropriate and, considering less intrusive alternatives, essential for safeguarding a compelling state interest. In re Turner, 635 So. 2d 894 (Miss. 1994).

A defendant's constitutional right to privacy was not violated by the State's taking the defendant to the health department for treatment of gonorrhea where the defendant was charged with capital rape of a child who was found to have gonorrhea, since the State's interest in operating a prison and providing for the health of inmates outweighed the privacy interests of the defendant. Ormond v. State, 599 So. 2d 951 (Miss. 1992).

A smear test for gonorrhea, which was conducted after the defendant was arrested for rape, did not constitute a "critical stage" of the criminal proceedings, and therefore the defendant had no right to the presence and advice of counsel under the Sixth Amendment. Ormond v. State, 599 So. 2d 951 (Miss. 1992).

A trial court in a murder prosecution erred in allowing the prosecutor to cross-examine a witness about a certified lab report of results of the defendant's drug screen test, where the test results were never offered into evidence during the trial and the witness had no actual knowledge of the drug screen analysis; without the testimony of a sponsoring witness with personal knowledge of the facts contained therein, the drug screen report was inadmissible hearsay, and without the opportunity to cross-examine the person responsible for the information contained in the report, the defendant's right to confront witnesses secured by the Sixth Amendment and Article 3, § 26 of the Mississippi Constitution were violated. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

In a capital murder prosecution involving an underlying felony of rape, the defendant's due process rights were not violated by a delay in providing the defendant with a "sexual assault kit" which collected samples of the victim's body fluids, even though the defendant did not receive the samples until almost one year after the State's expert conducted his testing, which allegedly resulting in the "degradation" of the samples so that the defendant was unable to perform accurate tests, where the State fully complied with a court order to preserve half the samples, and any delay in receiving the samples was due to the defendant's failure to "simply go and get the samples" from the State's expert and the defendant's mistaken belief that the expert had used up all the samples. Holland v. State, 587 So. 2d 848 (Miss. 1991).

122. — Mental examination and treatment, criminal practice and procedure.

Defendant's due process rights were not violated by a court's refusal to grant a mental evaluation because the record indicated that he was alert and understood the nature of the proceedings and the circumstances and consequences surrounding his actions. Coker v. State, 909 So. 2d 1239 (Miss. Ct. App. 2005).

Due process and equal protection claims arising out of arrestee's lack of access to civil commitment process, as result of pendency of "unresolved criminal charges," were moot, even if arrestee could in the future become involved in criminal activity and thus again be in position of having "unresolved criminal charges pending" against him, absent any basis for predicting future arrest and ineligibility for psychiatric care. McKlemurry ex rel. Rayborn v. Hendrix, 971 F. Supp. 1089 (S.D. Miss. 1997).

Statute precluding civil commitment to state psychiatric hospital of those charged with crimes did not proscribe provision of treatment, psychiatric or otherwise, for persons charged with crimes and, thus, statute did not violate equal protection; county could provide arrestee with treatment for his mental illness, but responsibility for providing treatment was county's duty, not State's duty. McKlemurry ex rel. Rayborn v. Hendrix, 971 F. Supp. 1089 (S.D. Miss. 1997).

Due process clause did not oblige state to make its civil commitment processes available to those who had been charged with or convicted of crimes, even if arrestee would have had due process right to notice and hearing before being transferred to mental health facility. McKlemurry ex rel. Rayborn v. Hendrix, 971 F. Supp. 1089 (S.D. Miss. 1997).

In the sentencing phase of a capital murder prosecution, the introduction of a state psychologist's testimony that it was her opinion that the defendant was not psychotic or mentally ill, did not violate the defendant's Sixth Amendment right to counsel where the defendant's attorney requested the psychiatric examination, the defendant testified that he wanted to have a psychiatric evaluation to determine whether he knew right from wrong, and presumably the defendant had consulted with his attorney about the nature of the psychiatric examination. Willie v. State, 585 So. 2d 660 (Miss. 1991).

A trial court's denial of a capital murder defendant's request for a private mental examination did not violate the Eighth and Fourteenth Amendments, where the defendant did not attempt to use an insanity defense, the State did not produce psychiatric testimony against him, and he did not demonstrate that sanity was to be a significant factor at trial. Ladner v. State, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

A defendant was not improperly denied the assistance of an independent privately employed psychiatrist in violation of his Sixth, Eighth and Fourteenth Amendment rights where the defendant requested and received a psychiatric examination and evaluation to determine his mental condition, resulting in the unanimous determination of 5 medical professionals that the defendant was sane at the time of the charged offense and was competent to aid in his defense. Lanier v. State, 533 So. 2d 473 (Miss. 1988).

Defendant was not competent to stand trial due to finding that he was unable to assist in his defense, where defendant's intelligence quotient was 48 to 52, findings of psychologist concluded that defendant did not possess mental capacity to assist in preparation of defense, and district attorney's motion to pass case to files contained affidavit asking that defendant be committed to mental institution; state's only effort at rebutting evidence of incompetency was effort to prove that defendant had answered questions rationally at his arraignment. Gammage v. State, 510 So. 2d 802 (Miss. 1987).

In hearing to determine whether or not accused is competent to stand trial, state need not be required to prove competency beyond reasonable doubt or by clear and convincing evidence, where procedures such as those set forth in Emanuel v State (1982, Miss) 412 So. 2d 1187, have been approved by United States Supreme

Court (see Drope v Missouri (1975) 420 U.S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896), prosecution at federal level is required to prove competency of criminal defendant by preponderance of evidence, and due process afforded defendant by current procedures preclude need to impose greater burden on state officials. Griffin v. State, 504 So. 2d 186 (Miss. 1987).

In a habeas corpus proceeding by one charged with murder and confined to the Mississippi State Hospital after having been found incompetent to stand trial, the petitioner was not denied due process of law where the burden of proof was placed upon him to prove that he had recovered his sanity and was no longer likely to cause harm to himself or others and where the state presented expert testimony that the petitioner was a paranoid schizophrenic, then in tenuous remission, and that he would pose a danger to himself or others if released from the hospital. Bethany v. Stubbs, 393 So. 2d 1351 (Miss. 1981).

Neither the United States Constitution nor the Mississippi Constitution requires that the nation or state furnish an indigent defendant with the assistance of a psychiatrist to examine the defendant and advise with his court appointed counsel in the preparation of his defense. Phillips v. State, 197 So. 2d 241 (Miss. 1967), cert. denied, 389 U.S. 1050, 88 S. Ct. 791, 19 L. Ed. 2d 844 (1968).

The right to a preliminary examination into the mental capacity of accused charged with murder, is a substantial, procedural right guaranteed to him by the due process clauses of the federal and state constitutions. Butler v. State, 217 Miss. 40, 63 So. 2d 779 (1953).

123. — Identification of accused, criminal practice and procedure.

Identification of defendant was not impermissibly suggestive because the men in the photographs were all African-American males, had the same build, and possessed the same facial features in accordance with the store clerk's description of the armed robber. The fact that defendant was the only individual wearing a coat was a minor difference and did not rise to the level of impermissible suggestion. Jones v. State, 993 So. 2d 386 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

Defendant's conviction for the sale of cocaine within 1,500 feet of a church was proper where his due process rights were not violated by the pre-court identification procedure because there was little likelihood of misidentification and the officer's degree of attention could have been considered to have been at a high level because he did not view defendant in passing or from a great distance. Johnson v. State, 904 So. 2d 162 (Miss. 2005).

Post-conviction relief was denied in a capital murder case because the issue of whether defendant's due process rights were violated by the use of a single set of dental molds in a murder case was procedurally barred since the issue was capable of being raised at trial or on direct appeal; even if it was not, identification of defendant by an eyewitness was distinguishable from an expert's conclusion that defendant inflicted a particular injury based on scientific analysis. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

In a shoplifting case, the trial court did not err in admitting the identification testimony or in court identifications by two witnesses, as both witnesses gave an accurate description of defendant to those who assisted in the pursuit, were certain that the man in a picture shown to them by the police was the same man who had been in the store, and both testified that they identified defendant as the shoplifter based on their familiarity with him, rather than because his was the only photograph shown to them by the police. Johnson v. State, 882 So. 2d 786 (Miss. Ct. App. 2004).

Appellate court overruled defendant's argument that the on-the-scene identification violated his due process rights and prevented him from receiving a fair trial because the pre-trial identification was sufficiently reliable. The victim had the opportunity to view defendant two or three times before the armed robbery occurred, the victim testified that he was indeed paying attention before, during, and after the robbery, the record indicated that the victim gave a detailed description of defendant that was largely accurate, and the victim was, insofar as the record revealed, unequivocal in his ability to identify defendant on four separate occasions. Johnson v. State, 884 So. 2d 787 (Miss. Ct. App. 2004), writ of certiorari denied by 883 So. 2d 1180, 2004 Miss. LEXIS 1302 (Miss. 2004).

State's subpoena of victim and her mother to attend another trial of defendant on sexual battery charge, after they stated they were unsure of his identity, led to improper bolstering and suggestive identification, violating defendant's right to due process in sexual battery prosecution. Hickson v. State, 697 So. 2d 391 (Miss. 1997).

Where a defendant is to be identified at trial, and the defendant requests that he or she be seated among other people in the courtroom, the trial judge should exercise broad discretion in determining whether the request should be granted; the factors to be considered by the trial judge include (1) any danger presented to the public by the defendant, (2) the danger of misidentification, (3) the courtroom facilities available, and (4) any other pertinent factors known to the trial judge. Scott v. State, 602 So. 2d 830 (Miss. 1992).

A trial judge did not abuse his discretion in denying a defendant's request to be seated among the general public when an in-court identification of the defendant was made where the trial judge thoroughly conducted voir dire examination of the witness before allowing his identification, and the defendant had previously been convicted for escape from an Arkansas prison. Scott v. State, 602 So. 2d 830 (Miss. 1992).

When a reasonably intelligent eyewitness has had a good opportunity to view the features of the perpetrator of a crime, the method the police use in having the witness identify the defendant recedes in importance in inverse ratio to the intelligence of the witness and opportunity to view the perpetrator. Thus, a rape defendant's argument that the victim's in-court identification resulted from an impermissibly suggestive photographic identification of the defendant, or from seeing him at the preliminary hearing, was without merit where the victim was a sensible child who had ample opportunity to view the rapist in the daylight, she gave a description of the defendant to a police officer, the accuracy of which was undisputed, and she identified the defendant's photograph without hesitation no more than 1 ½ hours after the crime. Powell v. State, 566 So. 2d 1228 (Miss. 1990).

A robbery victim's in-court identification of the defendant was not tainted by her extensive observation of the defendant at a pre-trial parole revocation hearing where the victim testified at the suppression hearing concerning her ample opportunity to observe the defendant at the time of the robbery. Saucier v. State, 562 So. 2d 1238 (Miss. 1990).

A pretrial voice identification of a burglary defendant was impermissibly suggestive and, therefore, denied the defendant due process of law where the witness heard only one voice after he was shown his stolen items by the police and was told by the police that the man whose voice he was hearing had those items on his person. Estes v. State, 533 So. 2d 437 (Miss. 1988).

Impromptu viewing, in jail, of robbery suspect by robbery victim is not so impermissibly suggestive as to require exclusion of victim's subsequent in court identification of suspect where victim's viewing of suspect in jail is performed in capacity as private individual and is not arranged by state authorities. Thompson v. State, 483 So. 2d 690 (Miss. 1986), habeas corpus dismissed 914 F.2d 736, rehearing denied 920 F.2d 931, certiorari denied, 111 S. Ct. 1083, 498 U.S. 1124, 112 L. Ed. 2d 1187.

Under totality of circumstances test, attorney's in court identification of defendant as robber is substantially reliable, notwithstanding attorney's having had opportunity to observe defendant at preliminary hearing where attorney, who was victim of robbery, had opportunity to view assailant at close range for approximately 30 seconds at time of crime, attorney's degree of attention was intense, there was no significant impairment of attorney's faculties, and general description of robber given to police night of crime was substantially similar to defendant's actual physical appearance. Robinson v. State, 473 So. 2d 957 (Miss. 1985).

In the case of a Fourteenth Amendment objection it is incumbent on the defendant to show that there is a failure of due process in permitting an in-court identification following an allegedly illegal lineup. Anderson v. State, 413 So. 2d 725 (Miss. 1982).

In a prosecution for burglary, the trial court did not err by permitting the victim to identify defendant in court after he had identified defendant in a highly suggestive station house line-up, where the witness had had an opportunity to view defendant at the time of the crime and to notice his facial features, where the witness had displayed a strong level of certainty regarding both identifications, and where the time between the burglary and the line-up was not more than several hours; defendant's due process rights were not violated. Stewart v. State, 377 So. 2d 1067 (Miss. 1979).

Accused was not denied due process by the trial court's refusal to grant a preliminary evidentiary hearing on his motion to suppress identification where there was no showing of illegality in either the photographic identification of the defendant or in the several lineup identifications. Howard v. State, 319 So. 2d 219 (Miss. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

124. — Discovery, criminal practice and procedure.

In a capital murder and death penalty case, there were no due process violations under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963); no DNA testing was done, most of the film had been disclosed, but to the extent that it was not, there was no reasonable probability that the outcome would have been different, and the other evidence had been disclosed to defendant. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant's rights under Brady were not violated by the trial court's denial of defendant's motion for disclosure of his arresting officers and the criminal histories of the codefendants because defendant failed to show that the evidence was favorable or that the prosecution even possessed the evidence; no proof existed in the record that defendant could not obtain the evidence with reasonable diligence, and defendant could not prove to a reasonable probability that the outcome of the trial would have been different had this evidence been in his possession. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

The defendant's constitutional rights were not violated by the failure of the state to timely disclose a transcript of a recording of the drug transaction at issue where the trial court did not allow the state to use the transcript at trial, the defendant had in his possession prior to trial a copy of the tape introduced by the state, and the defendant did not request a continuance of his trial during trial or assert that the trial court erred in refusing a continuance in his motion for new trial. White v. State, — So. 2d —, 2000 Miss. App. LEXIS 41 (Miss. Ct. App. Feb. 1, 2000), reversed by, remanded by 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

Government did not violate *Brady* in drug conspiracy case when it failed to produce defendant's financial records and car titles, which the government seized while executing a search warrant, absent showing that such records were not available to defendant through his own diligence. United States v. Dixon, 132 F.3d 192 (5th Cir. 1997), cert. denied, 522 U.S. 1061, 118 S. Ct. 721, 139 L. Ed. 2d 661, 523 U.S. 1096, 118 S. Ct. 1581, 140 L. Ed. 2d 796 (1998).

Prosecution's failure to provide defense with address and telephone number of witness, who had testified in earlier prosecution of same murder but allegedly could not be located to testify in current trial, did not violate defendant's due process rights, though witness's description of murder suspect in her statement to police did not match defendant; witness's testimony from earlier prosecution, which also contained the nonmatching description, was read to jury during trial. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Evidence is "material," so that its nondisclosure would violate defendant's due process rights, if there is reasonable probability that, had the evidence been disclosed to defense, result of proceeding would have been different. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

A trial court erred in determining that a defendant was not entitled to disclosure of the identity of a confidential informant where, without the informant's eyewitness testimony, the State's case would have rested almost exclusively on the uncorroborated and doubtful testimony of 2 codefendants; however, the trial court's error did not require reversal where the defendant discovered the informant's identity at trial and subsequently confronted and cross-examined him, since confrontation and cross-examination are the very rights which require disclosure of material witnesses in the first place and the defendant fully exercised those rights at the trial. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

There is no discovery violation as to an officer's notes, taken in the presence of witnesses and destroyed in good faith. Thus, the destruction of original handwritten notes of a defendant's statement, which were transcribed into a typed statement, and admission of the typed statement into evidence, did not deprive the defendant of his rights to a fair and impartial trial and adequate defense as provided by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Woodward v. State, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

A defendant is entitled to know of any advance plea agreement between the state and a codefendant who is to testify against him, and a general discovery request is adequate to impose upon the prosecution the duty of disclosure. Malone v. State, 486 So. 2d 367 (Miss. 1986).

In a prosecution for sale of less than one ounce of marijuana, due process required making the substance available to the defendant for inspection and analysis, where the outcome of the case was substantially dependent upon the identification of the alleged substance as contraband. Love v. State, 441 So. 2d 1353 (Miss. 1983).

125. — Jury selection, criminal practice and procedure.

Although defendant's rights under the Equal Protection Clause were violated by the state's striking of one male juror, a court of appeals erred by reversing armed robbery convictions under the plain error standard of review because there was no prejudice to the outcome of the trial since the jury was substantially gender-neutral. McGee v. State, — So. 2d —, 2006 Miss. LEXIS 469 (Miss. Aug. 31, 2006), opinion withdrawn by, substituted opinion at, affirmed by, remanded by 953 So. 2d 211, 2007 Miss. LEXIS 19 (Miss. 2007).

Defendant's Batson challenge was properly rejected by the trial court because the fact that the State exercised peremptory strikes on two African-American veniremen did not establish a prima facie case of racial discrimination. Gilbert v. State, 934 So. 2d 330 (Miss. Ct. App. 2006).

Mississippi caselaw did not extend the Batson protection to religious-based peremptory strikes of jurors; the only objection offered by defendant was a Batson objection. Because defendant did not object that religious-based peremptory strikes violated Miss. Const. Art. 3, § 18 and Miss. Code Ann. § 13-5-2, the trial judge did not err in accepting the reason offered by the State as a race-neutral reason not prohibited by Batson. Jackson v. State, 910 So. 2d 658 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

Manner in which the trial court conducted the polling of the jury did not deny defendant equal protection of the law where the circuit court adhered to the dictates of case law in determining that in the course of post-trial hearings, juror testimony was only admissible as to objective facts bearing on extraneous influences on the deliberation process. James v. State, 912 So. 2d 982 (Miss. Ct. App. 2004), reversed by, remanded by 912 So. 2d 940, 2005 Miss. LEXIS 539 (Miss. 2005).

Defendant argued that a missing juror was tantamount to a silent juror and because of the absent juror, the trial court could not eliminate all doubts as to the exposure of all jurors, and the fact that one juror was not present during the polling process alone was sufficient to establish a denial of due process; however, there was ample evidence that the circuit court went out of its way to assemble the jury and to conduct the polling in strict adherence to the appellate court's instructions, so that the absence of one juror did not invalidate an otherwise sound procedure. James v. State, 912 So. 2d 982 (Miss. Ct. App. 2004), reversed by, remanded by 912 So. 2d 940, 2005 Miss. LEXIS 539 (Miss. 2005).

Where the trial court required each side to explain the reasons for peremptory strikes, disallowed some strikes by both parties, but for several of the strikes denied to the defense or permitted to the State, there was no adequate fact-finding, the case would have been remanded for further fact-finding had it not been reversed on other grounds. Robinson v. State, 858 So. 2d 887 (Miss. Ct. App. 2003).

Where all of defendant's peremptory challenges were made against Caucasian jurors, and out of the seven total Caucasians on the jury venire, he challenged four, the trial court erred by summarily overruling the State's Batson objection without going forward with the analysis of whether the Batson objection was warranted. State v. Rogers, 847 So. 2d 858 (Miss. 2003).

The defendant failed to make out a prima facie case of gender discrimination in the state's exercise of peremptory challenges where (1) half of the venire was composed of women, (2) the state exercised 10 or 12 peremptory challenges against women, but tendered three women, (3) nothing about the voir dire, nothing about the prosecutors' conduct, nothing about the habitual policies of these prosecutors or any stated policies of the district attorney's office, and nothing about the nature of the case supported an inference of discriminatory intent, and (4) a review of the record established that the state had valid reasons to reject several of the jurors. Ryals v. State, 794 So. 2d 161 (Miss. 2001).

Where the trial court failed to provide an on-the-record factual determination of the reasons given by the state for the exercise of its peremptory challenges, and also failed to ensure that the reasons offered by the state for the exercise of its peremptory challenges were not a pretext for discrimination, the defendant suffered a violation of his right to equal protection and, therefore, he was entitled to reversal of his conviction and a new trial. Bogan v. State, 811 So. 2d 286 (Miss. Ct. App. 2001).

Defendant was not entitled to habeas relief based on alleged denial of Sixth and Fourteenth Amendment rights to a fair and impartial jury where juror, who served as foreman, had daughter who was employed by city police department in unknown capacity. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Prerequisite of presentation of claim of denial of constitutional rights due to denial of challenge for cause was showing that defendant exhausted all of his peremptory challenges and that incompetent juror was forced to sit on jury by trial court's erroneous ruling. McGowan v. State, 706 So. 2d 231 (Miss. 1997).

Clearly erroneous standard of review was appropriate in determining whether trial court erred in holding that defendant failed to make prima facie showing of gender discrimination in exercise of peremptory challenges against female jurors. Simon v. State, 679 So. 2d 617 (Miss. 1996).

Defendant failed to establish prima facie case of gender discrimination arising from prosecution's exercise of seven peremptory challenges against females where percentage of female venire members struck was nearly equivalent to percentage of females in venire upon which prosecution passed with three peremptory strikes unused; ultimate composition of jury, with eight females, produced percentage of women higher than percentage of females on original venire. Simon v. State, 679 So. 2d 617 (Miss. 1996).

Dismissal of doctor and 2 attorneys from jury did not deny defendant his rights to due process and to fair cross section of community; doctor was an emergency room physician who was working night shift, and attorneys were excused because they operated small businesses that could not afford to be closed. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Both circuit clerks and sheriffs qualify as "interested officials" for purpose of rule that participation of interested officials in juror selection violates due process, since both are officers of the court who have duties in the impaneling of juries. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

Although record in capital murder case indicated that veniremember who was excused for cause stated during voir dire that he could impose death penalty if circumstances warranted, and that another venire-member with similar name, who was not excused, indicated he could not impose death penalty under any circumstances, trial court did not err, where defense counsel's failure to differentiate between the 2 veniremembers during questioning and parties' subsequent arguments led to conclusion that court reporter mistakenly transposed veniremembers' names. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Even if veniremember who gave conflicting statements as to whether he could impose death penalty was erroneously stricken for cause in capital murder case, defendant's right to impartial jury was not violated, where, because veniremember was panel member number 35, defense would have had to use all 12 peremptory challenges and prosecution would have had to use at least 11 of its peremptory challenges to enable veniremember to serve on jury, and defendant did not claim that any of the 12 jurors who did serve were not impartial. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Even if trial court erred in capital murder case by failing to strike for cause prospective juror who allegedly stated he would always vote for death penalty, defendant's right to impartial jury was not violated, where prospective juror did not serve on defendant's jury panel, and defendant was not forced to use peremptory strike to keep him off panel. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Defendant's failure to make contemporaneous objection left unpreserved her claim that trial court violated her rights to due process by moving venireman to end of list of potential jurors. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A juror in a criminal prosecution should have been struck for cause where his sister was employed as an assistant district attorney. Hartfield v. Hartford Life & Accident Ins. Co., 656 So. 2d 104 (Miss. 1995).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

The State was not required to give "gender-neutral" reasons for peremptorily challenging female jurors; the Equal Protection Clause does not extend to gender, and Batson should not be extended to challenges of gender-based discrimination. Simon v. State, 633 So. 2d 407 (Miss. 1993), vacated, 513 U.S. 956, 115 S. Ct. 413, 130 L. Ed. 2d 329 (1994), on remand, 679 So. 2d 617 (Miss. 1996).

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A prerequisite to presentation of a claim of a denial of constitutional rights due to denial of a challenge for cause is a showing that the defendant had exhausted all of his or her peremptory challenges and that the incompetent juror was forced to sit on the jury due to the trial court's erroneous ruling. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A capital murder defendant was not denied a fair trial because he was forced to use his last peremptory challenge to remove a juror who was allegedly potentially biased since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury so long as the jury that sits is impartial, and the defendant did not show that an incompetent juror was forced to sit on the jury. Mettetal v. State, 615 So. 2d 600 (Miss. 1993).

Personal opposition to capital punishment is not a constitutional impediment to juror service so long as the juror is able to set aside his or her personal belief and fairly consider all sentencing options under the law; it was therefore error for a trial court to refuse defense counsel an opportunity to further voir dire potential jurors who had expressed reluctance to vote for the death penalty. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

State court's erroneous refusal to remove juror favoring death penalty, which refusal forces defense to use peremptory challenge, does not violate defendant's right to impartial jury or to due process. Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 11, 101 L. Ed. 2d 962 (1988).

Removal before guilt phase of capital trial of prospective jurors whose opposition to death penalty would impair or prevent performance of their duties at sentencing phase is not unconstitutional. Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L.Ed.2d 137 (1986).

A trial court did not deny defendant's constitutional right to a fair and impartial jury, where it eliminated only those prospective jurors who indicated that their conscientious scruples against the death penalty would prevent them from properly considering the issue of defendant's guilt in accordance with their oath. Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983), rev'd on other grounds, 741 F.2d 805 (5th Cir. 1984), reh'g denied, 747 F.2d 1465 (5th Cir. 1984).

Prosecutors are not limited in use of any legitimate informational source available as to jurors, nor does prosecutor have to question juror in open court about such information before using it as racially neutral ground to make peremptory strike, as long as source of information and practice itself are not racially discriminatory. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Failure of defense counsel to timely object to state's peremptory challenges bars later attempts to advance that claim on appeal; objection is timely only where made prior to impaneling of jury. Thomas v. State, 517 So. 2d 1285 (Miss. 1987).

Defendant's Sixth and Fourteenth Amendment rights were not violated in a capital murder case, where the trial court excused a juror for cause who had unequivocally stated that he was opposed to the death penalty to the extent that it would prevent him from making an impartial decision on defendant's guilt, that he would not even consider the court's instructions, and that under no circumstances would he vote for the death penalty. Joyce v. State, 327 So. 2d 255 (Miss. 1976).

Statute did not violate due process rights of appellant by excluding from jury service persons in his age group, 18 to 20 years; amendment of US Constitution by Twenty-Sixth Amendment did not qualify persons under 21 years of age as jurors under state laws. Joyce v. State, 327 So. 2d 255 (Miss. 1976).

A defendant, found guilty of murder and for whom the jury recommended a sentence of life imprisonment was not deprived of due process and equal protection of the law because of the exclusion of a prospective juror who had scruples against the death penalty, and his exclusion did not result in a panel biased with respect to defendant's guilt. Joseph v. State, 218 So. 2d 734 (Miss. 1969).

The exclusion of women from jury service does not deny equal protection and due process to a woman indicted and tried for murder. Pendergraft v. State, 191 So. 2d 830 (Miss. 1966), cert. denied and appeal dismissed, 394 U.S. 715, 89 S. Ct. 1453, 22 L. Ed. 2d 671 (1969).

Where, on motion of the prosecution, the trial judge declared a mistrial because after the jury had been empaneled one juror expressed an opinion as to the sanity of the defendant, the mistrial furnished no basis for plea of former jeopardy. Smith v. State, 198 So. 2d 220 (Miss. 1967).

A woman indicted for murder is not denied the equal protection of the law on the ground that members of her sex are completely excluded from jury service. Cobb v. City of Greenville, 187 So. 2d 861 (Miss. 1966), cert. denied, 385 U.S. 1011, 87 S. Ct. 704, 17 L. Ed. 2d 548 (1967).

126. — Jury practice, criminal practice and procedure.

In a capital murder case, the unsworn statements of one juror showing that the juror was predisposed to voting for the death penalty without weighing mitigating factors was countered with an affidavit from the juror stating that the juror had considered all of the evidence in the case, and the unsworn statement of the second juror did not state that the juror was silent during voir dire, that she had lied about her views on mitigating evidence, that the juror was unwilling to consider mitigating factors, or that she had a predisposition toward the death penalty that she did not disclose during voir dire; thus, the inmate's claim that the two jurors were predisposed toward voting for the death penalty was unsupported and the inmate was not deprived of his right to a fair and impartial jury under the Sixth and Fourteenth Amendments or Miss. Const. art. 3, §§ 14 and 26. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Trial judge who questions jurors in privacy of chambers in order to encourage them to speak openly regarding contact by someone attempting to influence them in favor of criminal defendant, and to prevent jurors who have not been contacted from being tainted by knowledge of contact violates right of defendant or defendant's counsel to be present at examination. Strickland v. State, 477 So. 2d 1347 (Miss. 1985).

Where evidence, based on statement of juror, disclosed that jury after twenty-three hours of deliberations stood 11 to 1 for verdict of guilty of murder when bailiff stated to jury that judge told him he had until next convening of court to wait until they reached verdict and that as far as he was concerned they could stay there until they rotted, and that shortly thereafter the jury returned a verdict of guilty, such conduct constituted a coercive influence on the jury prejudicial to defendant, it being immaterial whether the judge actually made such statement. McCoy v. State, 207 Miss. 272, 42 So. 2d 195 (1949).

127. — Conduct of trial, criminal practice and procedure.

Defendant's due process rights were violated where the State destroyed a video of a traffic stop and the moments before it while under a court order to preserve it, which impaired the defense since the video would have clarified material disputed facts as to whether defendant admitted to drinking alcohol, whether he slurred his words, whether his coordination was impaired, how he was driving immediately prior to the stop, the interaction between the two men and the portable breath test results. Freeman v. State, 121 So. 3d 888 (Miss. 2013).

In a manslaughter case, defendant's right to a fundamentally fair trial was denied because the trial court refused to allow the admission of the testimony of two police officers under Miss. R. Evid. 404(a)(2) where there was sufficient testimony to create a jury issue as to whether the victim was the aggressor in the incident that led to his death; the officers' testimony was relevant to show prior incidents so that the jury could have placed itself in defendant's shoes at the time of the incident. Miller v. State, 956 So. 2d 221 (Miss. 2007).

Defendant voluntarily waived his right to testify after being informed that his prior embezzlement conviction could be used against him for impeachment purposes; while defendant's enthusiasm for testifying might have suffered a chilling effect upon his being advised by the trial judge that his embezzlement conviction could be used against him for impeachment purposes, that was the reality of the adversarial system. Additionally, as the impeaching crime of embezzlement was a Miss. R. Evid. 609(a)(2) crime involving dishonesty or false statements, no balancing analysis was required for the admission of that prior conviction; thus, the trial court did not err in finding that the prior conviction would be admissible if defendant decided to testify. Jackson v. State, 910 So. 2d 658 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

Even if the record clearly showed that a petitioner was in shackles in front of the jury in the sentencing phase of a capital murder trial, there was no merit in the petitioner's arguments that his Sixth and Fourteenth Amendment rights were violated; the petitioner had already been convicted twice and had already received a death sentence for the murder of one victim, and he had a history of escaping from authority as a juvenile. Wilcher v. State, 863 So. 2d 719 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Petition for post-conviction relief was properly denied because inmate's due process rights were not violated when a special prosecutor was appointed in a murder case; the record showed that the prosecution of the inmate remained in the control of a district attorney, and the special prosecutor did not control crucial prosecutorial decisions. Hollingsworth v. State, 852 So. 2d 612 (Miss. Ct. App. 2003), writ of certiorari denied by 852 So. 2d 577, 2003

Miss. App. LEXIS 867 (Miss. Ct. App. 2003).

Eyewitness testimony of multiple witnesses was sufficient evidence that homicide committed by defendant, an armed late arriver to a nightclub fight, was not self-defense, and defendant was not prejudiced by the failure of the original indictment to state a specific overt act by which the homicide was committed, particularly where the indictment was amended to read "by shooting with a pistol." Jones v. State, 856 So. 2d 285 (Miss. 2003).

In a capital murder case where defendant was indicted separately for each of four murders, the State's pattern of continuously referring to the killing of the other three victims throughout the entire guilt phase denied defendant his fundamental right to a fair trial. Flowers v. State, 842 So. 2d 531 (Miss. 2003), remanded by 2006 Miss. LEXIS 356 (Miss. June 29, 2006).

Cumulative effect of the State's repeated instances of arguing facts not in evidence was to deny defendant the right to a fair trial. Flowers v. State, 842 So. 2d 531 (Miss. 2003), remanded by 2006 Miss. LEXIS 356 (Miss. June 29, 2006).

In a prosecution for a single murder, the defendant was denied a fair trial where the prosecution engaged in a pattern of repeatedly and unnecessarily citing to the killing of three victims throughout the guilt phase proceedings. Flowers v. State, 2000 Miss. LEXIS 116 (Miss. May 11, 2000), opinion withdrawn by, substituted opinion at, remanded by 773 So. 2d 309, 2000 Miss. LEXIS 266 (Miss. 2000).

In a prosecution for capital murder and armed robbery arising from the robbery of two adjacent businesses, the testimony of one business owner, who was also shot, regarding the events was properly admitted into evidence as the assault and robbery of that business owner was so intertwined with the murder of the other business owner that it could be perceived as a single occurrence. Ellis v. State, — So. 2d —, 2000 Miss. App. LEXIS 385 (Miss. Ct. App. Aug. 15, 2000), reversed by, remanded by 790 So. 2d 813, 2001 Miss. LEXIS 114 (Miss. 2001).

In a prosecution for murder, there was no error in the introduction into evidence of photographs of the murder victim where (1) there was nothing in the record to indicate that the admission of the photographs was simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury, (2) the photographs established that the victim was dead as a result of a criminal act, and the extent, position, and nature of the wounds the victim sustained, and (3) the photographs assisted the jury in visualizing the crime scene and corroborated the testimony of the investigators of the crime scene. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

In a prosecution for murder, an exclamation from the audience by the victim's mother that the defendant "cold blooded killed my child" did not prejudice the defendant's right to a fair trial where the victim's mother was immediately escorted from the courtroom after her outburst, and the judge then properly admonished the jury to disregard the incident and questioned the jurors to determine whether they could disregard the comments. Bell v. State, 631 So. 2d 817 (Miss. 1994).

A defendant's right to a fair trial by an impartial jury was not prejudiced by the fact that the defendant was brought shackled into the hallway outside the courtroom while some of the jurors were in the hallway, where the defendant was not brought into the courtroom until the shackles were removed, the incident was a technical violation which was not intentional but was coincidental to the jury being out in the hallway, and no evidence was presented to show that the defendant was seen shackled by some of the jury members. Wiley v. State, 582 So. 2d 1008 (Miss. 1991).

Defendant was not denied due process rights when he was brought into courtroom before jury in shackles, although defense counsel had been granted motion in limine prohibiting jury from viewing defendant in shackles, where, at worst, defendant was 10 feet inside courtroom for few minutes, there was no evidence this incident occurred intentionally, handcuffs were removed immediately after being noticed, and it did not appear incident deprived defendant of his right to fair

trial. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Defendant was denied right to fair trial where counsel denounced him as liar in open court before trier of fact, this being an evil of such magnitude that no showing of prejudice was necessary for reversal of conviction. Ferguson v. State, 507 So. 2d 94 (Miss. 1987).

Refusal of trial court to grant recess requested by defendant, in case in which jury retires to deliberate at 9:03 p.m. and returns with guilty verdict at 11:03 p.m., is permissible where there are no expressions or indications of discomfort or distress on part of counsel, jury or others involved in proceeding. Fairley v. State, 483 So. 2d 345 (Miss. 1986).

One on trial for life or liberty may be handcuffed or otherwise shackled in presence of jury only by reason of clear and present danger to order or security. Hickson v. State, 472 So. 2d 379 (Miss. 1985).

It was basically unfair for the trial court in a prosecution for murder to force defendant to offer his testimony and that of his witnesses to the jury after a fatiguing day in court and at a time when both counsel and jury were exhausted; moreover, due process of law necessitated a forum for defendant to present his case within reasonable hours and under reasonable circumstances. Parker v. State, 454 So. 2d 910 (Miss. 1984).

The due process clauses of the federal and state constitutions required that a trial be conducted according to the established criminal procedures, with an adequate opportunity to be heard in defense. Butler v. State, 217 Miss. 40, 63 So. 2d 779 (1953).

Refusal to grant continuance on third trial of prosecution for rape, which trial took place some two weeks after employment of new counsel for defendant, did not constitute a denial of defendant's right to effective representation by counsel contrary to the Fourteenth Amendment of the United States Constitution, where more than two years had elapsed since the commission of the offense, such counsel had advantage of voluminous and comprehensive briefs, records and opinions of the court in two previous trials and the assistance of two investigators to help them in preparing for the trial. McGee v. State, 40 So. 2d 160 (Miss. 1949), cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487 (1949), reh'g denied, 339 U.S. 958, 70 S. Ct. 977, 94 L. Ed. 1369 (1950).

"Due process" in criminal prosecutions requires merely that procedure be in accord with that applicable to all civil and criminal trials, recognized in all common-law jurisdictions, and does not result in arbitrarily depriving defendants of any constitutional or common-law right. Brown v. State, 173 Miss. 542, 161 So. 465 (1935), cert. granted 296 U.S. 559, 56 S. Ct. 128, 80 L. Ed. 682, conformed to 167 So. 82.

128. — Judicial conduct, criminal practice and procedure.

A trial judge's remarks pertaining to religion were not sufficient to constitute a violation of the First Amendment's Establishment Clause where the judge told a venire person during voir dire that the instructions on the law which would be given to the jury would not "conflict in any way with [H]is law at all," and he requested a moment of silence in honor of the troops serving in the Persian Gulf prior to the beginning of proceedings one morning. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

129. — Confrontation of witnesses, criminal practice and procedure.

Defendant's conviction for depraved heart murder was proper where the trial court did not err when it overruled defendant's objection to the testimony of a witness regarding statistical data regarding DNA evidence because defendant objected on the ground that the witness was not a statistician and thus not qualified to testify about statistical results but the witness did not make the statistical calculations about which he was testifying; further, there was no error and defendant was not denied his rights to confront and cross-examine witnesses against him. Edwards v. State, 856 So. 2d 587 (Miss. Ct. App. 2003), writ of certiorari dismissed by 860 So. 2d 1223, 2003 Miss. LEXIS 812 (Miss. 2003), writ of certiorari denied by 187 L. Ed. 2d 69, 2013 U.S. LEXIS 6108, 82 U.S.L.W. 3180 (U.S. 2013).

In a prosecution for sale of a controlled substance, the defendant was not deprived of his constitutional right to confront witnesses on the ground that the State failed to provide information as to the whereabouts of an informant where the defendant did not allege any bad faith by the State, and the State provided evidence as to its good faith attempt to locate the informant. Campbell v. Campbell, 618 So. 2d 116 (Miss. 1993).

In a prosecution for felonious child abuse arising from the defendant's beating of his 9-year-old son, the defendant's constitutional right to confront his accuser was not violated, in spite of the defendant's argument that his accuser was his wife and that he was not allowed to "confront" her, where the defendant's wife was not a witness at the trial, the defendant was allowed to fully cross-examine all State witnesses against him, and the record did not indicate that the defendant's wife ever accused him of felonious child abuse. Ahmad v. State, 603 So. 2d 843 (Miss. 1992).

Although a defendant was entitled to a preliminary hearing, he was not prejudiced by the lack of one where he was afforded ample opportunity through his pretrial hearings to confront the State's witnesses. Rogers v. State, 599 So. 2d 930 (Miss. 1992).

A judge's refusal to permit a criminal defendant's children to testify did not violate federal and state constitutional provisions entitling a defendant to access to witnesses where the judge provided the defendant with an opportunity show a "colorable need" for calling the children to testify and the defendant failed to show such a need. Edwards v. State, 594 So. 2d 587 (Miss. 1992).

A defendant's constitutional right to confront witnesses was violated by the prosecution's attempted cross-examination of a witness who had been called as an adverse witness by the defendant, where the witness pleaded her privilege against self-incrimination on direct examination, and then, on cross-examination, the prosecuting attorney purportedly read from the witness' pretrial statement, which implied the defendant's guilt, before each of the witness' claim of privilege against self-incrimination. However, the error was harmless beyond a reasonable doubt where the evidence against the defendant was overwhelming. Hansen v. State, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

A trial judge did not abuse his discretion in declining to grant a continuance due to the defendant's absence from trial where the defendant had executed a recognizance bond, which required his presence before the court, so that he was no longer at liberty but was in the custody of the law; since the defendant's absence from the court was voluntary, he waived his right to be present at trial. Samuels v. State, 567 So. 2d 843 (Miss. 1990).

A defendant's constitutional right to compulsory process for obtaining witnesses in his favor was violated where the trial court quashed the defendant's subpoenas to a district attorney and 2 deputy sheriffs who allegedly had first-hand knowledge of incidents that had happened at the county jail which would have been relevant to the defense of duress, since without their testimony the defendant had no defense to the charge of conspiracy to commit a jail escape. Hentz v. State, 542 So. 2d 914 (Miss. 1989).

The defendant was denied the right to a full and complete cross-examination when the witness, whether rightfully or not, successfully invoked the privilege against self-incrimination, and the defendant's motion for the court to instruct the jury to disregard the witness' testimony should have been sustained, and failure of the court to do so was error. Frackman v. Deposit Guar. Nat'l Bank, 296 So. 2d 695 (Miss. 1974).

In a forgery prosecution, dismissal of the state's witness after he had given the only evidence introduced in the case which identified the defendant as the person who cashed the check, and had indicated that the defendant had cashed bad checks on other occasions, without giving the defendant an opportunity to cross-examine the witness, was prejudicial error, since it denied the defendant his right to be confronted by witnesses against him, and deprived him of due process of law. Crapps v. State, 221 So. 2d 722 (Miss. 1969).

130. — Hearsay evidence, criminal practice and procedure.

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

Testimony admitted under former testimony exception to hearsay rule does not violate Confrontation Clauses of Federal and State Constitutions. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

131. — Juvenile witnesses, criminal practice and procedure.

For statement made by child of tender years describing act of sexual contact performed with or on child by another to be admissible, reliability of statement must be judged independently of any corroborating evidence. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

132. — Expert witnesses, criminal practice and procedure.

Post-conviction relief was denied in a capital murder case because the issue of whether defendant was denied a fair trial based on alleged falsehoods and misrepresentations by an expert was procedurally barred since it was capable of being raised on direct appeal. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Experts who rendered diagnosis of "no mental disorder" for low intelligence quotient for capital murder defendant, after being appointed to perform mental examination of him to determine his competency to stand trial, afforded defendant constitutionally adequate evaluation and furnished constitutionally adequate report. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Brady violation did not result from failure of defense counsel to learn that capital murder defendant had intelligence quotient (IQ) of 59 from experts at state hospital who were requested by defense to perform psychological examination of defendant, where defense counsel requested and received mental examination to determine defendant's competency to stand trial, not to determine his IQ, and defense counsel, trial judge and jury were well aware that defendant had only third-grade education and was unable to read and write. Cole v. State, 666 So. 2d 767 (Miss. 1995).

In a prosecution for capital murder committed during the commission of a rape, the trial court's failure to provide funds to the defendant to retain an independent pathologist constituted reversible error where the opinion of the State's pathologist that the victim was raped was the only evidence offered to prove this critical aspect of the State's case. In re Turner, 635 So. 2d 894 (Miss. 1994).

A murder defendant was not denied a fair trial because his motion for a court-appointed expert criminalist was denied, in spite of the defendant's argument that he was thereby prevented from properly presenting his theory of defense of accidental discharge of the pistol used to kill the victim, where the State did not present any expert and the defendant elicited testimony from witnesses to support his defense of accidental discharge. Green v. State, 631 So. 2d 167 (Miss. 1994).

A murder defendant was not denied a fair trial by the denial of his motion for a court-appointed psychologist, in spite of the defendant's argument that he was thereby prevented from properly presenting his theory of defense related to his state of mind when he was assaulted by the victim, where the State offered no expert testimony regarding the defendant's state of mind, the defendant did not testify as to his state of mind, and the record did not "even hint at a defense of this nature." Green v. State, 631 So. 2d 167 (Miss. 1994).

While the due process clause requires that an indigent defendant should at times be allowed an expert in the interest of fundamental fairness, a court is not required to appoint an expert upon demand. Some of the factors to be considered in determining if the defendant was denied a fair trial when the court did not appoint a requested expert include the degree of access the defendant had to the State's experts and whether those experts were available for vigorous cross-examination. Another consideration is the lack of prejudice or incompetence on the part of the State's experts. Fisher v. City of Eupora, 587 So. 2d 878 (Miss. 1991).

In absence of anything in the record that suggests that a defendant charged with uttering a forgery was prejudiced to the point of warranting a new trial by the failure to furnish him with a handwriting expert, the trial court did not err in refusing defendant's request for the expert. Burt v. State, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

Capital murder defendant is not denied due process by trial court's refusal to provide defendant funds with which to obtain own experts, nor does defendant suffer any disadvantage thereby where defendant's counsel has full access to experts of state, together with investigation and reports of those experts, counsel is able to subject them to rigid cross-examination, and there is nothing to indicate that state experts are biased or incompetent. Johnson v. State, 476 So. 2d 1195 (Miss. 1985).

133. — Arguments to jury, criminal practice and procedure.

Considerable prejudice resulted from the prosecutor's inappropriate statements to the jury and the supreme court was unable to say, beyond a reasonable doubt, that such prejudice was overcome by the evidence; thus, defendant's sentence and conviction were reversed and remanded to the trial court for a new trial. Brown v. State, 986 So. 2d 270 (Miss. 2008).

There was no evidence that the prosecution's statements during its opening and closing statements, related to defendant's presence in jail, prevented defendant from receiving a fair trial or warranted reversal under the plain error doctrine; therefore, defendant's escape and assault on law enforcement officer convictions were upheld. Sims v. State, 919 So. 2d 264 (Miss. Ct. App. 2005).

In a capital murder case, the State's invocation of higher biblical law did not violate the inmate's rights under the Eighth and Fourteenth Amendments, or under Miss. Const. art. 3, § 14, because the prosecutor was responding to the biblical argument made by the inmate's attorney; also, the inmate's ineffective assistance of counsel claim for counsels' failure to object to the State's biblical references had to fail. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a prosecution for auto theft, the state's cross-examination of the defendant and closing argument regarding his post-arrest failure to state that it was the passenger in the vehicle he was driving that had stolen the vehicle were impermissible references to his post-arrest right to remain silent, and it was error for the trial court to permit the cross-examination and comments during closing argument; the court rejected the state's contention that reference to the defendant's post-arrest silence was permissible because the defendant had not yet been given his Miranda warnings. McGrone v. State, — So. 2d —, 2001 Miss. App. LEXIS 140 (Miss. Ct. App. Apr. 3, 2001), reversed by 807 So. 2d 1232, 2002 Miss. LEXIS 41 (Miss. 2002).

For district court to grant habeas relief based upon remarks by the prosecutor, district court must find more than that prosecutor's comments were undesirable or even universally condemned, and relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process, and in the context of a death penalty case, the comments must have been such as to render the sentencing fundamentally unfair. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Claim of improper jury argument by state does not present claim of constitutional dimensions unless it is so prejudicial as to render defendant's trial fundamentally unfair within meaning of Fourteenth Amendment due-process clause; to show prejudice to his substantive rights, defendant must demonstrate either persistent and pronounced misconduct or that evidence was so insubstantial that but for remarks no conviction would have occurred; arguments concerning aggravating circumstances, appropriateness of mercy, and whether or not jury was final authority, represented neither persistent and pronounced misconduct nor was evidence so insubstantial that conviction would not have occurred but for prosecutor's remarks. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

134. — Instructions to jury, criminal practice and procedure.

Because the jury was instructed on all the elements of capital murder, defendant was not deprived of the constitutional rights to a fair trial and to a jury determination of every element of the crime charged when defendant was convicted under the one continuous transaction doctrine of capital murder with the underlying felony of robbery. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Habeas relief may only be granted when challenged jury instruction so infects the entire trial that the resulting conviction violated due process. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Trial court did not mislead jury, in capital murder case involving underlying felony of sexual battery, by instructing that "the fact that the actual moment of the victim's death may have preceded alleged consummation of the underlying felony of Sexual Battery does not void the charge of Capital Murder," even though defendant claimed that jury was misled on intent necessary for capital murder as instruction could be correct statement of law only if jury also found that defendant had formed intent to commit sexual battery; when taken in conjunction with other instructions, jury was clearly informed that it must find defendant intended to kill victim while engaged in commission of sexual battery. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial court did not deny due process rights of capital murder defendant by giving instruction that jury had first to acquit defendant on greater charge of capital murder before going on to consider whether defendant had committed lesser crime of murder. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Mistrial was not required in capital murder case after victim's grandmother "became emotional" when asked to look at pictures identifying victim during guilt phase; defendant had not made contemporary objection, thus precluding court from giving curative instruction which jury would have presumably followed, and as incident occurred after defendant had been officially found guilty he could not be heard to complain about an emotional state which he had brought on through his own actions. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Submission to jury of "especially heinous, atrocious or cruel" aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A jury instruction in a capital murder prosecution did not violate the due process clause of the 14th Amendment by relieving the State of the burden of proving intent to commit the underlying felonies where the instruction stated that the defendant should be found guilty if he wilfully performed "any act which is an element of the crimes with which he is charged or immediately connected with them or leading to their commission." Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The trial court in a prosecution for attempted armed robbery and aggravated assault erred reversibly by refusing defendant's proffered instruction on his alibi defense, notwithstanding a court rule permitting attorneys to submit no more than six instructions on the substantive law of the case the court further erred in permitting the alleged victim to testify that he had told others that he had identified defendant, in that such statements improperly bolstered his permissible identification testimony with hearsay. Young v. State, 451 So. 2d 208 (Miss. 1984), cert. denied 469 U.S. 105 S. Ct. 192, 83 L. Ed. 2d 125.

Contention of defendant that trial court's failure to instruct jury on intent and that mitigating circumstances need not be proven beyond reasonable doubt violated his rights as secured by Eighth and Fourteenth Amendments was rejected; mitigating circumstances instruction would not have affected outcome, in light of absence of closing argument on mitigating circumstances; refusal of intent instruction, which traced language of Enmund v Florida(1982) 458 US 782, 73 L Ed 2d 1140, 102 S Ct 3368, on remand (Fla) 439 So 2d 1383, later app (Fla App D2) 459 So 2d 1160, 9 FLW 2506, quashed, ctfd ques ans (Fla) 476 So 2d 165, 10 FLW 441 and (diverged from Tison v Arizona (US) 95 L Ed 2d 127, 107 S Ct 1676) as stated in Smith v Dugger (CA11 Fla) 840 F2d 787, was not raised on direct appeal and was therefore procedurally barred. Even if it were not procedurally barred, there is no requirement that jury find existence of intent factors; in Cabana v Bullock (1986) 474 US 376, 88 L Ed 2d 704, 106 S Ct 689, on remand (CA5 Miss) 784 F2d 187 and (diverged from on other grounds Rose v Clark, 478 US 570, 92 L Ed 2d 460, 106 S Ct 3101 (disagreed with by multiple cases as stated in State v Seward (La) 509 So 2d 413) and on remand (CA6) 822 F2d 596 and (not followed Re Mercer, 108 Wash 2d 714, 741 P2d 559)) as stated in Pope v Illinois (US) 95 L Ed 2d 439, 107 S Ct 1918, 14 Media L R 1001, later proceeding (2d Dist) 162 Ill App 3d 299, 113 Ill Dec 547, 515 NE2d 356, app den (Ill) 117 Ill Dec 229, 520 NE2d 390 and (not followed State v Kam (Hawaii) 748 P2d 372) and (not followed People v Lee, 43 Cal 3d 666, 238 Cal Rptr 406, 738 P2d 752). The United States Supreme Court stated that intent findings could be made by jury, trial judge, or Appellate Court, and Mississippi Supreme Court had made equivalent of required findings in its opinion on direct appeal. Stringer v. Scroggy, 675 F. Supp. 356 (S.D. Miss. 1987), aff'd, 862 F.2d 1108 (5th Cir. 1988), reh'g denied, 866 F.2d 1417 (5th Cir. 1989), vacated, 494 U.S. 1074, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), on remand, 909 F.2d 111 (5th Cir. 1990), vacated on other grounds, 979 F.2d 38 (5th Cir. 1992).

In a prosecution for aggravated assault on an indictment charging defendant with being a habitual criminal, the trial court's failure to give a limiting instruction on its own motion informing the jury not to consider defendant's prior convictions as evidence of the assault charges did not deny him due process of law, where defendant had testified freely as to the offenses made part of the indictment and where no limiting instruction was requested by defendant's counsel; under the totality of the circumstances, such an instruction was not constitutionally required. Nettles v. State, 380 So. 2d 246 (Miss. 1980).

135. — Lesser included offenses, criminal practice and procedure.

Where no further evidence is needed to establish lesser offense, once prosecution has proved greater offense, punishment for lesser is barred.

The due process clause of the Fourteenth Amendment requires a trial judge to give a lesser included offense instruction to the jury if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater. There is no due process violation, however, unless there is some evidence to support an instruction on the lesser included offense. Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982), cert. denied, 464 U.S. 843, 104 S. Ct. 142, 78 L. Ed. 2d 134 (1983).

136. — Habitual offenders, criminal practice and procedure.

Admission of evidence in habitual offender capital murder case that defendant's habitual offender status makes him ineligible for parole is founded upon theory that Eighth and Fourteenth Amendments require that sentencer not be precluded from considering, as mitigating factors, aspects of defendant's character or record proffered as a basis for sentence less than death. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty; where a defendant is adjudged to be a habitual offender, the jury should be informed that a life sentence means "life, without probation or parole." Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A defendant was properly sentenced as a habitual offender pursuant to § 99-19-81, even though the habitual offender language of the indictment failed to state the dates of his prior convictions, where all of the information contained in the indictment, and specifically the cause number, afforded the defendant access to the date of judgment. Therefore, the information pertaining to the dates of the judgments was substantially set forth in the indictment and sufficient information was afforded the defendant to inform him of the specific prior convictions upon which the State relied for enhanced punishment to comply with due process. Benson v. State, 551 So. 2d 188 (Miss. 1989).

The application of § 99-19-81 to recidivist murderers, rapists and kidnappers does not violate the Fourteenth Amendment of the United States Constitution even though under the habitual offender statutes, § 99-19-83 and § 99-19-81, taken together, only those convicted of murder, rape or kidnapping can be sentenced to life without parole without proof of a prior conviction of a crime of violence. Sutherland v. State, 537 So. 2d 1360 (Miss. 1989).

Defendant charged with being habitual criminal is not deprived of fair trial because grand jury indicting defendant has been informed of prior convictions; indeed, grand jury of necessity has to be informed of prior convictions before indictment seeking enhanced punishment can be sought by state. Washington v. State, 478 So. 2d 1028 (Miss. 1985).

137. — Sentencing proceeding, criminal practice and procedure.

Victim-impact testimony of the murder victim's parent was admissible because the parent testified as to the parent's relationship with the victim and the impact the victim's death had had on the family, and the victim-impact testimony was not so inflammatory as to have prejudiced defendant or to have rendered defendant's trial fundamentally unfair. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (2010).

Defendant was entitled to habeas relief on issue of state court's application of especially heinous, atrocious, or cruel aggravating circumstance, and to vacated death sentence with new sentencing hearing, where state Supreme Court failed to make any factual findings concerning the death of murder victim and failed to set forth any facts on which to base such an opinion; given lack of any factual basis to support court's conclusion, no reasonable factfinder could conclude that the crime was conscienceless or pitiless and unnecessarily torturous where victim was shot immediately with little or no warning upon opening front door to defendant. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Sufficiency of evidence claim is pure question of law and "rational factfinder" standard is the appropriate standard of review in habeas proceeding in determining whether a state court's application of its constitutionally adequate aggravating factor in capital murder case was so erroneous as to raise an independent due process or Eighth Amendment violation. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

In separate capital murder trials for killings of two persons, evidence of the other murder was admissible in each trial under Mississippi law to show the motive to kill the other victim and as part of an inseparable transaction, where victims were married to one another, wife was present when husband was killed, and it would have been difficult if not impossible to explain the facts of either murder without mentioning the other murder. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

In determining whether a state court's application of its constitutionally adequate aggravating factor was so erroneous as to raise an independent due process or Eighth Amendment violation for habeas corpus purposes, even though it is issue of law, habeas corpus court must afford a presumption of correctness to any factual findings made by state court in its determination of whether the facts were sufficient to support the challenged aggravating circumstance; however, habeas court is not necessarily bound by such factual findings. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Petitioner was not entitled to habeas relief for sentencing jury's consideration as aggravating circumstance that petitioner was under sentence of imprisonment, where certified copy of judgment from another state court that petitioner was on probation at time of capital murder trials was presented and petitioner offered no rebutting evidence, other than statement in his confession that was redacted during guilty phase. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Instruction given in capital murder trials contained proper limiting definition of the especially heinous, atrocious or cruel aggravating factor; court defined especially heinous, atrocious or cruel as a conscienceless or pitiless crime which is unnecessarily torturous to the victim, and state Supreme Court determined that such language properly channeled jury's discretion during sentencing phase. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Permitting prosecutor in capital sentencing proceeding to exercise peremptory challenges on two potential jurors based on their views of death penalty was not error; views regarding death penalty did not qualify those jurors as members of a district class protected under *Batson* or its progeny. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307 (Miss. 1997), reh'g denied, 706 So. 2d 252 (Miss. 1998).

Testimony by murder victim's daughter centering around disappearance and kidnapping of her mother after she left church and describing some of her mother's personal characteristics was necessary to development of case, was relevant to aggravating circumstance of kidnapping, and was admissible in sentencing trial, despite minimum probative value of evidence about victim's marriage, where state made no attempt to establish impact of victim's death on her husband. Berry v. State, 703 So. 2d 269 (Miss. 1997).

Capital sentencing scheme in which prosecutor has discretion as to which murders he can try as capital offenses did not grant unfettered discretion to prosecutor and did not violate constitutional protections, where discretion was statutorily limited, manslaughter instruction had to be given if warranted by facts, and imposition of death penalty was channelled through weighing of aggravating and mitigating circumstances. Berry v. State, 703 So. 2d 269 (Miss. 1997).

At sentencing phase in capital murder case, jury is entitled to know by instruction whether defendant is eligible for parole, as that information is nonspeculative and provides jurors with relevant information to determine defendant's fate. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

The "specially heinous" aggravator does not violate Fourteenth Amendment. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Aggravating circumstances used to determine whether to impose the death penalty do not themselves carry any penalty, as their only purpose is to narrow class of individuals most worthy of receiving the death penalty and to furnish guidance to the jury, so that use of aggravating circumstance, such as sexual battery, which has also been the basis for conviction for an offense does not violate double jeopardy. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Trial court did not unconstitutionally limit closing argument at guilt phase of capital murder case by denying defendant full 5 minutes of additional time requested after original 60 minutes had expired; 60-minute period had been requested by defendant's counsel, and after 5 minute extension request was refused counsel was allowed to place remaining 4 minutes into record, and case was not so complex as to require more time. Walker v. State, 671 So. 2d 581 (Miss. 1995), reh'g denied, cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Testimony dealing with victim's murder, offered at resentencing in capital murder case to give second sentencing jury evidence of specific facts surrounding murder, not to prove murder was "especially atrocious, heinous or cruel," was relevant, and its admission did not violate due process by relating to aggravating factor not mentioned in motion in limine; defendant entered sentencing hearing knowing that prosecution was seeking death penalty and that State would attempt to prove 2 aggravators and proof associated with each, and was apprised that jury would be informed of facts surrounding murder, but did not object. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

A prosecutor's remarks during the penalty phase of a capital murder prosecution did not constitute an improper comment on the defendant's failure to testify where the prosecutor stated that the defendant "showed no compassion, but would send a lawyer up here and ask you for compassion," since the argument pointed out the lack of a mitigation defense presented by the defendant, and that he was reduced to sending his lawyer in to plead for his life after all else had failed. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

The prosecutor's closing argument in the guilt phase of a capital murder prosecution did not constitute an improper comment on the defendant's right to remain silent following arrest where the prosecutor, while discussing a county jail inmate's testimony as to statements made by the defendant while he was in the jail, referred to the relationship between the defendant and the witness, and described the circumstances under which the statements were made. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's closing argument in a capital murder case did not constitute a comment on the defendant's failure to testify at trial, in spite of the defendant's argument that the prosecutor's comments highlighted the fact that the only people alive who could have testified as to the events surrounding the murders were the defendant and his accomplice, where the prosecutor merely stated that the defendant and his accomplice saw to it that there were no eyewitnesses, and that "people who kill their victims and kill their eyewitnesses cannot be set free." Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The trial court in a capital murder prosecution did not err in permitting 3 off-the-record bench conferences and a jury instruction conference to be conducted when the defendant was not present where the defendant was represented by counsel at every critical stage of the proceedings, and he was not prejudiced by his absences at the conferences. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the State's closing argument did not constitute a comment on the defendant's failure to take the witness stand in his own defense where the State made the following argument: "Do you think she was suffering? Do you think that's cruel and atrocious, and what's even more than that, what do you think was running through [defendant's] head as he sat through watching her gag on her own blood? What do you think he was thinking?" Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily tortuous to the victim." Hansen v. State, 649 So. 2d 1256 (Miss. 1994), reh'g denied, cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

Submission to a capital sentencing jury of the mitigating factor that the defendant had no "significant" history of criminal activity was not improper, in spite of the defendant's argument that the factor was unconstitutionally applied in his particular case because it implied that he had at least some criminal history when in fact he had none, where the mitigating factor was taken verbatim from the list provided by the legislature to be considered in imposing sentence, and the defendant had the opportunity during closing argument to dispel any notion the jury might have had that he had a history of criminal activity. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, Weatherspoon v. State, 732 So. 2d 158 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant's argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances must be unanimous because "everything else" required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word "unanimous" or "unanimously," and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, Weatherspoon v. State, 732 So. 2d 158 (Miss. 1999).

A trial court's limitation of closing argument to 15 minutes in the sentencing phase of a capital murder prosecution did not violate the defendant's constitutional right to a fair trial where the defendant made no proffer as to what he would have argued had he been given additional time, and he raised no objection to the time limit at the time of trial. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, Weatherspoon v. State, 732 So. 2d 158 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present ring on her finger,' and asking the jury not to forget the victim "because she deserves justice" did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim's family is not prohibited, as such evidence may be relevant to the jury's decision as to whether the death penalty should be imposed. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, Weatherspoon v. State, 732 So. 2d 158 (Miss. 1999).

The imposition of the death penalty against a mentally retarded defendant with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in §§ 99-19-101(6)(b), (f) and (g) and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. Jones v. State, 602 So. 2d 1170 (Miss. 1992).

A defendant was denied his constitutional right to a fair trial by an impartial jury in the sentencing phase of a capital murder prosecution where, upon conclusion of the guilt phase but before the sentencing phase began, the jury prematurely deliberated and sent a note to the judge indicating their decision that the defendant should be sentenced to death. Rather than questioning the jurors in order to determine whether each of them could remain impartial during the sentencing phase, the judge merely instructed the jurors to "refrain from further deliberations," which was insufficient to insure that the defendant's right to a fair hearing was not prejudiced. Holland v. State, 587 So. 2d 848 (Miss. 1991).

In the sentencing phase of a capital robbery/murder prosecution, convictions for armed robberies committed by the defendant after the robbery/murder were admissible as aggravating circumstances. Turner v. State, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character, record, or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. West v. State, 519 So. 2d 418 (Miss. 1988).

Submission of aggravating circumstances of heinous, atrocious, and cruel crime did not deny defendant his rights under Constitution of Mississippi and United States; although defendant contended there was no evidence supporting this aggravating circumstance and that evidence was uncontroverted that victim was shot dead as soon as he opened door to his house, state argued that there was no evidence that victim was dead or even unconscious when later shots were fired. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert.

denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Submission to jury of aggravating circumstances alleging commission of murder in course of burglary, robbery, and/or kidnapping did not deny defendant his constitutional rights. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Instructions at penalty phase of trial did not deprive defendant of his constitutional rights by failing adequately to inform jury of their option to recommend life sentence, where court clearly instructed jury that it should weigh mitigating circumstances against aggravating circumstances and if former outweighed latter, then it should return sentence of life imprisonment. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

In a prosecution for capital murder committed during a burglary, the jury's verdict imposing the death penalty complied with this section, despite defendant's contention that the jury did not state the specific facts upon which it based its sentence, where neither this section nor case law required such detailed findings. However, pursuant to § 99-19-105, the death sentence would be reversed and the case remanded for sentencing to life imprisonment, where the victim, upon seeing defendant, began firing his pistol and was then shot by defendant, and where defendant had the opportunity to shoot the victim's wife but did not; the penalty of death in this case was disproportionate to the penalty imposed in similar cases. Coleman v. State, 378 So. 2d 640 (Miss. 1979).

Section 97-3-65, governing sentencing procedures in rape cases, does not violate due process or equal protection of the law, even though no provision is made for the jury to consider mitigating circumstances in fixing a defendant's sentence; the rule requiring a bifurcated trial is applicable only to cases involving capital offenses. White v. State, 375 So. 2d 220 (Miss. 1979).

A capital murder defendant's sentence of death would not be set aside for failure to grant a proper limiting instruction regarding the "especially heinous, atrocious and cruel" aggravating factor as required by the Eighth and Fourteenth Amendments to the United States Constitution where the jury was given an instruction defining the "especially heinous" aggravating factor which tracked the language in Coleman v. State (1979, Miss) 378 So. 2d 640 (criticized by Cantrell v. State (Miss) 507 So. 2d 325) as stated in Jenkins v. Forrest County General Hospital (Miss) 538 So 2d 1162, corrected, reh'g denied (Miss) 1988 Miss LEXIS 573, withdrawn by publisher, reported at (Miss) 542 So. 2d 1180, reh'g denied (Miss) 1989 Miss LEXIS 283 and therefore the jury was properly instructed on the "especially heinous" aggravating factor. Lockett v. State, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994).

138. — Sentence and punishment, criminal practice and procedure.

Defendant's motion for post-conviction relief was properly denied because his sentence was not unconstitutionally vague and subject to more than one interpretation; he was sentenced to 18 years in prison with 12 years to serve, and 18 minus 12 left six years suspended, which is what the language in the sentencing order reflected. Jones v. State, 956 So. 2d 310 (Miss. Ct. App. 2006).

There was no equal protection violation when appellant received a 15-year sentence for statutory rape; appellant conceded that the statute applied equally to male and female defendants. McKenzie v. State, 946 So. 2d 392 (Miss. Ct. App. 2006).

Defendant's sentence of two days in jail for driving under the influence and failing to dim his headlights was upheld where there was no absolute constitutional bar to sentence enhancement at a second trial; an on-the-record explanation of an enhanced sentence was not warranted after a trial de novo in a superior court following an appeal from an inferior court. Carr v. State, 942 So. 2d 816 (Miss. Ct. App. 2006).

Because the record was clear that defendant was six days past his 18th birthday at the time of the capital murder, he was over the age of 18, and was therefore eligible for the death penalty. Scott v. State, 938 So. 2d 1233 (Miss. 2006).

Harsher sentence imposed on defendant was proper where, in his second sentencing hearing, the judge heard new evidence concerning the events of the crimes and that evidence led him to believe that the crime was more heinous than the judge originally believed. There was no indication of vindictiveness and neither the double jeopardy provision nor the Equal Protection Clause imposed an absolute bar to the more severe sentence upon reconviction. Fowler v. State, 919 So. 2d 1129 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 56 (Miss. 2006).

Defendant's due process rights were not violated by his removal from the intensive supervision program; when defendant was taken off house arrest and placed in the Mississippi Department of Corrections' custody, he merely experienced a change in his housing assignment and classification, which did not require a hearing since it did not involve a liberty interest. Brown v. Miss. Dep't of Corr., 906 So. 2d 833 (Miss. Ct. App. 2004).

The defendant was not deprived of due process in connection with his forfeiture of good time credits as it was apparent that § 47-5-138 provides much greater procedural protections than those which are typically found in extra-judicial prison revocation proceedings in that it only provides for a revocation of good time credits in the event that a "final order" is issued dismissing the prisoner's lawsuit. Tubwell v. Anderson, 776 So. 2d 654 (Miss. 2000).

Section 47-5-138 is not unconstitutional in that it violates the equal protection clause of the Fourteenth Amendment since neither prison inmates nor indigents constitute a suspect class entitled to heightened scrutiny under the equal protection clause. Tubwell v. Anderson, 776 So. 2d 654 (Miss. 2000).

The banishment of the defendant from a 100 mile radius of the place that he committed a burglary was not justified where the trial court did not make an on the record finding of the benefits of banishment. Weaver v. State, 764 So. 2d 479 (Miss. Ct. App. 2000).

The defendant's 25 year sentence fell within the guidelines of § 97-3-79, was not excessive, and did not violate his Sixth and Fourteenth amendment rights, notwithstanding the defendant's assertion that he was merely an accessory after the fact, where the trial judge found no reason to suspend any of the sentence the defendant had a previous conviction of burglary of an occupied dwelling. Lawson v. State, 748 So. 2d 96 (Miss. 1999).

The defendant's due process rights were not breached when the trial court added court costs and assessments to the written order and administered additional conditions of the suspension of sentence. Goss v. State, 721 So. 2d 144 (Miss. 1998).

Contention that it was error for harsher sentence to be imposed after defendant invoked his constitutional right to fair trial would be considered on appeal, though it was not preserved at trial, as right to due process was implicated. Pierce v. Delchamps, Inc., 667 So. 2d 26 (Miss. 1996).

There was no violation of due process in imposing 25-year sentence for armed robbery following trial, after prior conviction and 15-year sentence pursuant to plea bargain had been set aside; there was no evidence of vindictiveness, particularly since there were two different sentencers and the second sentencer had benefit of hearing evidence at trial, and was the same judge who had granted motion to vacate first sentence on ground that defendant was not properly advised of his rights. Pierce v. Delchamps, Inc., 667 So. 2d 26 (Miss. 1996).

Trial court is prohibited from imposing heavier sentence upon defendant because he has exercised his constitutional right to trial by jury than sentence offered defendant in plea bargaining process. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Imposition by trial court of heavier sentence than that which was offered in plea bargaining process is not abuse of discretion and violates no right of defendant where lenient sentence is proposed in pretrial plea bargain negotiations, where after rejecting same defendant is found guilty by jury, where before imposition of sentence trial judge is presented with evidence of aggravating circumstances relevant to sentencing not known to him at time of original plea bargain negotiations, where in fact trial judge imposes heavier sentence than was proposed at time of plea bargain and in fact bases imposition of heavier sentence upon information of aggravating circumstances of which he has been newly made aware, and where heavier sentence has not been imposed upon accused in whole or in part as penalty for his exercise of his constitutional right to trial by jury. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Sentence of life imprisonment for crime of capital rape was appropriate for defendant convicted of raping 6-year-old child, despite act that defendant had been offered 5-year sentence during plea negotiations prior to trial; court was not involved in plea negotiations, did not impose heavier sentence merely because defendant exercised his constitutional right to jury trial, and merely followed statutory sentencing dictates. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A court must base its revocation of a suspended sentence on a violation of the clear terms and conditions of the suspended sentence; due process requires that the trial judge at least orally inform the defendant of the terms and conditions upon which his or her suspended sentence is contingent before it may be properly revoked for the violation of those terms and conditions. Artis v. State, 643 So. 2d 533 (Miss. 1994).

A sentence of death was not improperly based on "vengeance and sympathy," in spite of the defendant's argument that the jury's sentencing determination was improperly predicated on the personal characteristics of the victim, where in response to the defendant's parents' request to the jury not to sentence their son to death the prosecutor merely noted that the defendant's parents were not the only ones who had suffered and grieved and that their "tears might be outweighed by the fact of the victim's murder," and he reminded the jury that the victim's parents had also suffered a loss and that they must not forget the "cold, calculated killing" of the victim. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Where police chief, who had apprehended students after responding to report of fight on or near school property, noticed single profanity written in dust on his car when he arrived at police station with four of students, and made several of them wash it and several other vehicles, students were entitled to partial summary judgment that their Fourteenth Amendment Rights were violated by being forced to wash car; and although no physical harm occurred, violation was not de minimis, considering plaintiff's age and fact that exercise took place in view of passersby and of news media; "punishment" of pretrial detainees is prohibited and although regulatory restraints incident to detention are permissible, they must be reasonably related to legitimate goal, and in instant case were not. C-1 ex rel. P-1 v. City of Horn Lake, 775 F. Supp. 940 (N.D. Miss. 1990).

A defendant's equal protection challenge to his sentence of 14 years in the state penitentiary with 7 years suspended if he paid a $125,000 fine was premature because there was nothing in the record showing the defendant to be indigent. Arnett v. State, 532 So. 2d 1003 (Miss. 1988).

Judge may impose more severe sentence upon defendant following new trial and conviction for same charge for which defendant has successfully appealed original conviction but only if judge affirmatively states in record reasons for harsher sentence and only if reasons are based upon objective information concerning identifiable conduct on part of defendant occurring after time of original sentencing proceeding, or based upon objective information concerning events occurring after time of original sentencing proceeding that may throw new light upon defendant's life, health, habits, conduct, or mental and moral propensities. Ross v. State, 480 So. 2d 1157 (Miss. 1985).

Sentencing convicted defendant to life imprisonment under § 99-19-83 is violation of due process where indictment under which defendant is convicted clearly notices defendant that state is seeking only 7 year term; this plain error is of constitutional dimensions and may be raised in post-conviction proceeding notwithstanding defendant's failure to raise issue at trial or on direct appeal, and is ground for resentencing under § 99-19-81. Smith v. State, 477 So. 2d 191 (Miss. 1985).

Defendant who has been sentenced to 5 years imprisonment on basis of guilty plea to charge of receiving and possessing stolen property and who is retried after successfully seeking writ of error coram nobis may be sentenced to 10 years imprisonment upon subsequent conviction for burglary and being habitual offender and resentencing is not result of judicial vindictiveness in violation of due process. Darby v. State, 476 So. 2d 1192 (Miss. 1985).

Denial of credit for time served in jail and of "good time" to person convicted of felony who appeals judgment of conviction and who remains in jail pending disposition of appeal due to inability to make bond, while allowing credit for time served in jail and award of "good time" to convicted felons serving sentence in county jail without appealing conviction is denial of equal protection, contrary to Fourteenth Amendment. Lacy v. State, 468 So. 2d 63 (Miss. 1985).

Where defendant was convicted of possession of a controlled substance with intent to distribute, and sentenced to seven years in prison with two years suspended upon payment of a $3000 fine, the appellate court would hold that the question of whether the imposition of an additional two year imprisonment upon nonpayment of the fine constituted an impermissible discrimination against indigents in violation of equal protection clause of the Fourteenth Amendment was premature, in that the record did not reflect that the defendant was, in fact, indigent, nor did it reflect that the sentencing court was aware of any alleged indigency. Payne v. State, 462 So. 2d 902 (Miss. 1984).

A term of probation requiring defendant to remain at least 125 miles away from a particular county did not violate his First, Fifth, or Fourteenth Amendment rights, where the record indicated that the trial judge carefully and meticulously explained to defendant his rights, the trial court found that defendant voluntarily and knowingly pled guilty, the Department of Corrections conducted an investigation of defendant prior to sentencing, and defendant accepted the terms of probation, which were neither unreasonable nor arbitrary. Cobb v. State, 437 So. 2d 1218 (Miss. 1983).

It is impermissible for a trial judge to enhance a sentence because the defendant refused a plea bargain and put the state and court to the trouble of trial by jury. Pearson v. State, 428 So. 2d 1361 (Miss. 1983).

A court may not first fine a defendant and then, because of his indigency, convert the fine into a jail sentence for failure of the defendant to make immediate payment. Reasonable alternatives to incarceration must first be resorted to in an attempt to afford the indigent an opportunity to satisfy his fine. Nelson v. Tullos, 323 So. 2d 539 (Miss. 1975).

There was no denial of equal protection of the law or of due process in the imprisonment of an indigent, who, after pleading guilty to a misdemeanor charge, was sentenced to a jail term and to pay a fine, and who after serving her jail term was unable to pay the fine because of her indigency, and remained in jail to work out her fine. Wade v. Carsley, 221 So. 2d 725 (Miss. 1969).

Due process in Mississippi requires the punishment of one charged with murder to be determined and fixed by the jury, rather than by the court. Yates v. State, 253 Miss. 424, 175 So. 2d 617 (1965), cert. denied 382 U.S. 931, 86 S. Ct. 321, 15 L. Ed. 2d 342.

Revocation of a suspended sentence without notice and an opportunity to be heard at public hearing to defendant violates the requirements of due process, even though the statute providing for such revocation does not specifically provide for notice and public hearing. Mason v. Cochran, 209 Miss. 163, 46 So. 2d 106 (1950).

Revocation of suspended sentence in hospital where circuit judge was confined as patient, upon ex parte application of sheriff and county attorney, which was concurred in by the district attorney, at a time when defendant was confined in jail on pending charges for violations of law, and without notice or hearing to defendant, constituted violation of the requirements of due process. Mason v. Cochran, 209 Miss. 163, 46 So. 2d 106 (1950).

139. Parole.

Court rejected the inmate's claim that the parole board's discretion to deny him parole denied him equal protection as provided under the Fifth and Fourteenth Amendments, because the inmate did not argue that he was a member of a suspect class or that a fundamental right had been violated, and the State naturally had an interest in protecting members of society from dangerous criminals and in punishing criminals for failing to abide by the law; therefore, a rational relationship existed between the parole board's discretion and the State's interests. Edmond v. Miller, 942 So. 2d 203 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 718 (Miss. 2006).

140. Parole hearing.

Parole board's failure to give the inmate a psychiatric examination prior to his parole hearing did not deny the inmate due process as provided in the Fourteenth Amendment; Miss. Code Ann. § 47-7-3 did not require a psychiatric evaluation prior to the inmate's parole hearing; rather the language of § 47-7-3 clearly stated that the inmate must otherwise be eligible for parole before he was entitled to a psychiatric evaluation. Also, because Miss. Code Ann. § 47-7-3 and Miss. Code Ann. § 47-7-17 use the permissive "may" and not the mandatory "shall," the Mississippi Supreme Court has held that the statutes do not confer a constitutionally recognized liberty interest in parole or a psychiatric examination. Edmond v. Miller, 942 So. 2d 203 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 718 (Miss. 2006).

141. —Cruel and unusual punishment, criminal practice and procedure.

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Post-conviction relief was denied on the issue of whether defendant's death sentence was unconstitutionally excessive in capital murder case based on the fact that it was felony murder because the issue was procedurally barred; even if it was not, the issue was meritless since this argument had been previously rejected, and the jury found all four factors under Miss. Code Ann. § 99-19-101. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S.

Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant's death sentence was proper pursuant to Miss. Code Ann. §§ 99-19-101(7), 99-19-105(3) and the Eighth and Fourteenth Amendments where it was not imposed under the influence of passion, prejudice, or any other factor. Additionally, many of defendant's complaints about various statements were procedurally barred for the failure to make a contemporaneous objection. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Supreme Court of Mississippi vacated the death sentence imposed on a defendant convicted of capital murder. The death sentence violated the Eighth and Fourteenth Amendments to the United States Constitution, because defendant was only 17 years old when he committed the crime. Dycus v. State, — So. 2d —, 2005 Miss. LEXIS 594 (Miss. Sept. 15, 2005).

At the time of his mental retardation evaluation, defendant (1) was appropriately groomed and properly maintained personal hygiene, (2) possessed a driver's license, (3) was responsible for buying clothing, groceries, and personal items, (4) had completed school through the ninth grade and attended GED classes, and (5) was employed; thus, defendant did not show that he was mentally retarded. Therefore, defendant's execution was not prohibited by the Eighth and the Fourteenth Amendment. Branch v. State, 882 So. 2d 36 (Miss. 2004), writ of certiorari denied by 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289, 73 U.S.L.W. 3530 (2005).

In a capital murder case, the inmate asserted that he had been subjected to cruel and inhuman treatment in violation of his Fifth, Eighth, and Fourteenth Amendment rights because he had been kept in maximum confinement on Mississippi's death row under conditions that included lock-down and isolation for at least 23 hours of the day and because he had been subjected to numerous execution dates during those 19-20 years; however, there was no law in the United States or Mississippi that supported the inmate's claim and, thus, there were no grounds for post-conviction relief on that issue. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

The defendant failed to establish that the imposition of the death penalty violated his rights to due process and/or equal protection as he failed to offer any substantial proof that the death penalty was applied in a discriminatory manner in Mississippi or that he suffered discriminatory application of the law where his argument was based solely on insufficient statistical evidence and the bald assertion that had he been convicted of murdering an African-American instead of a white woman, he would have been sentenced to life imprisonment. Underwood v. State, 708 So. 2d 18 (Miss. 1998).

Paragraph (d) of subsection (5) of § 99-19-101 does not violate the Eighth or Fourteenth Amendments to the United States Constitution. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Where sentence does not exceed statutory limits, it does not constitute cruel and inhuman treatment. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

A 10-year sentence imposed upon a defendant pursuant to § 63-11-30(4) for a DUI maiming conviction did not constitute cruel or unusual punishment, as it was within the statutory limits. Holloman v. State, 656 So. 2d 1134 (Miss. 1995).

The execution of a defendant who had been repeatedly diagnosed as a chronic paranoid schizophrenic did not constitute cruel and unusual punishment, since every expert who testified stated that one could be a paranoid schizophrenic and still be competent to be executed under § 99-19-57. Billiot v. State, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

A defendant's sentence was not disproportionate to the crime and did not amount to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution where he was convicted of possession of marijuana with intent to deliver or distribute and was sentenced to serve 20 years in the custody of the Mississippi Department of Corrections and ordered to pay a $250,000 fine, since the sentence was less than the maximum 30 years imprisonment and one million dollar fine authorized by § 41-29-139(b)(1). Hart v. State, 639 So. 2d 1313 (Miss. 1994).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by vesting original jurisdiction in the circuit court when a person under 18 years of age is charged with a capital offense, rather than requiring a certification proceeding in youth court for transfer to the circuit court; Mississippi law allows a capital murder defendant who is under the age of 18 years to request a special hearing to consider his or her age, lack of prior offenses, likelihood of successful rehabilitation and other factors which favor sending the case to the youth court rather than continuing in circuit court. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by its failure to explicitly state a minimum age that a person may be subject to the death penalty, since the age at which one may receive a death sentence for the crime of capital murder is implied; no one under 13 years of age may receive the death penalty because a child under the age of 13 cannot even be charged with a felony. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A 60-year sentence for a conviction of sale of cocaine did not violate the Eighth Amendment's prohibition against cruel and unusual punishment, even though the defendant was convicted of selling only a small amount of cocaine, where the defendant was given a 30-year sentence pursuant to § 41-29-139(b)(1) for his conviction and the sentence was then doubled pursuant to § 41-29-147 because the defendant had previously been convicted of possession of marijuana, since the sentence was within the statutory guidelines and the legislature has called for stiff penalties for drug offenders as a matter of public policy. Campbell v. Campbell, 618 So. 2d 116 (Miss. 1993).

The imposition of a 25-year sentence for the crime of possession of 5.7 grams of cocaine with intent to distribute did not constitute a denial of the defendant's constitutional rights on the ground that it was excessive and disproportionate where the defendant did not produce facts concerning sentences imposed on other criminals, the sentence was within the limits fixed by § 41-29-139(b), and the sentence was not "grossly disproportionate" or "shockingly excessive." Edwards v. State, 615 So. 2d 590 (Miss. 1993).

A 14-year sentence for forging and publishing a $40 check, a 2-year consecutive sentence for forging a $50 check, and 2 14-year sentences for forging and publishing checks in the amounts of $54 and $62, though severe, were not so "grossly disproportionate" as to violate the Eighth Amendment to the United States Constitution. Wallace v. State, 607 So. 2d 1184 (Miss. 1992).

The sentencing of a defendant under § 99-19-81, the habitual offender statute, to the 20-year maximum term for aggravated assault as set forth in § 97-3-7(2) was not disproportionate to the crime charged and did not violate the Eighth Amendment where the defendant was convicted of severely bludgeoning the victim with an iron pipe; the statutory maximum penalty for aggravated assault is not grossly out of line with the maximum terms allowed for the commission of other violent crimes in Mississippi, and the maximum penalties imposed for aggravated assault in neighboring states are not profoundly different from those in Mississippi. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

In a capital murder prosecution, the prosecutor's references to a second victim did not violate the Eighth and Fourteenth Amendments, since these references were necessary to tell the complete story of the crime where both victims were killed in the same mobile home with the same gun. Ladner v. State, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

In a murder prosecution involving a victim who died of smoke inhalation after receiving a blow to the head, the admission of facts concerning the murder of another victim who died from shotgun wounds did not violate the defendant's rights under the Eighth Amendment to the federal constitution or the due process clauses of the Mississippi Constitution and the federal constitution, where the revelation that a second person was missing was necessary in putting together the pieces of the case, evidence that the investigating officers discovered 2 bodies in the trunk of the victim's car was unavoidable, and the testimony of the other victim's mother was necessary in that she was the only witness who could testify to seeing the defendant near the victim's house, she was able to discuss what the victim was doing on the day he was killed, and she was able to give some important time frames. Mackbee v. State, 575 So. 2d 16 (Miss. 1990).

A sentence of 15 years imprisonment and a $9,000 fine for conviction of sale of cocaine was within the provisions of the statute and within the sound discretion of the trial judge, and did not constitute cruel and inhuman punishment. Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

Section 99-19-57 does not unconstitutionally restrict rights of defendants, as it is harmonious with the import of the Eighth Amendment prohibition against cruel and unusual punishment as interpreted in Ford v. Wainwright (1985, U.S.) 91 L. Ed. 2d 335, 106 S. Ct. 2595. Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

The mandatory life sentence meted out to defendant, who was convicted of murder, did not violate the Eighth and Fourteenth Amendments, even though the sentencing statute did not provide for individual consideration of the offense and the offender, since no such procedure is required for a charge less than a capital charge. Taylor v. State, 452 So. 2d 441 (Miss. 1984), but see May v. State, 524 So. 2d 957 (Miss. 1988).

142. —Sale of seized contraband, criminal practice and procedure.

Statutes providing for the seizure, forfeiture as contraband, and sale of firearms used for the illegal hunting of deer are fatally defective and unconstitutional as to an owner out of possession and innocent of knowledge of the illegal purpose for which the guns are used, in that they provide no notice, actual or constructive, to be given to such an owner. Kellogg v. Strickland, 191 So. 2d 536 (Miss. 1966).

In an action to condemn and sell an automobile which had been seized while in possession of a third person, who had allegedly used it for transporting intoxicating liquor, the owner, in interposing his claim, was entitled to give a forthcoming bond and gain possession thereof pending a hearing, both in the circuit court and on appeal, as to his ownership thereof, and as to whether he had knowingly permitted it to be used for unlawful purposes in violation of Code 1942 §§ 2618 and 2619. Stringer v. State, 229 Miss. 412, 91 So. 2d 263 (1956).

143. —Appellate review, criminal practice and procedure.

Defendant's assertion that he was denied the right to appeal was misplaced where his brief had been filed with the appellate court and the issues raised were before the appellate court for consideration. Wynn v. State, 964 So. 2d 1196 (Miss. Ct. App. 2007).

Mississippi Supreme Court overrules Turner v. State, 818 So.2d 1186 (Miss. 2001) in part, rectifying the Fourteenth Amendment problems with the procedure governing appeals by indigent criminal defendants by implementing a five part procedure that requires, inter alia, compliance with Miss. R. App. P. 28(a)(1)-(4), (7); because a brief submitted by defense counsel merely stated that the appeal had no merit, rebriefing of a burglary case on appeal was required. Lindsey v. State, 939 So. 2d 743 (Miss. 2005).

Where states have incorporated appellate review as integral part of system for final adjudication of guilt or innocence, that review is raised to the plane of federal due process and equal protection. Harris v. State, 704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

It is not violation of due process to have appellate court perform reweighing or harmless error analysis when invalid aggravating circumstance is found to exist in capital case. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Issue of discriminatory application of death penalty to defendant is barred, absent showing of cause, because issue had never been raised prior to appeal to Supreme Court. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

144. —Post-conviction proceedings, criminal practice and procedure.

Inmate's due process rights were not violated when a district attorney sent a letter to a parole board objecting to parole because there was no breach of a plea agreement; the district attorney kept the promise of making a sentencing recommendation, and eligibility for parole did not affect a voluntariness analysis since there was no right to parole. Garlotte v. State, 915 So. 2d 460 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2005 Miss. LEXIS 769 (Miss. 2005).

Where there was a rescission of the possibility of probation caused by the prisoner's failure in the house arrest program, the expectation of probation was not protected by liberty interest procedures. Moore v. State, 830 So. 2d 1274 (Miss. Ct. App. 2002).

Defendant failed to demonstrate that he was entitled to an opportunity for a hearing prior to the revocation of his parole based on his expectation of parole where the parole board initially voted to grant him parole but rescinded its initial decision approximately two months later. White v. Miss. State Parole Bd., 844 So. 2d 480 (Miss. Ct. App. 2002).

Evidentiary error in a state trial does not justify federal habeas corpus relief unless it is of such magnitude as to constitute a denial of fundamental fairness under the Due Process Clause. Lockett v. Puckett, 980 F. Supp. 201 (S.D. Miss. 1997), motion granted, 988 F. Supp. 1019 (S.D. Miss. 1997).

Claim of erroneous failure to supply capital jury with properly limiting definition of "especially heinous, atrocious or cruel" to accompany such aggravating factor is excepted from procedural bars that apply in post-conviction proceedings. (Per Banks, J., with three Justices concurring and one Justice concurring in result only.) Booker v. State, 699 So. 2d 132 (Miss. 1997).

Doctrines of res judicata and waiver barred capital murder defendant's post-conviction claims that his alleged mental retardation prevented him from giving free and voluntary confession and from understanding his Miranda rights, where only issue raised on direct appeal concerning defendant's confession was whether he was effectively prevented from making jury arguments about confession's credibility, and it was clear that defendant's low intelligence level was considered during suppression hearing in determining voluntariness of his confession. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A post-conviction relief petitioner was not entitled to de novo review on appeal from a ruling that he was competent to be executed where the trial judge stated that he relied on § 99-19-57(2)(b) and Ford v. Wainwright (1985, U.S.) 91 L. Ed. 2d 335, 106 S. Ct. 2595 in determining the petitioner's competency, and that the petitioner failed to prove by a preponderance of the evidence that he was not competent to be executed; the petitioner was afforded due process and the trial judge's ruling could only be reversed if it were against the overwhelming weight of the evidence or an abuse of discretion. Billiot v. State, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

A capital murder defendant's objection to the admission of a blood sample obtained without a warrant was barred by the waiver of § 99-39-21(1) where the defendant did not raise the issue on direct appeal, since the basis of the Fourth Amendment objection to the admission of illegally obtained evidence is well known, and the defendant had practically no chance of escaping conviction even without the blood sample evidence. Woodward v. State, 635 So. 2d 805 (Miss. 1993).

The Supreme Court's lack of authority under the Mississippi Uniform Post-Conviction Collateral Relief Act (§ 99-39-1 et seq.) to appoint counsel, provide funds for expert assistance, or provide subpoena power did not violate a capital murder defendant's due process and equal protection rights under the Fourteenth Amendment to the United States Constitution or the Supreme Court's inherent powers to control judicial proceedings, since the State is not required to pay for a petitioner's "fishing expeditions" at the collateral relief stage merely because the petitioner is indigent; thus, the defendant's motion for appointment of counsel for his post-conviction procedures and the appropriation of $450.00 for psychiatric testing would be denied. Lockett v. State, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994).

The time limitations provisions of the Mississippi Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) do not work an unconstitutional suspension of the writ of habeas corpus. Cole v. State, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

145. Speedy trial—In general.

Defendant's constitutional and statutory rights to a speedy trial on drug charges were not violated. The 742-day delay between indictment and trial was presumptively prejudicial, but defendant failed to actively pursue his right to a speedy trial, and he was not actually prejudiced. Alexander v. State, 875 So. 2d 261 (Miss. Ct. App. 2004).

Defendant's right to a speedy trial was not violated, as approximately 197 days had elapsed between defendant's arrest and trial, a number well below the statutory limit of 270 days, and the greatest part of the "delay" between the commission of the felony and trial was directly and solely the consequence of defendant's flight; therefore, defendant's counsel was not ineffective for failing to file a motion to dismiss on speedy trial grounds. Jackson v. State, 864 So. 2d 1047 (Miss. Ct. App. 2004).

Defendant's right to speedy trial is guaranteed by Sixth and Fourteenth Amendments to the United States Constitution as well as by Article 3, section 26 of the Mississippi Constitution. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Sole remedy for denial of defendant's right to speedy trial is dismissal of charges against him. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In determining whether constitutional right to speedy trial has been denied, delay is triggering mechanism and must be presumptively prejudicial or analysis is halted. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Balance is struck in favor of rejecting defendant's speedy trial claim if delay is neither intentional nor egregiously protracted, and where there is complete absence of actual prejudice. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Where, in a murder prosecution, three trials of the defendant were initiated within two years of the crime, one ending in a mistrial and two resulting in convictions, but both convictions were reversed for improper instructions or improper argument by the prosecutor, and the defendant alleged harassment by the state, the defendant would not be released and the prosecution terminated, the sequence of events in the proceedings not constituting a denial of the defendant's rights to due process and a speedy trial. Smith v. State, 220 So. 2d 313 (Miss. 1969).

146. —Statutory rights, speedy trial.

Constitutional right to speedy trial exists separately from the statutory right. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

Although long delays between the time of arrest and arraignment have the potential to violate the defendant's constitutional right to a speedy trial even if the 270 day mandate of § 99-17-1 has been met, the State's compliance with § 99-17-1 would be viewed as significant when determining whether the defendant's constitutional right to a speedy trial had been violated. Spencer v. State, 592 So. 2d 1382 (Miss. 1991).

A defendant's statutory right to a speedy trial was not violated, even though 338 days elapsed between the defendant's original arraignment and the first day of his trial, where the defendant was granted a 63-day continuance during that time, and the case was continued for 37 days due to a congested docket. Additionally, the defendant's constitutional right to a speedy trial was not violated, even though 456 days elapsed between the time the defendant was arrested and the first day of his trial, where a significant part of the delay was attributable to the defendant, the balance of the delay was attributable to mere negligence and court congestion, and the defendant failed to assert his right to a speedy trial until the day the trial was scheduled. Adams v. State, 583 So. 2d 165 (Miss. 1991).

A defendant's statutory right to a speedy trial under § 99-17-1 was not violated, even though his trial occurred 460 days after his arrest, where the trial occurred only one day after his arraignment. Additionally, the defendant's constitutional right to a speedy trial was not violated where the defendant moved for 2 continuances during the period between the indictment and the trial which resulted in 181 days of time lost, much of the remaining delay could be attributed to 5 changes in the defendant's attorney, the delay was for good cause to allow his counsel sufficient time to prepare for trial, there were no deliberate attempts by the State to cause a delay to hamper the defendant's ability to prepare a defense, and there was no showing of prejudice to the defendant. Wiley v. State, 582 So. 2d 1008 (Miss. 1991).

For constitutional purposes, the right to a speedy trial attaches and time begins to run with arrest. The statutory right to a speedy trial set forth in § 99-17-1 attaches with arraignment; calculation of statutory time requires exclusion of the date of arraignment and inclusion of the date of trial and weekends, unless the last day of the 270-day period falls on Sunday. Any delays in prosecution attributable to a defendant under either the constitutional or statutory scheme tolls the running of time. Any continuances for "good cause" will toll the running of time unless "the record is silent regarding the reason for delay," in which case "the clock ticks against the State because the State bears the risk of non-persuasion on the good cause issue." The statutory 270-day rule is satisfied once the defendant is brought to trial, even if that trial results in a mistrial. Handley v. State, 574 So. 2d 671 (Miss. 1990).

147. —Time right attaches, speedy trial.

Defendant's right to speedy trial attached at time of his arrest. Skaggs v. State, 676 So. 2d 897 (Miss. 1996); Simmons v. State, 678 So. 2d 683 (Miss. 1996); Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Constitutional right to speedy trial attaches when person is effectively accused of a crime. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Constitutional right to speedy trial attaches at time of accused's arrest, indictment, or information. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In determining whether defendant's claim of constitutional speedy trial violation is justified, date of defendant's arrest is date right to speedy trial attaches. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

148. —Assertion of right, speedy trial.

Defendant has some responsibility to assert right to speedy trial, although state has duty to ensure that defendant receives speedy trial. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Defendant's failure to ask for speedy trial is not dispositive in speedy trial analysis, but must be weighed against other factors. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Although defendant is not required to demand speedy trial, his assertion of such right will weigh more heavily in his favor when determining whether his constitutional right to speedy trial has been violated. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Late filing by defendant asserting his right to speedy trial is not fatal to defendant's claim of violation of constitutional right to speedy trial. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Failure by defendant to assert his constitutional right to speedy trial does not constitute waiver of such right. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Assertion of constitutional right to speedy trial need not be in writing. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A defendant was denied his constitutional right to a speedy trial where 610 days elapsed from the date of indictment to the date of trial, even though the defendant failed to assert his right to a speedy trial. Although a defendant may have some responsibility to assert his or her speedy trial claim, the primary burden is on the courts and the prosecutors to assure that cases are brought to trial. Thus, the defendant's failure to "consistently badger" the prosecution to proceed with his trial did not eliminate his claim that he was denied a speedy trial. Flores v. State, 574 So. 2d 1314 (Miss. 1990).

149. —Duty of state, speedy trial.

While defendant may have some responsibility to assert speedy trial claim, primary burden is on courts and prosecutors to assure that they bring cases to trial. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

State bears burden of providing defendant with speedy trial; therefore, delay that is not attributable to defendant counts against the state, unless state can show good cause for the delay. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

State bears burden of bringing accused to trial in speedy fashion. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

150. —Tolling of time, speedy trial.

Trial court did not err in denying petitioner's motion for post-conviction relief where he failed to prove his assertions that he was denied his right to a speedy trial and that he received ineffective assistance from counsel; there was no evidence in the record of the starting date of petitioner's incarceration, but the record showed that 89 days elapsed between indictment and trial which the appellate court found was quite reasonable. Hill v. State, 827 So. 2d 743 (Miss. Ct. App. 2002).

Under speedy trial analysis, any delays which are attributable to accused toll the running of the clock; however, time of delay is assessed against state if state fails to show good cause for such delay. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Constitutional speedy trial clock is tolled for period of time attributable to delay caused by defendant; period of delay attributable to defendant is subtracted from total days of delay. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether a defendant has been denied his or her right to a speedy trial, a continuance granted to the defendant is counted differently from a continuance granted to the State. Any delay as a result of action by the State without "good cause" causes the time to be counted against the State. A delay caused by the actions of the defendant, such as a continuance, tolls the running of the time period for that length of time, and this time is subtracted from the total amount of the delay. Wiley v. State, 582 So. 2d 1008 (Miss. 1991).

151. —Factors considered, speedy trial.

Defendant was not denied his right to a speedy trial where a total of 810 days elapsed from the date of defendant's arrest to the date on which the trial began, because defendant requested continuances prior to moving for a speedy trial, the State was granted continuances for DNA analyses and to find a key witness, after DNA tests were ordered, there were several motions filed by defendant and the State, and thus good cause was shown related to matters beyond the control of the State. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

Defendant's embezzlement conviction was proper where his speedy trial rights were not violated because, by falsely agreeing to repay the owner, defendant avoided pursuing an indictment against him, and thus, the delay until August 2001 was a neutral factor Further, defendant did not diligently pursue a speedy trial. Crimm v. State, 888 So. 2d 1178 (Miss. Ct. App. 2004).

Under balancing test to determine whether defendant's constitutional right to speedy trial has been violated, no one factor alone is dispositive, and the factors must be considered individually, assessed both objectively and dispassionately, then weighed and balanced together. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

Under case law, four factors must be considered before one can determine if right to speedy trial has been denied: length of delay; reason for delay; defendant's assertion of his right to speedy trial; and prejudice resulting to defendant. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

Factors to be examined in determining whether constitutional right to speedy trial has been violated include length of delay, reason for delay, assertion of right to speedy trial, and prejudice to defendant from the delay; no single factor is dispositive. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Factors to be considered in determining whether defendant's right to speedy trial was violated are length of delay, reason for delay, defendant's assertion of right to speedy trial, and prejudice to defendant resulting from delay. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Analysis of whether defendant was deprived of right to speedy trial must turn on facts of particular case, quality of evidence available on each factor, and, in absence of evidence, identification of party with risk of non-persuasion; no sole factor is dispositive. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Bad motive on part of prosecution significantly affects balancing test in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Once constitutional right to speedy trial has attached, Supreme Court, in determining whether right has been denied, must examine length of delay, reason for delay, defendant's assertion of right to speedy trial, and prejudice resulting to defendant from delay, in light of all circumstances, including conduct of prosecution and accused. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Court must balance four factors in determining whether defendant's claim of constitutional speedy trial violation is justified: length of delay, reason for delay; whether defendant has timely asserted right to speedy trial and whether defendant has been prejudiced by delay. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether defendant's claim of constitutional speedy trial violation is justified, no single factor is dispositive, but court must consider totality of circumstances, including any additional relevant circumstances beyond 4 enumerated factors, in making that determination. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

For purpose of constitutional speedy trial analysis, delay which is presumptively prejudicial to defendant will not require reversal in and of itself but will require that remaining factors in determining whether claim of constitutional violation is justified be examined closely. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

For purpose of constitutional speedy trial analysis, as period of delay between defendant's arrest and trial increases, importance of delay factor also increases. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

For purpose of constitutional speedy trial analysis, where delay between arrest and trial is not long enough to be considered presumptively prejudicial, court does not need to examine remaining factors used to determine whether constitutional speedy trial violation has occurred. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Delay of 409 days between arrest of defendant on charge of capital rape and commencement of trial was presumptively prejudicial, and triggered examination of remaining factors to determine whether violation of defendant's constitutional right to speedy trial had occurred. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A defendant's constitutional right to a speedy trial was not violated, even though the length of the delay was 281 days and was therefore presumptively prejudicial, where the case involved 9 counts of burglary and one count of conspiracy and was therefore a "complex, serious" case rather than an "ordinary street crime," the delay appeared to be reasonable and not unduly lengthy, and the defendant failed to substantiate his claim of prejudice resulting from the delay. Jackson v. State, 614 So. 2d 965 (Miss. 1993).

152. —Time of application for speedy trial.

Defendant was arrested on July 5, 2000, indicted one year later, and his trial commenced on April 2, 2002. For purposes of the pre-indictment delay of 366 days, there was nothing in the record or in defendant's brief to indicate (1) that defendant made any effort to request an attorney, seek bail, or demand a speedy trial prior to June 2001; (2) that the State delayed bringing defendant to trial for any prejudicial or improper reason; or (3) any prejudice to defendant by the delay; thus, defendant's right to a speedy trial was not violated by the pre-indictment delay. Young v. State, 891 So. 2d 813 (Miss. 2005).

Defendant's constitutional right to speedy trial was not violated, although 21-month delay between arrest and trial was presumptively prejudicial, where significant portion of delay was due to defendant's request for psychological evaluation, defendant did not bring motion to dismiss on speedy trial grounds for over a year, and defendant did not demonstrate any prejudice. Simmons v. State, 678 So. 2d 683 (Miss. 1996).

In speedy trial analysis, defendant's failure to bring denial of speedy trial issue up until trial, as well as defendant's motion for continuance, which could be considered as contrary to any concerns about speedy trial, weighed in favor of state. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Although accused was presumptively prejudiced by 280-day delay before trial, he was not denied right to speedy trial, since he failed to ask for speedy trial until trial, he moved for continuance before trial, and he failed to show prejudice from the delay. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Filing of motion to dismiss for denial of defendant's right to speedy trial 3 days prior to trial date was not fatal to defendant's claim, but weighed less heavily than an earlier assertion of his right would have done in analysis of whether his constitutional right to speedy trial was violated. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A defendant was not denied his right to a speedy trial, even though 266 days elapsed from the time of his arrest to the time of his first trial which ended in a mistrial, 305 days elapsed from his arrest to his second trial which resulted in a conviction, the delay was attributable to the State, and the defendant filed a motion for a speedy trial 15 days after indictment, where he did not file a motion to dismiss for lack of a speedy trial until the day before the second trial, and he failed to show any actual prejudice. Rhymes v. State, 638 So. 2d 1270 (Miss. 1994).

153. —Prejudice to defendant, speedy trial.

Time elapsing from the date of defendant's arrest to the beginning day of his trial was more than 31 months, and was presumptively prejudicial under the Barker factor. However, he had not asserted his right to a speedy trial and on appeal, he did not assert that his defense suffered any prejudice because of his lengthy incarceration; he did not contend that witnesses were unavailable because of the delay or that evidence had been lost or destroyed or that his defense against the charges was affected in any way by the delay, and because no actual prejudice was shown, his constitutional right to a speedy trial was not violated. Guice v. State, 952 So. 2d 187 (Miss. Ct. App. 2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Perfecting of defendant's appeal took an inordinately long time; however, defendant did not satisfy the most important factor in the appellate delay analysis, the requisite showing of prejudice, because (1) defendant's appeal was meritless; (2) he did not show that any anxiety and concern during the pendency of his appeal was of such a degree that it would distinguish his case from that of any other prisoner awaiting the outcome of an appeal; and (3) the delay in perfecting defendant's appeal did not impair his grounds for appeal or impair his defense in the event of a retrial. Thus, the 12-year delay in processing his appeal did not result in a violation of his due process rights. Jackson v. State, 910 So. 2d 658 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

Vague assertions of lost witnesses, faded memories, or misplaced documents are insufficient to establish due process violation from preindictment delay. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Five-year period from defendant's mistrial on murder charges to entry of nolle prosequi on indictment did not violate defendant's due process rights, as formal accusation ended with entry of nolle prosequi. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Presumptive prejudice, requiring further inquiry into remaining factors for determining whether speedy trial violation has occurred, arises where there has been delay of eight months or more before trial. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Delay may prejudice defendant, for speedy trial purposes, in two ways; delay may actually impair defendant's ability to defend himself, and defendant may suffer because of restraints to his liberty. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Incarceration before trial is not alone enough prejudice to warrant reversal of conviction on ground that defendant was denied speedy trial. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In speedy trial analysis, defendant was not prejudiced by his inability to talk with potential alibi witnesses, due to his incarceration prior to trial; record mentioned names of no potential alibi witnesses who had suffered memory loss or who could not be found, and defense counsel could have traced leads at defendant's direction. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In speedy trial analysis, delay of 8 months is presumed prejudicial. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Delay of 280 days from time defendant's constitutional right to speedy trial attached to time trial began was presumptively prejudicial for purposes of speedy trial analysis. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

For speedy trial analysis, prejudice to accused encompasses both actual prejudice in defending case and prejudice from inordinate delay. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Accused may suffer prejudice due to delay, a factor in speedy trial analysis, in form of oppressive pretrial incarceration, anxiety and concern, and impairment of defenses. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Without evidence of absent witness' departure date or expected testimony, accused could not show prejudice from delay in commencement of trial, a factor in speedy trial analysis; moreover, even if accused could have shown prejudice due to absent witness, he would have been barred from doing so, as he raised prejudice from absent witness for first time on appeal. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, defendant may be prejudiced by fact that he has been detained before trial, that he has suffered anxiety as result of delay, or that his defense has been impaired by delay. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, defendant suffers no prejudice from detention when he is out on bail. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, where incarceration is only ground raised by defendant as basis for prejudice, reversal generally will not be required. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether defendant has been prejudiced by delay between arrest and trial such that violation of his constitutional right to speedy trial is implicated, impairment of defendant's defense may occur as result of witnesses dying or disappearing or of loss of memory on part of witnesses. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether defendant has been prejudiced by delay between arrest and trial such that violation of his constitutional right to speedy trial is implicated, anxiety on part of defendant is presumed from mere fact of delay even where defendant does not complain that he has suffered anxiety. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A defendant's right to a speedy trial was not violated, even though 6 years elapsed between the date of indictment and the actual determination of the defendant's habitual offender status, since habitual offender status is not a crime in and of itself, but is merely a status which enhances the sentence imposed for the conviction of an offense, and, therefore, the determination of habitual offender status is not an "offense" to which the right to a speedy trial would apply. Gray v. State, 605 So. 2d 791 (Miss. 1992).

In a constitutional speedy trial analysis, prejudice to the defendant may take several forms: (1) delay may prejudice the outcome of the defendant's case; (2) prejudice may take the form of harm to the defendant's personal interests, such as the debilitating effect of delay on the defendant's financial, societal, and emotional circumstances; and (3) lengthy pretrial incarceration may be unnecessarily oppressive and may pose societal disadvantages, though a defendant's assertion of prejudice attributable solely to incarceration, with no other harm, typically is not sufficient to warrant reversal. Ross v. State, 605 So. 2d 17 (Miss. 1992).

A 6-month delay between a mistrial and a retrial was not "presumptively prejudicial," and therefore the defendant's constitutional right to a speedy trial was not violated by the delay. Handley v. State, 574 So. 2d 671 (Miss. 1990).

154. —Delay attributable primarily or solely to defendant, speedy trial.

Where defendant was tried 538 days after arraignment, and 264 days of the delay could be attributed against the State, there was no statutory violation under the guidelines set forth in Miss. Code Ann. § 99-17-1. Further, the delay could be attributed to continuances requested upon the motion of defendant's attorneys, substitution of counsel, plea negotiations, ongoing discovery, and potentially the trial date being lost due to a crowded docket, and applying the balancing test to the four factors listed in Barker, and the conduct of the State and defendant, defendant's constitutional right to a speedy trial was not denied. Summers v. State, 914 So. 2d 245 (Miss. Ct. App. 2005).

Defendant was arrested on July 5, 2000, indicted one year later, and his trial commenced on April 2, 2002; because defendant was released on bond shortly after his indictment there was no oppressive pretrial detention after he was indicted. Further, at least part of the delay to trial, following his indictment, was attributable to the two continuances granted at defendant's request; thus, there was no merit to defendant's denial of a speedy trial claim as to the period of time following his indictment. Young v. State, 891 So. 2d 813 (Miss. 2005).

Delay caused by actions of defendant, such as continuance, tolls running of speedy trial period for that length of time, and is subtracted from total amount of delay. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Continuances requested by defendant, including continuance to allow defense counsel additional time for discovery after defendant changed attorneys in immediate days before trial for no compelling reason, would be charged to defendant in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Delays caused by 2 changes in defense counsel would not be charged against state in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Continuances requested by defendant, including continuance to allow defense counsel additional time for discovery after defendant changed attorneys in immediate days before trial for no compelling reason, would be charged to defendant in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Defendant was not denied right to speedy trial by delay of 1,027 days between arrest and start of trial; delays were caused by plea bargaining, 3 continuances, 2 changes of defense counsel, motion for change of venue, and requests by defense for additional discovery and trial preparation. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, delay between arrest and trial caused by withdrawal of defendant's attorney which entails allowing new attorney reasonable time to become familiar with case and prepare for trial cannot be weighed against state because it is beyond state's control. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, delay due to changes in defendant's attorneys and defendant's reneging on plea agreement weigh against defendant. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A defendant's constitutional right to a speedy trial was not violated, even though the length of the delay was 636 days, where the bulk of the delay was caused by the defendant's frequent changes of counsel and his reneging on a plea agreement, the multitude of pretrial motions filed on the defendant's behalf further contributed to the delay, the defendant made no assertion of his right other than a motion to dismiss the charges after the fact, and the defendant could not show tangible prejudice but relied only on the anxiety caused by incarceration and pending charges. Wagner v. State, 624 So. 2d 60 (Miss. 1993).

A defendant was not denied his statutory or constitutional rights to a speedy trial, even though he was arrested on February 13, 1989, arraigned May 5,1989, and his trial began March 5, 1990, where the defendant filed 15 motions before he was brought to trial which substantially contributed to the delay, the record supported the State's position that it could not try the case until the issues of change of venue and admissibility of forensic DNA analysis had been resolved, and the defendant did not contend that the delay either diminished his defense or strengthened the State's evidence, but stated only that he suffered "a great deal of anxiety." Polk v. State, 612 So. 2d 381 (Miss. 1992).

A defendant's constitutional and statutory rights to a speedy trial were not violated, even though the delay between the defendant's arrest and trial was 378 days and the delay between arraignment and trial was 370 days, where only one of the delays — a continuance requested by the State solely for its prosecutorial tactical advantage — was attributable to the State, and, after calculating the delays caused by the defendant, he came to trial 164 days after his arrest and 156 days after his waiver of arraignment. Ross v. State, 605 So. 2d 17 (Miss. 1992).

Any defendant-prompted delay, regardless of merit, tolls the constitutional speedy trial clock; the speedy trial remedy is meant to address the harm visited on the defendant because of the State's delay in bringing the defendant to trial. Ross v. State, 605 So. 2d 17 (Miss. 1992).

Defendants did not suffer a deprivation of the right to a speedy trial, even though there was a 414-day delay between the date the defendants were arrested and the date of their trial, where a substantial part of the reason for the delay was that the defendants took no steps to secure counsel, and the delay did not operate to their substantial prejudice since there was no evidence of prejudice at trial and the defendants' arrest resulted in their parole revocation and immediate incarceration to complete prior sentences, so that the defendants' lives were not "put on hold" solely as a result of the delay. Jaco v. State, 574 So. 2d 625 (Miss. 1990).

155. —Delay attributable primarily or solely to state, speedy trial.

Any delay as result of action by state, without good cause, causes time to be counted against state in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Delay of murder trial at request of state until after defendant's aggravated assault trial would be charged to state in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A defendant was denied his constitutional right to a speedy trial where 2 ½ years elapsed between the time of the defendant's arrest and his trial, the defendant caused 11 months of the delay while the State caused one year and 9 months of the delay without good cause, the defendant asserted his right to a speedy trial one year prior to his trial, and the defendant was prejudiced as a result of the delay in bringing him to trial as the only witness alleged to have connected the defendant to the crime died before the defendant was brought to trial and another witness admitted that her memory was not as good at the time of trial as it had been previously. Jenkins v. State, 607 So. 2d 1137 (Miss. 1992).

155.5. —Delay attributable neither to state nor defendant, speedy trial.

Constitutional right to a speedy trial was not denied, although a rape trial commenced more than two years after defendant's arrest, because there was good cause for the delay and no showing of actual prejudice. Watson v. State, 848 So. 2d 203 (Miss. Ct. App. 2003), affirmed by 2003 Miss. App. LEXIS 623 (Miss. Ct. App. June 17, 2003).

Over four years expired between defendant's arrest and trial for murder, but defendant was out on bond after the first year, made no demand for a speedy trial, failed to show any prejudice to the defense, or that the State intentionally delayed the investigation in its search for critical eyewitnesses and other evidence. Defendant's right to a speedy trial was not violated under the Sixth and Fourteenth Amendments to the United States Constitution, or Miss. Const. art. III, § 26. Moore v. State, 837 So. 2d 794 (Miss. Ct. App. 2003).

A capital murder defendant was not denied his constitutional right to a speedy trial, even though 434 days elapsed between his arrest and the trial, and the defendant asserted his right to a speedy trial at his initial appearance and by pretrial motions, where some of the delay was due to the defense counsels' conflicts, the judge to whom the case had been assigned for 7 months was murdered, there was a complete "turn-over" in the district attorney's office, there was no showing that the State made a willful effort to delay the trial or that it was negligent in doing so, and the delay did not cause any prejudice to the defense. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A defendant was not denied his constitutional right to a speedy trial, even though 449 days elapsed between his arrest and the date of the hearing adjudicating his motion to dismiss the charges, and there was a 6 ½ month delay between arrest and indictment which was attributed to the crime lab and court congestion, where a 5-month delay was attributable to the defendant and his change of counsel, 8 months of the delay occurred during a period in which there was no demand for a speedy trial and in which the defendant was held on other unrelated charges, and the defendant's testimony did not mention the existence of prejudice. State v. Magnusen, 646 So. 2d 1275 (Miss. 1994).

A defendant was not denied his right to a speedy trial, even though there was a 23-month delay from the date of arrest to the date of trial and a portion of the delay was attributable to official neglect with respect to completion and delivery of a lab report, where the defendant was indicted within 15 months of his arrest, and he failed to show any actual prejudice as a result of the delay. Perry v. State, 637 So. 2d 871 (Miss. 1994).

A defendant was not denied his constitutional right to a speedy trial, even though 475 days elapsed between his arrest and his trial, where extradition of the defendant caused 9 days of the delay, a substantial portion of the delay (119 days) was due to a continuance granted to the defendant on the date the case was originally set for trial, approximately 12 months of the delay was not attributable to either the defendant or his attorney, the defendant did not assert his right to a speedy trial until after he had been granted the continuance on the date originally scheduled for trial, and the defendant's claim that he was prejudiced by the delay because he lost touch with certain alibi witnesses was diminished by the facts that minimum effort was made by the defendant or his investigator to locate or contact witnesses who had moved, the lost witnesses would have been available to testify on the date originally set for trial, and no mention of this matter was made in the defendant's motion for a new trial filed a week after the verdict was rendered. Noe v. State, 616 So. 2d 298 (Miss. 1993).

156. —Crowded dockets, speedy trial.

Defendant's right to speedy trial was not violated by 554-day delay between arrest and trial, even though delay was due to crowded docket and weighed against state, where defendant suffered no prejudice as a result of the delay and defendant was out on bond pending trial. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

Delays due to crowded court docket do not weigh as heavily against state, for speedy trial purposes, as do deliberate or purposeful delays. Skaggs v. State, 676 So. 2d 897 (Miss. 1996).

A defendant was not denied his constitutional right to a speedy trial, even though 574 days elapsed from the date of his arrest to the date of trial and he properly asserted his right to a speedy trial, where the delay was caused by an overcrowded trial docket and the county's system of assigning each case to a particular judge as that case proceeded up to and through the trial process, and the defendant demonstrated no actual prejudice. McGhee v. State, 657 So. 2d 799 (Miss. 1995).

An aggravated assault defendant was not denied his constitutional right to a speedy trial, even though there was a delay of more than 25 months between the date of his arrest and his trial and the State blamed part of the delay on an overcrowded docket which weighed against the State, where the defendant requested a continuance of an earlier trial date, the victim had to undergo several surgical treatments and it was several months before he was physically able to proceed with the case, the defendant did not raise the speedy trial issue until more than one and ½ years after his arrest, and the defendant failed to show any material prejudice as a result of the delay. Stogner v. State, 627 So. 2d 815 (Miss. 1993).

A defendant was not denied his constitutional right to a speedy trial, even though the length of the delay between the defendant's arrest and his trial was 334 days and the defendant asserted his right to a speedy trial in a timely manner, where most of the delay was attributable to ordinary lag from crowded dockets and court terms, and the defendant did not even attempt to show any particular prejudice resulting from the delay but merely maintained that he had increased anxiety due to the delay. Hurns v. State, 616 So. 2d 313 (Miss. 1993).

A defendant's right to a speedy trial was violated where 301 days elapsed between the day of arraignment and the day of the trial, and the case was continued twice by court order stating that "all cases not otherwise disposed of are hereby ordered continued to the next regular term of court." Although docket congestion is "good cause" for delay in certain circumstances, the State never sought a continuance for this or any other reason, but instead relied on the "mass continuances" routinely made at the end of each court term. Yarber v. State, 573 So. 2d 727 (Miss. 1990).

157. —Plea negotiations, speedy trial.

Plea negotiations that lasted 360 days would not be counted against state in speedy trial analysis; defendant participated or at least acquiesced in negotiations and received some benefit from them. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

For speedy trial analysis, delays from attempts to negotiate plea agreement were not attributable to accused, since there was no evidence in record as to whether defendant acquiesced to these plea negotiations. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, delays caused by plea negotiations are for good cause and have effect of tolling speedy trial clock, although such negotiations should be substantiated by documentation. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

158. —Reindictment, speedy trial.

Twenty-six-year delay between second mistrial on defendant's murder charge and return of second indictment did not violate defendant's due process rights, as there was no statute of limitations on murder. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Twenty-one-year delay between entry of nolle prosequi on murder indictment and reindictment or same murder did not violate defendant's due process rights, though witnesses for both state and defense had died during period between trials; testimony from previous trials was available and was read to jury, defendant did not put into record any facts he could have proved by deceased witnesses that did not go to jury through their prior testimony, and state did not intentionally delay prosecution to gain tactical advantage. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Prosecution may not circumvent accused's demand for speedy trial by seeking new indictment for same offense and then proceeding upon new indictment. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Delay in trial caused when state reindicted defendant twice in good faith weighed less heavily against state in speedy trial analysis than if state had acted in bad faith. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

159. —Presumptions and burden of proof, speedy trial.

In order for defendant to prove that preindictment delay violated his due process rights, defendant must show that (1) preindictment delay caused actual prejudice to him, and (2) such delay was intentional device used by government to obtain tactical advantage over defendant. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Accused is not required to put forth affirmative showing of prejudice to prove his right to speedy trial was violated; nevertheless absence of prejudice weighs against finding of violation. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Where a defendant contended that his statutory and constitutional rights to a speedy trial were violated because he was tried more than 600 days after his arrest and arraignment, the State bore the burden of positively demonstrating that the backlog of drug cases in the court system and the state crime lab, which were alleged to be the reasons for the delay, actually caused the delay in that particular case. McGee v. State, 608 So. 2d 1129 (Miss. 1992).

160. —Sufficiency of evidence, speedy trial.

The defendant's right to a speedy trial was not violated, notwithstanding a 731 day delay between arrest and trial where 515 days of delay were attributable to the defendant's continuances and changing of attorneys, the defendant did not assert his right until very late in the process and the defense asked for and was granted two continuances after he attempted to assert his right, and the only prejudicial effect alleged caused by the delay was the defendant's incarceration for nearly two years without a trial. Sharp v. State, 786 So. 2d 372 (Miss. 2001).

The defendant was not denied his right to a speedy trial notwithstanding that more than eight months elapsed between his arrest and trial, where (1) the major portion of the delay was attributable to the fact that the first indictment against the defendant was dismissed because a witness recanted a statement that would have shown the defendant's guilt, (2) the defendant did not assert his right to a speedy trial until one week before trial, and (3) the only prejudice asserted by the defendant was the anxiety he suffered while incarcerated and awaiting trial. Estes v. State, 782 So. 2d 1244 (Miss. Ct. App. 2000).

The defendant's right to a speedy trial was not violated notwithstanding a 14-month delay between his arrest and trial, as (1) the greater part of the delay was caused by the defendant through his numerous continuances and changing of legal counsel, (2) although the defendant filed a motion for a speedy trial about four months before his trial, in the interim he filed three motions for continuance and his motion for speedy trial was not heard by the trial court until the day of trial, and (3) the defendant failed to show prejudice caused by the delay. Bell v. State, 769 So. 2d 247 (Miss. Ct. App. 2000).

The defendant was denied his right to a speedy trial, notwithstanding a total delay of 22 months where (1) the bulk of the delay rested with the defendant through continuously swapping legal counsel and signing continuances, (2) although he filed two motions pro se which asserted his right to a speedy trial, his attorneys either withdrew them on his behalf or waived them by agreeing to continuances after asserting such motions, and (3) there was no prejudice because the defendant failed to point to any specific place in the record where a witness's memory was affected and did not even point out a witness's lack of detail in answering a question posed by either side. Whitaker v. State, 757 So. 2d 1060 (Miss. Ct. App. 2000).

Defendant failed to establish speedy trial violation in connection with delay of more than 18 months between his arrest and his indictment and trial, particularly as defendant failed to point to any evidence establishing reason for delay or showing how he was prejudiced, and defendant never asserted his right to speedy trial. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

Defendant was not denied his constitutional right to speedy trial, considering totality of circumstances; total delay from date of arrest to date of trial was 409 days and thus was presumptively prejudicial, total period of delay after subtracting delays attributable to defendant was 211 days, defendant claimed violation of his constitutional right to speedy trial 3 days before trial, and defendant made no showing of actual prejudice other than his incarceration. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A defendant's constitutional right to a speedy trial was not violated where the defendant was tried 230 days after his arrest, the delay was due to the State's reasonable and legitimate motion for a continuance predicated on the unavailability of a material witness, the defendant's assertion of his right to a speedy trial was made 173 days prior to trial in conjunction with his objection to the State's request for a continuance, and there was no actual prejudice to the defendant in his defense. Box v. State, 610 So. 2d 1148 (Miss. 1992).

A defendant was not denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article 3, § 26 of the Mississippi Constitution, even though approximately 11 months transpired between the defendant's arrest and the commencement of his trial, where the State twice offered to try the case after each of the defendant's 2 motions for speedy trial and the defendant twice declined, and the defendant made no showing of actual prejudice. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

A defendant's constitutional right to a speedy trial was not violated, even though 536 days elapsed between the defendant's arrest and his trial and no reason for the delay appeared in the record, where 126 days were attributable to a continuance requested by the defendant, the defendant's first and only assertion of his right to a speedy trial came only one day prior to trial, and the defendant experienced no prejudice as a result of the delay. Spencer v. State, 592 So. 2d 1382 (Miss. 1991).

A defendant was denied his constitutional right to a speedy retrial where there was a 288-day delay which was presumptively prejudicial, the prosecution offered only the court's docket pages as evidence, there was no evidence in the record justifying the delay or rebutting the presumption of prejudice, and the defendant had made a demand for a speedy retrial on October 13, 1987 and the prosecution did nothing until the defendant moved to dismiss in February of 1988. State v. Ferguson, 576 So. 2d 1252 (Miss. 1991).

A defendant was not deprived of his constitutional right to a speedy trial, even though he was tried 603 days after his arrest, where only the 162-day delay from the arrest to the indictment was chargeable against the State, the defendant did not assert his right to a speedy trial until 35 days prior to trial, and he failed to show prejudice as a result of the delay. Handley v. State, 574 So. 2d 671 (Miss. 1990).

A defendant was not denied his right to a speedy trial, even though his retrial did not commence until 383 days after the reversal of his original conviction, where part of the delay could be attributed to the logistics of a change in venue, the defendant apparently did not assert his right to a speedy trial, and there was no prejudice, particularly since it was in the defendant's best interest that the retrial be delayed as both parties searched to secure the attendance of a witness whom the defendant claimed was critically important to have as a live eyewitness at trial; the delay did not violate § 99-17-1 since the 270-day rule does not apply to retrials. Mitchell v. State, 572 So. 2d 865 (Miss. 1990).

There was no merit in argument that defendant's due process rights had been violated by unexcused and unreasonable delay in charging him with crime where there was no proof government even knew of alleged embezzlement before receiver of trust went to district attorney's office, which occurred after death of trust beneficiary, much less that government deliberately delayed indictment in order to gain advantage over defendant. Hooker v. State, 516 So. 2d 1349 (Miss. 1987).

161. —Waiver of rights, speedy trial.

Defendant's delay of nearly seven years waived his right to use post-conviction petition to challenge sentencing delay as violation of his right to speedy trial. Marshall v. State, 680 So. 2d 794 (Miss. 1996).

162. —Appellate review, speedy trial.

Where defendant did not raise the issue below, an assertion that her speedy trial rights were violated in a manslaughter case was not heard on review since an appellate court was not equipped to be a fact finder. Miller v. State, 956 So. 2d 221 (Miss. 2007).

Defendant failed to adequately demonstrate violation of fundamental right regarding his claim of speedy trial violation in connection with delay of more than 18 months between his arrest and his indictment and trial and, thus, reviewing court would not use rule of plain error to hear speedy trial issue, which was not raised in trial court; defendant's discussion of issue on appeal was brief and did not state how delay violated his rights. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

Habeas corpus petitioner failed to demonstrate that Mississippi's direct appeal bar was not strictly and directly applied near time of petitioner's direct appeal to cases involving speedy trial claims direct appeal raised for first time on collateral review, as required to render bar inadequate as procedural bar. Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

On a record showing a largely unexplained delay of almost 400 days in bringing the accused to trial, aggravated by some 216 unjustified days in delay following the accused's demand that he be brought to trial, and applying the familiar balancing test, the accused's right to a speedy trial was violated and he was required to be discharged. Beavers v. State, 498 So. 2d 788 (Miss. 1986).

163. —Double jeopardy—In general.

"Double jeopardy" consists of three separate constitutional protections; it protects against second prosecution for same offense after acquittal, it protects against second prosecution for same offense after conviction, and it protects against multiple punishments for same offense. White v. State, 702 So. 2d 107 (Miss. 1997).

Although state may freely define crimes and assign punishments, it is not allowed to punish defendant for crime containing elements which are completely enveloped by offense for which defendant was previously convicted. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In context of double jeopardy, underlying felony in felony-murder is, by definition, included in greater offense and may not be punished separately. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A defendant's double jeopardy right not to be re-prosecuted for the same offense accrues instantly upon the happening of some event in criminal proceedings against him or her, though the original jeopardy must have "terminated" in order for such a right to accrue; thereafter, lapse of time neither strengthens nor diminishes the right as no subsequent event affects an accrued double jeopardy right. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

The double jeopardy clause did not bar reprosecution of a defendant for murder following the Supreme Court's reversal of his conviction where the conviction was reversed on procedural grounds and the defendant was allowed to plead guilty to lesser offenses pursuant to the bargain, but the defendant subsequently refused to plead guilty to the lesser offenses. The defendant could be prosecuted for the murder under the original indictment since the reversal of his murder conviction on procedural grounds did not constitute a rendering of the case nor a discharge of the defendant, and the defendant's refusal to plead guilty to the lesser offenses was a breach of the bargain. State v. Danley, 573 So. 2d 691 (Miss. 1990).

A retrial did not place defendant in double jeopardy where reversal of his manslaughter conviction was due to the error of the lower court in compelling defendant's wife to testify for the state and was not based on insufficiency of the evidence; however, it was error to retry defendant for murder instead of manslaughter where he had been charged with but not convicted of murder in the first trial. Tapp v. State, 373 So. 2d 1029 (Miss. 1979).

164. —Nolle prosequi, double jeopardy.

A nolle prosequi entered upon the motion of the district attorney did not terminate the defendant's original jeopardy or accrue unto him the right not to be re-indicted and re-prosecuted for the same offense where the State had unsuccessfully sought the defendant's conviction through 2 successive trials which both ended when the jury became deadlocked so that there was a "manifest necessity" to declare a mistrial in each case, there was nothing to suggest any prosecutorial misconduct or manipulation in moving for the nolle prosequi, and there was no objection by the defendant to the entry of the nolle prosequi. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

165. —Conspiracy, double jeopardy.

Test for determining when separate conspiracy exists, for purpose of determining whether subsequent prosecution is barred by double jeopardy, requires government to prove, by preponderance of the evidence, a separate conspiracy focusing upon elements of time, persons acting as coconspirators, statutory offenses charged in indictments, overt acts charged by government or any other description of offense charged which indicates nature and scope of activity which government sought to punish in each case, and place where events alleged as part of conspiracy took place. Cook v. State, 671 So. 2d 1327 (Miss. 1996).

Subsequent prosecution of defendants, who had been acquitted of conspiracy to commit forgery and/or defraud corporation out of money for forged soybean weight certificates, on charge of conspiracy to defraud Farmer's Home Administration was barred by double jeopardy clause, even though second prosecution accused defendants of trying to defraud different victim, as corporation was named in both indictments and, in addition, same time frame was involved, persons named as coconspirators were substantially the same, offenses charged in both indictments were conspiracy to defraud and to cheat, overt acts by defendants amounted to same course of conduct of transferring forged soybean certificates to company which issued checks in defendants' names representing payment for soybeans purportedly delivered to corporation, and conduct occurred in same counties. Cook v. State, 671 So. 2d 1327 (Miss. 1996).

A defendant's convictions for both murder-for-hire capital murder under § 97-3-19(2)(d) and conspiracy to commit capital murder under § 97-1-1 violated the constitutional protection against double jeopardy, since the definition of murder-for-hire in § 97-3-19(2)(d) completely encompasses the agreement or conspiracy to commit capital murder. Colosimo v. Senatobia Motor Inn, Inc., 662 So. 2d 552 (Miss. 1995).

Although a substantive offense and a conspiracy to commit are 2 separate offenses, where there is a common nucleus of operative facts existing in both indictments, and where the ultimate fact has been determined in a prior acquittal of the substantive offense by a final judgment, a conspiracy trial is barred thereafter under the constitutional double jeopardy provision. Griffin v. State, 545 So. 2d 729 (Miss. 1989).

166. —Same elements, double jeopardy.

Conviction of defendant for individual operation of chop shop violated double jeopardy under *blockburger*test, as defendant was convicted of operating the same chop shop on different days, and was convicted of joint operation of chop shop; operation of chop shop is continuing offense when based on same evidence, and offenses of individual and joint operation of chop shop arose from single transaction, same evidence, and same proof. White v. State, 702 So. 2d 107 (Miss. 1997).

Blockburger or "same-elements test" of whether double jeopardy bar applies in context of multiple punishment or multiple prosecution inquires whether each offense contains an element not contained in the other; if not, they are same offense for double jeopardy purposes. Cook v. State, 671 So. 2d 1327 (Miss. 1996).

A trial court erred in allowing a defendant to plead guilty to both capital murder and the underlying felony of burglary which elevated the murder to capital murder; sentencing the defendant separately for both felony murder and the underlying felony violated his right against double jeopardy. Fuselier v. State, 654 So. 2d 519 (Miss. 1995).

Section 63-11-30 proscribes the act of drunk driving rather than the act of negligent killing; thus, an indictment charging the defendant with 2 counts of violating § 63-11-30 based on only one act of drunk driving subjected the defendant to double jeopardy and required reversal of the conviction on the second count. Mayfield v. State, 612 So. 2d 1120 (Miss. 1992).

In a prosecution for aggravated assault arising out of an automobile accident, the trial court properly quashed the indictment on the grounds of double jeopardy and collateral estoppel where defendant had previously been acquitted of manslaughter in the death of another victim of the accident and where the pivotal issue of whether defendant had grabbed the steering wheel of the truck in which he was riding, thereby causing the collision, was the same in both cases and had previously been resolved in defendant's favor in the manslaughter prosecution. State v. Clements, 383 So. 2d 818 (Miss. 1980).

167. —Separate and distinct crimes, double jeopardy.

Under *Blockburger* double jeopardy test, defendant can be punished or tried for two offenses, if each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution. White v. State, 702 So. 2d 107 (Miss. 1997).

Since conspiracy and burglary are separate and distinct crimes requiring proof of different elements, a defendant did not have a double jeopardy claim based on the prosecution of these 2 crimes arising from the same incident, despite the fact that the prosecution chose to prosecute the defendant for these crimes at separate trials. House v. State, 645 So. 2d 931 (Miss. 1994).

A defendant's right to be free from double jeopardy was not violated, even though the defendant was tried, convicted and sentenced for 2 distinct offenses — simple assault and simple assault upon a law enforcement officer — arising from the same incident, because the defendant engaged in conduct which was severable into 2 separate offenses where he intervened in an ongoing assault to aid another perpetrator by preventing a third party from assisting the victim, and he subsequently committed an assault against the same victim by pointing his pistol at him. Moore v. State, 617 So. 2d 272 (Miss. 1993).

168. —Mistrial generally, double jeopardy.

In a rape and simple assault case, admission of photographs of doors showing what were purported to be new locks, already testified to by the victim, did not affect the fundamental fairness of the trial to the extent of constituting reversible error. Williams v. State, 868 So. 2d 346 (Miss. Ct. App. 2003).

In a defendant's second trial conducted approximately one week after the declaration of a mistrial during his first trial did not violate the constitutional prohibition against double jeopardy where the first trial ended in a mistrial declared by the court on its own motion when the prosecutor brought to his attention that a juror had failed to divulge that she was related to a law enforcement officer. Box v. State, 610 So. 2d 1148 (Miss. 1992).

169. —Mistrial at request of defendant, double jeopardy.

Defendant who moves for mistrial generally is barred from later complaining of double jeopardy violation; to overcome bar, defendant must show that error occurred and that it was committed by the prosecution purposefully to force defendant to move for mistrial. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

Double jeopardy does not arise from grant of mistrial on defendant's motion without proof of judicial error prejudicing defendant or bad faith prosecutorial misconduct. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

Alleged error committed by the prosecution in requesting and receiving information on jury panel members from circuit clerk, resulting in mistrial on defendant's request, was insufficient to trigger double jeopardy so as to bar second trial where defendant failed to prove prosecutor's intent to force defendant to request mistrial. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

170. —Capital sentencing procedure, double jeopardy.

Since Mississippi's capital sentencing procedure requires the jury to determine whether the State has proved its case for the death penalty, the double jeopardy clause will protect a defendant from any subsequent attempt to subject him or her to the death penalty after a jury has impliedly acquitted him or her of the death penalty by determining that only a life sentence was warranted. Lanier v. State, 635 So. 2d 813 (Miss. 1994).

The double jeopardy clause did not afford a capital murder defendant protection against further capital sentencing procedures where he was originally sentenced to death by a jury, the death sentence was subsequently reversed due to a confrontation clause problem but there was no finding that the State had failed to prove its case for the death penalty, and the defendant and the State then entered into a sentencing agreement which was found to be void; since there was no acquittal of the death penalty, the double jeopardy clause would not prohibit the State from seeking the death penalty at a subsequent sentencing hearing. Lanier v. State, 635 So. 2d 813 (Miss. 1994).

The prohibition against double jeopardy did not preclude the State at resentencing from enhancing a defendant's life sentence for murder with the habitual offender statute where the defendant was initially sentenced to death and therefore his status as an habitual offender was not determined until after the sentencing trial on remand; since the defendant's status as an habitual offender had not previously been determined, the finding of habitual offender status on resentencing was not barred by double jeopardy. Gray v. State, 605 So. 2d 791 (Miss. 1992).

A defendant's right to be shielded from double jeopardy was violated where the defendant was convicted and punished for both kidnapping under § 97-3-53 and capital murder while engaged in the crime of kidnapping under § 97-3-19(2)(e); since the defendant was indicted, tried and found guilty of capital murder under § 97-3-19(2)(e) with the kidnapping as the underlying felony, and thereafter exposed to trial for his life, the State was precluded from punishing him further for the § 97-3-53 kidnapping. Meeks v. State, 604 So. 2d 748 (Miss. 1992).

171. —Appellate rights, double jeopardy.

The Supreme Court was authorized to treat a circuit court's denial of a criminal defendant's motion to dismiss the indictment against him on double jeopardy grounds as a "final judgment" in a civil action under § 11-51-3, which authorizes an appeal from a final judgment, and § 9-3-9, which gives the Supreme Court jurisdiction of an appeal from any final judgment in the circuit court, since the double jeopardy claim went beyond the defendant's right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore denial of the claim was final and justified immediate determination. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art. I § 9 of the United States Constitution and Art 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

An appeal by the Mississippi State Bar to enhance an attorney's punishment for his violation of disciplinary rules did not violate the attorney's constitutional right against double jeopardy. Mississippi State Bar v. Blackmon, 600 So. 2d 166 (Miss. 1992).

172. Search and seizure—In general.

Where police found drugs in the vehicle of a minor, he was charged with possession of more than thirty grams of marijuana. The circuit court did not abuse its discretion by denying his untimely motion to transfer the case to drug court; defendant did not have an equal protection claim since no one has the right to attend the drug court. Jim v. State, 911 So. 2d 658 (Miss. Ct. App. 2005).

A defendant did not have standing to object to a search of his sister's residence and subsequent seizure of cocaine where the defendant resided elsewhere, did not possess a key to the house, did not have permission to "have the run of the place," and, aside from the familial relationship, was "little more than a babysitter." Hopson v. State, 625 So. 2d 395 (Miss. 1993).

There is no requirement that Miranda warnings precede a consent search. Jones v. State ex rel. Mississippi Dep't of Pub. Safety, 607 So. 2d 23 (Miss. 1991).

A search and seizure question was preserved for review by the Supreme Court, even though the defendant did not use the term "Fourth Amendment" or "Section 23" at the initial suppression hearing, where there was no doubt that the defendant was seeking protection of his right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article 3, § 23 of the Mississippi Constitution. Longstreet v. State, 592 So. 2d 16 (Miss. 1991).

173. —Warrant, search and seizure.

When defendant asserts that information contained in affidavit supporting application for search warrant constitutes false swearing, then reviewing court must determine, with false material set aside, whether affidavit's remaining content, together with sworn oral testimony presented to issuing magistrate, is sufficient to establish probable cause. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Even though underlying facts stated in affidavit for search warrant, considered alone, may not be sufficient to confer probable cause for issuance of warrant, oral testimony adduced before issuing magistrate, when taken together with affidavit, may sufficiently establish probable cause for issuance of search warrant under totality of circumstances test. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Affidavit supporting application for warrant to search defendant's motel room, when excised of false information, was not by itself sufficient to establish probable cause for issuance of warrant, where affidavit provided merely that officer who was executing other warrant found defendant in possession of large quantity of currency and motel room key, and motel manager verified that motel room was registered to defendant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Probable cause did not exist for issuance of warrant to search defendant's motel room based on information that defendant was present, with others, when drugs were purchased by confidential source, that defendant was present when police officers executed other warrant which yielded 4 grams of cocaine, and that officers found on defendant's person large amount of money and motel room key. Petti v. State, 666 So. 2d 754 (Miss. 1995).

The provisions of the Fourth Amendment against the issuance of a search warrant except upon probable cause are applicable to the states. Walker v. State, 192 So. 2d 270 (Miss. 1966).

174. —Consent, search and seizure.

Consent is unnecessary when seizure follows search based on probable cause. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

There is no requirement that Miranda warnings precede a consent search. Jones v. State ex rel. Mississippi Dep't of Pub. Safety, 607 So. 2d 23 (Miss. 1991).

175. —Probable cause, search and seizure.

Search of defendant's automobile was not illegal as the car was lawfully stopped for speeding and once the trooper smelled marijuana, he had probable cause to search the vehicle; the trooper's legal search of the vehicle yielded the money and the Carpet Fresh spray can. Cowan v. Miss. Bureau of Narcotics, 2 So. 3d 759 (Miss. Ct. App. 2009).

When officer is making valid stop, and has not exceeded its parameters in dealing with defendant, any search pursuant to probable cause is valid; in determining whether probable cause existed for search, it must be information reasonably leading officer to believe that then and there contraband or evidence material to criminal investigation would be found. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

Search may be made when circumstances surrounding search incident to arrest indicate probable cause, and items may be seized as a result of cursory viewing (or smelling) of area. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

Police radio broadcast describing rape suspect, which led officer to look for defendant, established probable cause for arrest and reasonable suspicion justifying stop of defendant's vehicle, and validating defendant's subsequent consent to search of vehicle, rendering rifle and flashlight recovered during vehicle search admissible. Ellis v. State, 667 So. 2d 599 (Miss. 1995).

Task of court reviewing whether search warrant was issued upon probable cause is to insure that issuing magistrate had substantial basis for concluding that probable cause existed for issuance of search warrant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Information necessary to establish probable cause must be information reasonably leading officer to believe that, then and there, contraband or evidence material to criminal investigation would be found. Petti v. State, 666 So. 2d 754 (Miss. 1995).

In determining question of probable cause for issuance of warrant, oral testimony is admissible before officer who is required to issue search warrant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Under totality of circumstances test, written affidavit supplemented by oral testimony of police officers can, as combined, establish substantial basis for magistrate's determination that probable cause existed for issuance of search warrant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

In making its review of whether search warrant was issued upon probable cause, reviewing court looks both to facts and circumstances set forth in affidavit for search warrant and as well, sworn oral testimony presented to issuing magistrate. Petti v. State, 666 So. 2d 754 (Miss. 1995).

In a prosecution for the sale of cocaine to an undercover police officer, the trial court did not err in admitting into evidence currency seized from the defendant when he was stopped at a traffic light since the officers had probable cause to arrest the defendant without a warrant where one of the officers had videotaped the defendant earlier the same day in a drug sale transaction with other undercover officers, and the stop of the defendant for running a red light was lawful and a subsequent consensual search produced evidence justifying an arrest. Curry v. State, 631 So. 2d 806 (Miss. 1994).

176. —Informants, search and seizure.

A confidential informant's tip to a sheriff's deputy provided probable cause to justify a stop, and therefore a subsequent search and seizure of the suspect's property did not violate his constitutional rights, where the officer knew the informant, information supplied by the informant had been successfully used by the officer in the past, and the informant accurately told the officer that the suspect would be traveling in a certain direction on a certain road which demonstrated a special familiarity with the suspect's affairs. Neely v. State ex rel. Tate County, 628 So. 2d 1376 (Miss. 1993).

177. —Motor vehicle, search and seizure.

Pursuant to automobile exception to warrant requirement, evidence seized without warrant from automobile is admissible if there is probable cause and exigency. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

Both probable cause and exigency prong of automobile exception to warrant requirement were satisfied, despite defendant's claim that narcotics agents should have gotten search warrant in the several hours that passed between informant's giving defendant informant's car and defendant's arrest; in recorded conversations, defendant had agreed to go out-of-state and get cocaine for informant, who had allegedly made similar transactions with defendant in past, and at time vehicle was stopped, nearness of state line and ease with which defendant could have fled agents' jurisdiction made getting search warrant impracticable. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

For purposes of exigency prong of automobile exception to warrant requirement, exceptional circumstances excusing issuance of warrant are: when vehicle searched is in motion; when officers have probable cause to believe vehicle contains contraband subject to search; and when it is impracticable to secure warrant because vehicle can and may be removed from jurisdiction. Sanders v. State, 678 So. 2d 663 (Miss. 1996), reh'g denied (Miss. Aug. 15, 1996).

In a prosecution for possession of crack cocaine, the search of an automobile was not valid as a search incident to an arrest for driving with a suspended license where the police officer searched the car after the defendant had been frisked, handcuffed and placed in the back seat of the officer's patrol car, and therefore the officer could have had no reasonable fear that the defendant might have had a weapon or could have been in a position to destroy incriminating evidence from the crime which led to his arrest. Ferrell v. State, 649 So. 2d 831 (Miss. 1995).

In a prosecution for possession of crack cocaine, the search of an automobile was not valid under the plain view exception to the search warrant requirement where the police officer entered the car to retrieve the keys, he saw an ordinary matchbox on the passenger seat and opened it to find only matches, and he then noticed another matchbox between the 2 front seats and opened it to find that it contained 9 rocks of crack cocaine; no incriminating evidence was visible at the time the officer entered the car, since the mere presence of a matchbox on the front seat of a car ordinarily cannot be termed an incriminating object in plain view. Ferrell v. State, 649 So. 2d 831 (Miss. 1995).

It was permissible for a police officer to stop an automobile and detain the occupants until a warrant to search the car was obtained where the officer had "staked out" the highway based on phone calls from a confidential informant who had given him reliable information in the past, the officer was familiar with the occupants of the car and the informant had given him their names, and the car make, license plate, and ownership of the car were confirmed by the officer before he pulled the car over. Haddox v. State, 636 So. 2d 1229 (Miss. 1994), modified on denial of rehearing, 1994 Miss. LEXIS 323 (Miss. June 16, 1994).

Substantial evidence existed to support a finding that probable cause existed for a warrantless search of a defendant's automobile where there was probable cause to obtain a warrant to search the defendant's home, and evidence found in the home provided probable cause to believe that a murder may have been committed in the home and that the victim's body may have been placed in the automobile for transportation. Spivey v. Mowdy, 617 So. 2d 999 (Miss. 1992).

A trial court did not err in overruling a capital murder defendant's motion to exclude certain physical evidence seized from his automobile, even though the search was conducted pursuant to consent given by the defendant's wife who may not have had mutual use of the car, since the police were reasonable in their belief that the wife had common authority, mutual use, and joint control over the car where the wife held title to the car, she told the police she owned the car and provided them with keys, and she never indicated that the car had been in the defendant's sole possession. Mettetal v. State, 615 So. 2d 600 (Miss. 1993).

Police officers who set up a roadblock after receiving information that employees of two nearby factories were driving without licenses and who were checking all drivers did not violate defendant's constitutional rights in stopping his automobile and detaining its occupants and, upon smelling the odor of burning marijuana emanating from defendant's car, had probable cause to search it; the police officers were also authorized to seize the marijuana in defendant's car where one of the officers observed a purse or bag in the lap of defendant's wife with the corner of a plastic bag protruding therefrom in which he saw a green leafy substance that he suspected to be marijuana. Mettetal v. State, 615 So. 2d 600 (Miss. 1993).

It was neither a trespass nor an unlawful search, nor was it illegal for a deputy sheriff to look into a station wagon recently occupied by three persons subsequently charged with burglary, and through the windows of the vehicle to observe and consider marks and other indicia that tended to establish that the vehicle had been used for the transportation of property allegedly stolen. Wilson v. State, 186 So. 2d 208 (Miss. 1966).

177. —Blood and bodily fluids, search and seizure.

An officer's failure to inform the defendant that he had a right to refuse the officer's request for a blood sample did not render the test results inadmissible in a manslaughter prosecution against the defendant where the officer had probable cause to obtain the blood sample in that the officer knew that the defendant was the driver of an automobile which had collided head on with another vehicle, the collision occurred on a straight and level highway when the road condition was dry, the officer knew that at least two people were dead in the vehicle which the defendant hit, the officer had observed a beer in the defendant's vehicle, and the defendant had slurred speech and dilated pupils. For a search which would otherwise be illegal, absent consent, knowledgeable waiver of one's constitutional right not to be searched is guaranteed by Article 3, § 23 of the Mississippi Constitution. However, blood searches which are based upon probable cause are not illegal, and, therefore, the question of the defendant's knowledgeable waiver was not relevant. Longstreet v. State, 592 So. 2d 16 (Miss. 1991).

178. —Abandonment of property, search and seizure.

In a prosecution for possession of a controlled substance, cocaine which had been discarded by the defendant was not the fruit of an illegal search and seizure, and was therefore properly admitted into evidence, since the defendant was not "seized or arrested" when he discarded the drugs where the defendant did not stop when police officers ordered him to do so for the purpose of checking his identification, and he threw down the cocaine while he was walking away from the officers; the defendant was not restrained or stopped at the time he discarded the cocaine, and therefore the cocaine was abandoned and not the fruit of an unlawful seizure or arrest. Harper v. State, 635 So. 2d 864 (Miss. 1994).

179. —Search incident to arrest.

Search of passenger compartment of defendant's car and of bag found therein was valid as justified by search incident to arrest and probable cause; officer had pulled defendant over for running traffic light, defendant was placed under lawful arrest for three failures to appear for traffic violations and was seated in patrol car, defendant's request for his money bag sent officer back to vehicle, officer then smelled marijuana, giving him probable cause to search further for source of smell, and search for money bag in passenger compartment, in which defendant had been only passenger, followed immediately after arrest. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

The search of a defendant's person incident to his arrest for carrying a concealed weapon was reasonable within the confines of the Fourth Amendment, even though the search took place after the defendant was taken to the county jail rather than at the time and place of the arrest; thus, the defendant's attorney was not deficient in failing to move to suppress the evidence obtained as a result of this search on the ground that the search was illegal. Rankin v. State, 636 So. 2d 652 (Miss. 1994).

The search of a defendant's jacket incident to his arrest for carrying a concealed weapon was reasonable within the meaning of the Fourth Amendment where the arresting officers saw the defendant take the jacket off and place it on a guard rail beside him, since the jacket was in the area within the defendant's immediate control at the time of his arrest; thus, the defendant's attorney was not deficient in failing to move to suppress the evidence obtained as a result of this search on the ground that the search was illegal. Rankin v. State, 636 So. 2d 652 (Miss. 1994).

180. —Self-incrimination — In general.

Defendant's due process rights were not violated by a prosecutor's question regarding the invocation of the right to remain silent because defense counsel referred to the issue during direct examination;

moreover, defendant failed to invoke the right during questioning after an arrest for sexual battery. McCoy v. State, 878 So. 2d 167 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 910 (Miss. 2004).

A police detective's testimony concerning the fact that the defendant fainted after he was informed of his Miranda rights was not a violation of the defendant's constitutional rights since the defendant did not give a statement and the detective did not comment on his silence; the detective's stating that the defendant fainted was not the same as stating that the defendant refused to testify. Stogner v. State, 627 So. 2d 815 (Miss. 1993).

Privilege against self-incrimination exists in bar disciplinary proceedings, even though no criminal charges are pending against attorney being charged at time, although questions concerning personal history, unrelated to charges in formal complaint, should be answered. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

One who is required by the power of the state to testify to his hurt is immune from prosecution for the thing for which he was required to testify, whether that testimony is used by the state or not. Kellum v. State, 194 So. 2d 492 (Miss. 1967).

It is not necessary for arresting officer to summon member of suspect's family or friend or lawyer when arrest is made to attend interrogation to be conducted by officers and confession was not involuntary for this reason when accused was arrested in presence of his father and mother, who knew that he was being incarcerated, and there was no refusal to permit attorneys of prisoner to have access to him after they were employed in case. Moore v. State, 207 Miss. 140, 41 So. 2d 368 (1949), appeal dismissed and cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

181. —Advisement of Miranda rights, self-incrimination.

Licensed social worker employed by state was not required to inform defendant of his *Miranda* rights before interview to investigate allegations of sexual battery; social worker was not law enforcement official, lacked authority to arrest defendant, and had duty to report any suspected abuse. Hennington v. State, 702 So. 2d 403 (Miss. 1997).

A defendant's statements should have been suppressed where he invoked his right to remain silent and to have an attorney present after he was taken into custody and Mirandized by Tennessee authorities, and he was subsequently Mirandized by Mississippi officers without his having initiated the conversation. Duplantis v. State, 644 So. 2d 1235 (Miss. 1994), cert. denied, 514 U.S. 1123, 115 S. Ct. 1990, 131 L. Ed. 2d 876 (1995), appeal after remand, 708 So. 2d 1327 (Miss. 1998).

A warning advising a suspect "that anything he said might be used against him in a court of law" is constitutionally adequate; an officer is not required to advise a suspect of all specific possible criminal consequences. One of the virtues of Miranda is its clarity; the warnings are the same in every case. Adding the requirement that the officer inform the suspect of specific criminal consequences would add a component variable from case to case and undermine the simplicity and bright-line character of the rule as it stands. Fowler v. State, 566 So. 2d 1194 (Miss. 1990).

In a prosecution for capital murder (§ 97-3-19(2)(e)), the trial court did not err in failing to suppress defendant's confession, despite defendant's contention that the confession was not voluntary because he was concerned that the police were implicating his brother in the murder when in fact his brother was not involved, where the record was replete with evidence that defendant was given his Miranda rights on several occasions, and where the record would not support a conclusion that his concern was used by officers to overreach him. Reddix v. State, 381 So. 2d 999 (Miss. 1980), cert. denied, 449 U.S. 986, 101 S. Ct. 408, 66 L. Ed. 2d 251 (1980), habeas corpus granted, 554 F. Supp. 1212 (S.D. Miss. 1983), aff'd in part, rev'd in part and remanded, 728 F.2d 705 (5th Cir. 1984), reh'g denied, 732 F.2d 494 (5th Cir. 1984), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984), on subsequent appeal, 547 So. 2d 792 (Miss. 1989).

In the absence of a clear showing that the warnings required in Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 394, were given, the testimony of a sheriff as to certain admissions alleged to have been made to him by the defendant which was disputed by the defendant's evidence, should not have been admitted. Williams v. State, 220 So. 2d 325 (Miss. 1969).

182. —Continued interrogation after defendant's invocation of rights, self-incrimination.

A defendant's statements should have been suppressed where he invoked his right to remain silent and to have an attorney present after he was taken into custody and Mirandized by Tennessee authorities, and he was subsequently Mirandized by Mississippi officers without his having initiated the conversation. Duplantis v. State, 644 So. 2d 1235 (Miss. 1994), cert. denied, 514 U.S. 1123, 115 S. Ct. 1990, 131 L. Ed. 2d 876 (1995), appeal after remand, 708 So. 2d 1327 (Miss. 1998).

A defendant's confession should not have been admitted into evidence where the confession was obtained by law enforcement officers after the defendant made a request for an attorney to the justice court judge who was considering binding him over to await the action of the grand jury, and one of the officers heard the defendant's request. Although the defendant may only have meant that he wanted a lawyer for court proceedings and did not want a lawyer to advise him before being questioned about the crime, the officers did not seek to make such a determination, but simply proceeded to question the defendant, knowing that he was a cocaine addict and to some extent, because of such addiction, judgment-impaired at the time. No intelligent, knowing waiver of the right to counsel, which the defendant had expressed to the justice court judge, could be found from an officer testifying that he simply orally gave the defendant the Miranda warning. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

Once an accused has requested an attorney, it is improper for either the same or another law enforcement officer to question the accused about his or her criminal conduct. If the accused indicates in any manner at any time prior to or during questioning that he or she wishes to remain silent or to have access to counsel, the officers must cease interrogation. When the accused asks for counsel, the officers may not resume interrogation until counsel has been provided, except where the accused voluntarily reinitiates the discussion of the charges. If the accused requests access to counsel, all officers of the prosecution force are bound thereby, including those who have no actual knowledge of the request. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

183. —Admissions following unlawful arrest, self-incrimination.

In a prosecution for murder arising out the deaths of two people during a fire in a house owned by the defendant's brother-in-law, the conviction would be reversed and the case remanded for a new trial where the trial court erred in admitting into evidence a written inculpatory statement made by the defendant after he had been arrested by the police where there was no evidence to establish probable cause for the arrest and where no event or combination of events transpired to sever the connection or stream of closely related events between his illegal detention and the written statement which was given two hours after an oral statement which had been ruled inadmissible by the trial court. Dycus v. State, 396 So. 2d 23 (Miss. 1981).

184. —Capacity of defendant to make knowing waiver, self-incrimination.

The trial court in a capital murder prosecution properly concluded at the end of a lengthy suppression hearing that defendant's confession was admissible as having been freely and voluntarily given, notwithstanding the fact that defendant was mentally retarded, where there was no evidence of any threats, promises, or any form of physical abuse or coercion, where defendant never requested the assistance of counsel, where there was no evidence that on any occasion during the questioning defendant had been under the influence of drugs or liquor, where the record was replete with the inference that the detective who interrogated defendant had been courteous, considerate, patient and persistent, and where that detective testified that the confession had been given at a time when defendant had understood and appreciated the gravity of the charges against him, and that it had been given at a time when defendant was fully aware of his constitutional privilege against self-incrimination and his right to counsel. Neal v. State, 451 So. 2d 743 (Miss. 1984), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984), denial of post-conviction relief aff'd, 687 So. 2d 1180 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

185. —Refusal to sign waiver form, self-incrimination.

A murder defendant's initial refusal to sign a waiver of rights form did not constitute a demand for an attorney where he was not questioned again until more than 32 hours had lapsed when he was presented with incriminating physical evidence connecting him to the crime, and he was again advised of his rights before further questioning; thus, admission of his confession into evidence did not violate his constitutional right against compulsory self-incrimination or right to an attorney. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel were not violated by the admission of his confession into evidence, even though the confession was obtained after the defendant initially refused to sign a waiver of rights form and had stated that he would not sign anything until he talked to his mental health counselor. The defendant's refusal to sign the waiver of rights form was not a per se invocation of his Fifth Amendment rights. Additionally, the defendant's request for a mental health counselor was not a per se invocation of his Fifth Amendment rights; a request for someone other than an attorney does not invoke a defendant's Fifth Amendment rights, and a mental health counselor is not qualified to protect a defendant's Fifth Amendment rights. Similarly, neither the defendant's request to speak to his mental health counselor nor his temporary refusal to sign the waiver form constituted a request for counsel so as to invoke his Sixth Amendment right. Mohr v. State, 584 So. 2d 426 (Miss. 1991).

186. —Voluntary admissions, self-incrimination.

In a possession of marijuana case, defendant was not denied his due process rights in the revocation of his post-release supervision as there was evidence defendant ha waived his rights to a hearing and that he had admitted to violating his probation. Hughes v. State, 901 So. 2d 1274 (Miss. Ct. App. 2004).

A defendant's confession was freely and voluntarily given, and was therefore admissible into evidence in his murder trial, where law enforcement officers testified that he was given all the Miranda warnings prior to giving his confession and that he did not ask for an attorney at any time, he was familiar with his constitutional rights as evidenced by his refusal to sign a waiver form and the fact that he had previously been convicted of a felony, and his video-taped confession did not suggest any coercion. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

187. —Physical evidence generally, self-incrimination.

Defendant was not denied constitutional right to fair trial where he alleged that small particle of skin from abrasion on his right index finger was material, exculpatory evidence that had been intentionally destroyed or lost by state, where there was nothing in testimony suggesting prosecutorial bad faith and where record contained little suggesting that skin particle would have played significant role at trial. Tolbert v. State, 511 So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

188. —Breathalyzer tests, self-incrimination.

In a prosecution for driving a motor vehicle while under the influence of intoxicating liquor, the admission into evidence under § 63-11-41 of the defendant's refusal to take a breathalyzer test did not violate the Fifth Amendment to the

United States Constitution and Article 3, § 26 of the Mississippi Constitution, even though the defendant was not specifically warned that his refusal could be admitted into evidence against him; the penalty of introducing a refusal serves an important state interest in encouraging defendants to submit to a chemical test, and as the refusal is physical instead of testimonial, its introduction into evidence violates neither the Fifth Amendment nor § 26. Ricks v. State, 611 So. 2d 212 (Miss. 1992).

189. —Fingerprints, self-incrimination.

Obtaining fingerprint evidence violates the Fourth and Fourteenth Amendments to the federal constitution, so as to make such evidence inadmissible in a state criminal trial, where (1) the fingerprints were obtained while the accused was detained at police headquarters without probable cause for his arrest, (2) the detention at police headquarters of the accused was not authorized by a judicial officer, (3) the accused was unnecessarily required to undergo two fingerprinting sessions, and (4) the accused was not merely fingerprinted during the first of the two sessions, but was also subjected to interrogation. Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969).

The temporary detention of a defendant for fingerprinting in the course of an investigation without his being booked, charged, or incarcerated did not constitute an arrest, and evidence derived therefrom was not inadmissible at the defendant's trial on charges of burglary and assault and battery with intent to kill. Reeves v. Reeves, 210 So. 2d 780 (Miss. 1968).

190. —Hearsay evidence, self-incrimination.

Invoking Fifth Amendment privilege against self-incrimination makes the witness unavailable and any hearsay statements from another witness about what the unavailable witness said fall within hearsay exception. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

191. —Comment upon exercise of right to remain silent, self-incrimination.

Government's exploitation of silence, after government has helped induce that silence by informing defendant of his right to remain silent, violates due process. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Alternative tests for determining whether prosecutor's or witness's remarks constitute comment on a defendant's silence are whether "manifest intent" was to comment on defendant's silence or, alternatively, whether character of remark was such that jury would "naturally and necessarily" construe it as comment on defendant's silence, determining both intent of prosecutor and character of remarks in relevant context. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Prosecution is prohibited from making direct comment, or reference by innuendo or insinuation, to defendant's failure to testify on his or her own behalf. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Right not to give compelled testimony is violated by direct statement regarding defendant's decision not to testify, or comment which could reasonably be construed by jury to be comment about defendant's failure to testify. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prosecutor is prohibited from commenting on defendant's failure to testify, whether by direct comment or by innuendo and insinuation. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutorial comment on defendant's failure to testify is incurable, and defendant is entitled to mistrial; instruction to jury to disregard prosecutor's comments is insufficient to correct impropriety. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutor may comment on lack of any defense, and such comment is not construed as reference to defendant's failure to testify through innuendo and insinuation. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Whether prosecutorial comment is improper comment on defendant's failure to testify is determined on facts and circumstances of each case; question is whether comment can reasonably be construed as comment upon failure of defendant to take stand. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutor did not comment on defendant's failure to testify by stating that sole issue, in prosecution against defendant for arson, was whether defendant recruited arsonist to burn building on the day in question. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by pointing out that not one defense witness testified that prosecution witness was lying. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating that no evidence was presented, in prosecution against defendant for arson, that arsonist, allegedly recruited by defendant to burn building on the day in question, was a professional criminal; rather, comment merely referred to paucity of evidence supporting defense theory that arsonist burned building to get revenge on defendant. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

192. —Impeachment, self-incrimination.

Defendant's post-arrest statement, that victim "come out on me with a gun," was sufficiently inconsistent with his trial testimony, that third-party shook defendant's rifle and shooting was accidental, to establish that prosecutor's comments on statement were designed and had effect of highlighting arguable inconsistency, rather than commenting improperly on defendant's exercise of his right to remain silent. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Where defendant's postarrest statement addresses same subject matter as his trial testimony and is arguably inconsistent with that testimony, prosecutor's questions and comments designed to highlight inconsistency do not violate due process. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

When witness invokes his Fifth Amendment right, his response is not the proper subject for impeachment. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Where a defense witness invoked the Fifth Amendment, so that his testimony on direct-examination yielded nothing, the trial court erred in permitting the prosecutor to cross-examine the witness concerning a prior statement made by him; when the prosecutor, through the use of leading questions, parades before the jury the "testimony" of a silent witness, this violates the confrontation clause since the prosecutor cannot take the stand to be cross-examined by the defendant about the silent witness' "testimony". Balfour v. State, 598 So. 2d 731 (Miss. 1992).

A defense witness who invoked the Fifth Amendment could not be impeached by the State with respect to a prior statement made by him since the silence of a witness who invokes the Fifth Amendment does not constitute a denial which may be impeached. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

Impeachment evidence as well as exculpatory material comes within the scope of the Brady rule; failure to produce does not depend upon the good faith or bad faith of the prosecution, nor upon the specificity of the defense request. Malone v. State, 486 So. 2d 367 (Miss. 1986).

193. —Arguments of counsel, self-incrimination.

Where defendant's testimony at trial does not deal with same subject matter as his pretrial statement, prosecutor's remarks on omissions in pretrial statement is considered plea for jury to infer guilt or other negative inferences from defendant's exercise of his *Miranda*rights. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Prosecutorial statements that are either intended to or have necessary effect of raising negative inference simply because of defendant's exercise of his right to remain silent are prohibited, but where prosecutor's questions and comments are aimed at eliciting explanation for arguably prior inconsistent statement, no due process violation occurs. Pitts v. Anderson, 122 F.3d 275 (5th Cir. Miss. 1997).

Even if prosecutor's statement during closing argument that referred to witness' testimony, in which witness told defense counsel to ask defendant if he had told witness about committing crime, was improper reference to defendant's refusal to testify, statement did not require reversal; defense counsel did not object when witness made comment, prosecutor's remarks could be characterized as summary of witness' testimony rather than remark on defendant's failure to testify, evidence supported conviction beyond reasonable doubt without prosecutor's statement, and comment had almost no persuasive force. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Prosecutor did not improperly comment on defendant's failure to testify during sentencing phase of capital murder trial when he made comments concerning defendant's credibility, where defendant had testified during guilt phase and stipulated to use of guilt phase testimony during sentencing phase. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that it was not likely that government witness fabricated his testimony, in that if he had, he would have fabricated a better story; rather, comment merely referred to paucity of evidence supporting defense theory witness was publicity seeker who would fabricate testimony. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that there was no testimony supporting defense theory that defendant could not have committed the crime inasmuch as he was doctor who derived sense of closeness from the community because he was "their" doctor; rather, comment merely referred to paucity of evidence supporting that defense theory. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that there was no testimony supporting defense theory that arsonist was blackmailing defendant; rather, comment merely referred to fact that blackmail theory was put forth by defense attorneys rather than by defense witnesses. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Defendant's constitutional interest in privilege against compelled self-incrimination is balanced on case-by-case basis against rule allowing attorneys wide latitude in making closing arguments, except where attorney makes direct reference to defendant's failure to testify. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutor did not make improper comments on defendant's failure to testify, and defendant was thus not entitled to mistrial, when prosecutor commented about what defendant might or might not have said to arresting officer, objected to defense counsel's statement that defendant was a family man who should be sent home to his family, and noted that jury had not heard any proof about where defendant was going if jury did not convict him. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

A prosecutor's remarks during closing argument did not constitute improper comment on the defendant's decision not to testify where the prosecutor did not comment on the defendant's failure to take the stand, but merely attempted to turn the jury's attention to the defendant's confession to the police which had been admitted into evidence. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A prosecutor's comments on the defendant's failure to testify reached a constitutional dimension so egregious that failure on the part of the defense counsel to make a proper objection either at trial or in his motion for a new trial did not waive the error where the prosecutor made 4 separate statements telling the jury that the State's witness' testimony was "unopposed," "unimpeached," "unrebutted," and that there was "no evidence whatsoever toward their unreliability." Whigham v. State, 611 So. 2d 988 (Miss. 1992).

A prosecutor did not improperly comment during closing argument on the defendant's right to remain silent where the prosecutor remarked that the victim could not talk because she was dead and stated that only the defendant and God knew what happened, but he did not observe the defendant's silence during trial; the prosecutor's comments would be a reference to the defendant's failure to testify only if innuendo and insinuation were employed. Alexander v. State, 610 So. 2d 320 (Miss. 1992).

A prosecutor improperly commented during closing argument on a capital murder defendant's failure to testify where the prosecutor stated that the defendant "hasn't told you the whole truth yet," that "you still don't know the whole story," and that the defendant was the only person alive who could give the whole story. Butler v. State, 608 So. 2d 314 (Miss. 1992).

A prosecutor did not improperly comment on the defendant's failure to testify when he stated during closing argument: "That's what you have got before you, and that's all you have got before you. All the evidence in this case points to one thing and one thing only"; the prosecutor's comment related to the evidence presented in the trial by both the State and defense as a whole, rather than the failure of the defendant to take the stand. Rogers v. State, 599 So. 2d 930 (Miss. 1992).

In a prosecution for rape, statements made by the prosecutor concerning defendant's failure to deny guilt when arrested were improper but did not mandate reversal of the conviction where the defense attorney neither asked the trial court to instruct the jury to disregard the statements, nor moved for a mistrial, thereby failing to properly preserve the issue for appeal, and where such error was harmless in view of the overwhelming evidence of defendant's guilt beyond a reasonable doubt. Austin v. State, 384 So. 2d 600 (Miss. 1980).

194. Confessions—In general.

Because defense counsel, at the very least, had notice of the fact that the mental examination would take place as he signed off on the examination order, the trial court did not err in failing to suppress the inmate's confessions. Crawford v. State, 867 So. 2d 196 (Miss. 2003), writ of certiorari denied by 543 U.S. 866, 125 S. Ct. 205, 160 L. Ed. 2d 110, 2004 U.S. LEXIS 6519, 73 U.S.L.W. 3210 (2004).

By alleging that his confession was coerced, defendant secured due process entitlement to reliable determination that his confession was not given as a result of coercion, inducement, or promises. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

In order to establish the admissibility of a murder defendant's confession, the State was not required to offer as witnesses law enforcement officers who allegedly yelled at the defendant and were abusive when he was initially questioned, since the alleged statements made by the officers had no bearing on the defendant's confession which was made 2 days later after he was given the Miranda warnings. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

In a prosecution for driving a motor vehicle while under the influence of intoxicating liquor, the defendant's statement to a police officer that the breathalyzer machine would "probably show I'm in a coma" was essentially a confession that the defendant was drunk, and was therefore admissible into evidence as a voluntary statement where it was made spontaneously after the defendant had been given the Miranda warnings. Ricks v. State, 611 So. 2d 212 (Miss. 1992).

A defendant's out of court signed statement was properly used to impeach his testimony, though the statement was inadmissible in the State's case-in-chief because the defendant signed the statement without being informed of his Miranda rights, since the statement was voluntarily given where the defendant was not threatened or mistreated when he made the statement, no one made any promises to him, he was not intoxicated or under the influence of any drugs, and the defendant admitted that he could have stopped talking at any time and could have left the room. Bowen v. State, 607 So. 2d 1159 (Miss. 1992).

A trial court followed the correct legal standards to determine the admissibility of the content of a defendant's confession and there was substantial evidence to support a finding of voluntariness, where no pre-trial motion to suppress was filed, the trial court conducted a hearing in chambers during the trial after the defendant's in-court objection to the voluntariness of his confession, the trial court found that the State had established a "proper predicate" on the testimony of a fire marshal who was present at the time of the confession, and the defendant did not rebut the State's predicate during arguments on the motion, so that the State was not required to produce all of the witnesses to the confession to establish voluntariness. Cox v. State, 586 So. 2d 761 (Miss. 1991).

195. —Capacity of defendant, confessions.

Defendant's age, 17 years, did not have any bearing on whether he had the ability to voluntarily waive his Miranda rights. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Defendant's statements to police were voluntary and admissible against him where he understood the content and substance of his Miranda warnings and there was no coercion and, even though defendant had an IQ of 67, expert was of the opinion that he would understand the terms of the waiver if it was explained to him. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

There is no per se rule that mental retardation renders confession involuntary and inadmissible. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Confession is not rendered involuntary simply because person making it is mentally weak. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Although there is no constitutional requirement to examine the mental capacity of the defendant in making a determination as to whether a confession was voluntary, it remains true as a matter of evidence that before any confession is admissible, it must have been given by a person with enough intelligence to be a competent witness. Butler v. State, 608 So. 2d 314 (Miss. 1992).

There is no constitutional requirement to examine the mental capacity of the defendant in making a determination as to whether a confession is free and voluntary; the focus is directed entirely to the conduct on the part of the State. Butler v. State, 608 So. 2d 314 (Miss. 1992).

The evidence was sufficient to support a finding that the defendant knowing, intelligently, and voluntarily waived his Miranda rights, even though the defendant had been drinking prior to his arrest, he had not slept for nearly 24 hours prior to waiving his rights, and he had periodic bouts of crying, where the defendant repeatedly acknowledged that he understood his Miranda rights and expressed this acknowledgment both orally and in writing, he was 49 years old, had a high school and vocational education, and considered himself to be a "very intelligent person," his criminal past provided him with some experience and knowledge about a suspect's Miranda rights, 5 witnesses testified that he did not appear to be impaired by alcohol and did not slur his speech, the defendant testified that he had been a chronic drinker, the defendant was for the most part calm and cooperative throughout the investigation and particularly at the moment he waived his rights, the defendant had meticulously schemed to "cover his tracks" to avoid arrest which reflected a coherent, unimpaired state of mind, and the defendant's taped confession contained the admission that no one had "threatened," "intimidated," or "promised him anything." Holland v. State, 587 So. 2d 848 (Miss. 1991).

A defendant's confession was not the product of mental deficiency, and therefore the defendant 'knowingly' confessed, even though there was evidence that the defendant was mildly mentally retarded, where the defendant graduated from high school though he flunked 3 grades in school, there was no evidence that he was ever placed in special education classes, he admitted that he could read and write and that he understood the charges against him, and all who witnessed the interrogation said they saw no evidence that the defendant suffered mental abnormalities such that he could not understand the interrogation process or its consequences. Veal v. State, 585 So. 2d 693 (Miss. 1991).

196. —Pre-arrest statements, confessions.

Incriminating statements made by a murder defendant were properly admitted into evidence where the defendant was not under arrest at the time of the questioning, the law enforcement officers were merely seeking information about a missing person, the defendant voluntarily went with the officers to the sheriff's office, he was free to leave, and he was taken home by an officer when the questioning was over. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

197. —Delay in release or arraignment, confessions.

Delay of approximately 24 hours between time of arrest and initial appearance before magistrate did not warrant suppression of confession given by defendant prior to initial appearance; defendant was arrested by warrant while he was already in jail, defendant was informed of his right to remain silent, his right to attorney, and his right to stop answering questions at any time and to ask for attorney, and defendant did not ask for appointment of counsel on charge for which he was arrested. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

The delay from the time of a defendant's arrest until he was taken before a judicial officer did not violate Rule 1.04, Miss. Unif. Crim. R. Cir. Ct. Prac. and the 4th Amendment to the United States Constitution where his initial hearing was held within 48 hours of the time he was taken into custody for questioning, and there was no indication that the officers were purposely holding him in custody to gather sufficient evidence to justify his arrest; thus, his confession was not a product of any delay in taking him before a magistrate and was therefore admissible. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

The failure to provide a defendant with an initial appearance until five days after his arrest even though a judge was available at all times constituted reversible error where the defendant gave a confession in the absence of counsel and in violation of his right to counsel as a consequence of the delay, and the defendant's conviction for capital murder was based entirely on his confession. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

Detention of accused without commitment is only one factor for consideration in reaching conclusion as to whether or not confession is free and voluntary, and it is only where confession is obtained as result of unreasonable delay in taking prisoner before magistrate for examination into his case that his admissions of guilt under such psychological pressure are inadmissible. Moore v. State, 207 Miss. 140, 41 So. 2d 368 (1949), appeal dismissed and cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

Confession is not obtained as result of illegal detention and there is no unnecessary delay in taking prisoner before magistrate for inquiry into case when prisoner is arrested at 5:30 p. m., is questioned about hour with reference to other crimes, there is hour or more intermission and he admits murder at about 9:30 p. m., and magistrate and other courts are open only within legal hours during daytime. Moore v. State, 207 Miss. 140, 41 So. 2d 368 (1949), appeal dismissed and cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

198. —Voluntariness, confessions.

The court rejected defendant's claim that confessions were involuntary because (1) rights were read to defendant, (2) defendant acknowledged understanding those rights, (3) defendant exhibited no erratic behavior calling into question the voluntariness of a desire to confess, and (4) no evidence of police coercion was found, and thus there was no violation of U.S. Const. amend. XIV. Martin v. State, 854 So. 2d 1004 (Miss. 2003).

Trial court did not err when it failed to suppress defendant's statement where the State made out a prima facie case of voluntariness by demonstrating in the suppression hearing that contact was initiated by defendant and multiple Miranda warnings were given; the arresting officer testified as to the voluntariness of the statements and defendant made no attempt to refute the officer's testimony. Granger v. State, 853 So. 2d 830 (Miss. Ct. App. 2003).

Generally, for confession to be admissible, it must have been given voluntarily and not given as result of promises, threats, or inducements. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Finding that defendant understood his right to remain silent was supported by defendant's testimony that he understood that he had right to stop answering questions and by videotape of confession showing that detective explained to defendant that he could stop answering questions at any time and have attorney appointed, which defendant indicated he understood. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

A defendant's confession was freely and voluntarily given, and was therefore admissible into evidence in his murder trial, where law enforcement officers testified that he was given all the Miranda warnings prior to giving his confession and that he did not ask for an attorney at any time, he was familiar with his constitutional rights as evidenced by his refusal to sign a waiver form and the fact that he had previously been convicted of a felony, and his video-taped confession did not suggest any coercion. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

The principle enunciated in Agee v. State (1966, Miss.) 185 So. 2d 671 with respect to proving the voluntariness of a confession remains sound, but its importance to an accused has receded in view of the strong affirmative mandates of Miranda; only those persons who are claimed to have induced a confession through some means of coercion are required to be offered by the State as a witness under Agee. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A trial court did not err in allowing a defendant's statement to the police into evidence, in spite of the defendant's argument that his statement was not voluntary because of his age, education, and intelligence, where the defendant was 17 years old at the time of his arrest and interrogation, he had an 8th grade education, his parents were uneducated, he had suffered head injuries as a young child which allegedly sometimes caused impairment of his mental faculties, and the arresting officers testified that the defendant was read his Miranda rights at least twice before any interrogation, he stated that he understood those rights and the waiver of those rights, and he stated that he did not have any trouble reading or writing. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A defendant's waiver of his right to counsel and his right to remain silent when he executed a written waiver prior to confessing could not be found to be voluntary where his confession given immediately thereafter was involuntary due to improper collusion by law enforcement interrogators, since the defendant's waiver of his right and his confession were inextricably bound and were the product of prolonged coercive police interrogation. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

Competency of confession should be ascertained preliminarily to its introduction before jury, and accused has right to take witness stand during such preliminary hearing and limit his testimony to facts bearing upon whether confession was free and voluntary, and his testimony is entitled to be considered and weighed, along with other evidence, by trial judge upon fact whether accused made confession freely and without hope of reward or fear of punishment, and defendant has right not to take stand and testify. Summerville v. State, 207 Miss. 54, 41 So. 2d 377 (1949).

Right of accused in rape prosecution to testify in preliminary hearing on competency of his confession and to limit his testimony to facts bearing upon whether confession was free and voluntary cannot be limited by trial judge by condition that defendant testify before jury on merits and no conditions are imposed upon accused by trial court who informs him that he may take witness stand "at this stage of the proceedings merely to contest the freedom of the confessions." Summerville v. State, 207 Miss. 54, 41 So. 2d 377 (1949).

The due process clause of the Fourteenth Amendment invalidates a state court conviction grounded in whole or in part upon a confession which is the product of other than reasoned and voluntary choice. Lee v. Mississippi, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330 (1948), conformed to, 203 Miss. 264, 34 So. 2d 736 (1948).

Use of a confession of guilt by the accused extorted by brutality and violence to obtain a conviction of crime is a denial of due process of law even though coercion was not established until after the confession had been admitted in evidence and counsel for the accused did not thereafter move for its exclusion. Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

199. —Inducements or threats, confessions.

Defendant's confession was not unlawfully induced by detective's comment that defendant should tell truth and that "the truth shall set you free"; defendant had history of legal problems and had opportunity to become familiar with criminal justice system, there was nothing to indicate that defendant placed trust or confidence in detective, and defendant testified that he was not offered any promises or inducements to make written or videotaped confessions. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Determination that defendant was not threatened into making confession was supported by testimony of all detectives present at time of alleged threat, in which detectives all denied that threat was made. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

A defendant's statement to police was admissible and not the product of improper inducement, even though a police officer had told the defendant that "it'd be best for him to tell us to help himself," where the defendant received Miranda warnings twice, he understood his constitutional rights, his statement was a denial rather than a confession, no specific promise was made to him by a law enforcement officer, and he maintained that he would have told the truth regardless of the officer's comments to him. Chase v. State, 645 So. 2d 829 (Miss. 1994), cert. denied, 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995), reh'g denied, 515 U.S. 1179, 116 S. Ct. 20, 132 L. Ed. 2d 903 (1995), post-conviction relief denied, 699 So. 2d 521 (Miss. 1997).

The trial court in a capital murder prosecution erred in refusing to suppress the defendant's confession as involuntary where a former teacher and retired minister was called in by the sheriff to meet privately with the defendant, the minister communicated to the defendant, at the sheriff's direction, the notion that there might be a chance for mercy if he volunteered to cooperate, the minister and the defendant discussed the death penalty and the religious ramifications of the defendant's action, a sheriff's deputy told the defendant that he thought it would look better if the defendant confessed, and an investigator who conducted the interrogation with the sheriff admitted that the defendant may have been given the impression by the investigator and the sheriff that cooperation could be of some benefit. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

A trial court erred by admitting testimony concerning a defendant's confession where the defendant testified that he could not recall being read his Miranda rights and that he thought he would be incarcerated that same day if he did not confess, the prosecution did not produce all officers who were present when the defendant was questioned and his confession given, and no adequate reason for the officers' absence was given. Lettelier v. State, 598 So. 2d 757 (Miss. 1992).

Statements made by sheriffs to a defendant that "it was always best to tell the truth" and that "it would be better for him to tell the truth" were mere exhortations to tell the truth and not an inducement to confess, where the defendant was a 22-year-old adult who had several prior convictions and was therefore familiar with the criminal justice system, the defendant's first statement after the sheriff's alleged inducements was a denial rather than a confession, and the defendant testified at his suppression hearing that the sheriffs did not make any specific promises. Willie v. State, 585 So. 2d 660 (Miss. 1991).

Confession held properly admitted in prosecution for assault with intent to rape notwithstanding the defendant's contention that confession was forced from him by two detectives who struck him and that its admission amounted to taking of life without due process, where the jailer testified no detective had access to defendant and all detectives appeared but defendant was unable to identify the detectives who allegedly struck him. Lee v. State, 207 Miss. 96, 39 So. 2d 868 (1949), appeal dismissed, cert. denied, 70 S. Ct. 64, 338 U.S. 803 94 L. Ed. 486.

A defendant in a state criminal proceeding does not lose the right to contend that his conviction was without due process because upon evidence including a coerced confession, by testifying at the trial that the confession was in fact never made. Lee v. State, 207 Miss. 96, 39 So. 2d 868 (1949), appeal dismissed, cert. denied, 70 S. Ct. 64, 338 U.S. 803 94 L. Ed. 486.

200. —Burden of proof, confessions.

Prosecution shoulders burden of proving beyond reasonable doubt that defendant's confession was voluntary. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Prosecution's burden of showing that confession was voluntary is met and prima facie case made out by testimony of officer, or other persons having knowledge of facts, that confession was voluntarily made without threats, coercion, or offer of reward. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Where the State has laid the "proper predicate" for admission of a defendant's confession, the onus is then on the defendant to provide other evidence or testimony on the issue of voluntariness to rebut the State's assertion. Haymer v. State, 613 So. 2d 837 (Miss. 1993).

Where a defendant objects to the prosecution's use of a confession at trial as evidence against him or her, the prosecution bears the burden of proving beyond a reasonable doubt each fact which is prerequisite to admissibility. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

201. Right to counsel — In general.

Defendant's right to counsel was not violated by law enforcement officers' use of defendant's wife as confidential informant, absent showing that wife communicated the substance of defendant's conversations and thereby created a realistic possibility of injury to defendant or benefit to the State. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

State constitution's right to counsel embraces all rights guaranteed to criminally accused defendant by the Sixth Amendment. Triplett v. State, 666 So. 2d 1356 (Miss. 1995).

The Sixth Amendment does give a criminal defendant a right to choose his or her counsel, but that right is not absolute. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Defendant's right to counsel was not violated, although trial judge ordered court-appointed counsel to proceed instead of defendant's hired counsel, since judge made decision based on hired counsel's unpreparedness, and court allowed hired counsel to assist and even participate in trial. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Representation by a legal intern, acting under authority of § 73-3-207, does not constitute the actual assistance of counsel guaranteed by the Constitution. Benbow v. State, 614 So. 2d 398 (Miss. 1993).

A defendant's right to have counsel present during interrogation was respected and his confession was admissible, where the defendant was given the opportunity to confer with his attorney who advised him to confess, even though the defendant only conferred with his attorney by telephone; there is no reason on principle why telephonic access to counsel is legally less significant than "eyeball-to-eyeball" access. Riddle v. State, 580 So. 2d 1195 (Miss. 1991).

It is not the duty of law enforcement officers and prosecutors, nor the function of the courts, to insist that a person accused of a crime actually confer with an attorney before talking about the crime nor is there any prescribed procedure or form to be followed in the waiver of the right to such assistance. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A trial judge's failure to recess and adjourn at reasonable times did not deny the defendant the effective assistance of counsel where the record failed to reveal any evidence of old age, illness, fatigue or exhaustion that affected the defense counsel's performance. Lanier v. State, 533 So. 2d 473 (Miss. 1988).

Failure to provide counsel for a defendant while a crime of rape was under investigation by the police and he was interrogated in connection with the offense was not a violation of his constitutional rights when no attempt was made by the prosecution to use in evidence any confession, admission, or statement of any kind extracted from the defendant after his arrest. Davis v. State, 204 So. 2d 270 (Miss. 1967), rev'd, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969).

The Fourteenth Amendment secures to a defendant in state prosecutions the right to a fair opportunity to arrange for counsel of his own choice. Watson v. State, 196 So. 2d 893 (Miss. 1967).

The Sixth Amendment to the Federal Constitution provides that accused in a criminal prosecution shall have the assistance of counsel for his defense, and the Sixth Amendment is applied to state prosecutions through the Fourteenth Amendment. Watson v. State, 196 So. 2d 893 (Miss. 1967).

The denial to the accused indicted for murder of representation by counsel who had conferred with him prior to the trial was a denial of a fundamental and not a technical right, and prejudice is presumed. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

In a case decided prior to decision of the Supreme Court of the United States in Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R.2d 733, it was said that due process clause of this amendment does not of its own force require tender of assistance of counsel to one charged in state court with non-capital crime and such tender is not essential to due process where record does not show whether accused was unable to employ attorney or requested trial judge to provide one and defendant's conduct of his own defense clearly indicated his appreciation of what was needed to develop case on his own behalf. Odom v. State, 205 Miss. 572, 37 So. 2d 300 (1948), cert. denied, 336 U.S. 932, 69 S. Ct. 747, 93 L. Ed. 1092 (1949).

202. —Probationers and parolees, right to counsel.

Probationers and parolees do not "have, per se, a right to counsel at revocation hearings." Whether probationers have a right to counsel must be answered 'on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." Riely v. State, 562 So. 2d 1206 (Miss. 1990).

A probationer was not deprived of the right to counsel at his probation revocation hearings in violation of his constitutional rights where the circuit court did not actually "disallow" the probationer to have legal representation but merely refused to continue the hearing in response to his belated request for more time to obtain counsel, the case was not "complex or otherwise difficult to develop," and counsel was provided upon the probationer's request prior to the fourth hearing before the circuit court and prior to his appeal to the Supreme Court. Riely v. State, 562 So. 2d 1206 (Miss. 1990).

203. —Post-conviction proceedings, right to counsel.

A trial court did not err in failing to sua sponte appoint counsel for a post-conviction relief petitioner at the evidentiary hearing, in spite of the petitioner's contention that it was clear that he lacked knowledge and understanding of the proceedings being conducted by the court. A criminal defendant has neither a state nor federal constitutional right to appointed counsel in post-conviction proceedings. Additionally, the appointment of counsel at an evidentiary hearing is discretionary with the trial judge by virtue of § 99-39-23(1). Moore v. State, 587 So. 2d 1193 (Miss. 1991).

Sixth and Fourteenth Amendments' right of counsel to an accused no longer applies after conviction upon appeal. Neal v. State, 422 So. 2d 747 (Miss. 1982).

Court-appointed attorneys were entitled to be relieved of any further responsibility in a prosecution for capital murder, where they represented defendant during his trial which resulted in a death penalty and further represented him on his appeal to the Mississippi Supreme Court, which resulted in the affirmance of the judgment. King v. State, 423 So. 2d 121 (Miss. 1982).

204. —Pro se or hybrid representation, right to counsel.

In determining whether a trial court granted "self-representation" or "hybrid representation" to a defendant, and thus whether a waiver of the right to counsel was necessary, the factors to be considered include: (1) the defendant's accessibility to counsel; (2) whether and how often the defendant consulted with counsel up to the point of the request; (3) the stage of trial at which the defendant requested a participatory role; (4) the magnitude of the role the defendant desired to assume; (5) whether the trial court encouraged immediate and constant accessibility of counsel; and (6) the nature and extent of assistance of counsel which had been provided up to the point of the request, including both substantive and procedural aid. Metcalf v. State, 629 So. 2d 558 (Miss. 1993).

A waiver of counsel inquiry was not required before permitting a defendant to represent himself at trial where the defendant requested and was provided with the assistance of counsel throughout the entire trial process in the form of a "hybrid representation." Metcalf v. State, 629 So. 2d 558 (Miss. 1993).

A criminal defense counsel did not render constitutionally ineffective assistance of counsel where the defendant requested during trial that the defense counsel be dismissed but the court denied the request, and thereafter the defendant acted pro se with the attorney present and ready and willing to assist the defendant in the case, and therefore the attorney, as stand-by counsel, was without authority, discretion or control. Estelle v. State, 558 So. 2d 843 (Miss. 1990).

205. —Joint representation, right to counsel.

The fact that the defendant's wife, indicted as an accessory to the burglaries for which he was indicted, had competent counsel who included him in their conferences with his wife, did not satisfy the mandatory constitutional requirement that one charged with a felony is entitled to be represented by counsel; and this was particularly true where the interests of the defendant and his wife were antagonistic, and it would be impossible for her attorneys to defend him with fidelity. Scott v. State, 190 So. 2d 875 (Miss. 1966).

206. —Conflicts of interest, right to counsel.

Effective right of counsel encompasses the right to representation by attorney who does not owe conflicting duties to other defendants, and undivided loyalty of defense counsel is essential to the due process guarantee of the Fifth Amendment. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

There was no actual conflict arising from fact that defense counsel had previously represented government rebuttal witness in unrelated prosecutions, where subject of cross-examination was witness' prior deals with state to provide testimony in exchange for plea agreements. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Prejudice is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected his lawyer's performance. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Defense counsel's representation was not adversely affected by fact that he had previously represented government rebuttal witness in unrelated prosecutions, where counsel was not "suddenly curtailed" in his cross-examination when subject of prior deals with prosecutors arose but, rather, proceeded onward to question witness in detail about his motivation for prior testimony in another case as well as his motivation for testifying against defendant in the present case. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Where no actual conflict of interest is present, defendant must demonstrate prejudice and show reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Defendant was not prejudiced by any adverse performance of defense counsel due to fact that he had previously represented government rebuttal witness in unrelated prosecutions; even assuming that counsel conclusively established that witness's sole motivation in testifying was to receive a reduced sentence pursuant to agreement with the State, there remained the vast amount of evidence presented during state's case in chief. Perry v. State, 682 So. 2d 1027 (Miss. 1996).

Actual conflict of interest, violating defendant's right to effective assistance of counsel, resulted from public defender's representation of both codefendant during plea negotiations and defendant at trial in prosecution originating from simultaneous double sale of drugs. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Prejudice from attorney's conflict of interest is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected attorney's performance. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Prejudice from actual conflict of interest, which existed when public defender provided dual representation to both defendant and codefendant, existed when public defender prematurely terminated cross-examination of codefendant. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Prosecutor and trial court have responsibility to notify defendant concerning potential conflicts of interest by defense counsel. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Undivided loyalty of defense counsel is essential to due process. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Mere fact that counsel for capital murder defendant shared office space with prosecutor who prosecuted defendant's preliminary hearing was not sufficient to demonstrate actual conflict of interest causing prejudice to defendant in violation of defendant's right to counsel. Cole v. State, 666 So. 2d 767 (Miss. 1995).

In a prosecution for conspiracy to distribute cocaine, a defendant's constitutional right to the effective assistance of counsel was violated due to an irreparable conflict of interest where the attorney who represented the defendant had also been counsel for the State's main witness in the trial against the witness for the same offense. Littlejohn v. State, 593 So. 2d 20 (Miss. 1992).

The right to effective assistance of counsel encompasses 2 broad principals—minimum competence and loyal assistance. The right to conflict free counsel is attendant to the Sixth Amendment right to effective assistance of counsel. It is incumbent upon courts which confront and which are alerted to possible conflicts of interest to take the necessary steps to ascertain whether the conflict warrants separate counsel. Thus, where a defense attorney represented 2 codefendants during the sentencing phase of the judicial proceedings and it could easily have been anticipated that the attorney would argue that the actions of one of the codefendants should not be attributed to the other or that the attorney would opt to not say or do anything in litigation for fear that to do so would characterize one codefendant as being more culpable than the other, the failure of the trial court to disclose to the codefendants the potential dangers of joint representation by counsel laboring under a conflict resulted in a violation of the right to effective assistance of counsel, and therefore a new sentencing hearing was warranted. Armstrong v. State, 573 So. 2d 1329 (Miss. 1990).

There is nothing in the law of this state which prohibits the partner of a county attorney from representing a defendant in a criminal proceeding outside the county where the county attorney serves, and the denial of defendant's counsel of choice on such grounds was a violation of his Sixth and Fourteenth Amendment rights.

Frackman v. Deposit Guar. Nat'l Bank, 296 So. 2d 695 (Miss. 1974).

207. —Indigent defendant, right to counsel.

An indigent defendant charged with a felony is entitled to be represented by counsel irrespective of whether he pleads guilty or is tried on a not guilty plea. Scott v. State, 190 So. 2d 875 (Miss. 1966).

Where the record indicates beyond question that the defendant, charged with assault and battery, was indigent, that he desired an attorney to represent him, and that he did not consciously and intelligently waive such appointment it was reversible error to force him to trial on the charge without an attorney. Mississippi State Highway Comm'n v. Glenn, 178 So. 2d 677 (Miss. 1965).

The duty of the court to assign counsel to defend one accused with a capital crime, who is unable to employ counsel, was not intended to be a mere formality, and means more than a mere appointment of counsel. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

208. —Time right attaches, right to counsel.

Right to counsel, both federal and state varieties, attaches at point in time when initial appearance before magistrate ought to have been held. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Defendant's Sixth Amendment right to counsel with respect to murder charge attached when he was arrested by warrant while already in jail for another offense. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

209. —Invocation of right to counsel.

Defendant's capital murder convictions were proper where his Fifth, Sixth, and Fourteenth Amendment rights to counsel and to remain silent were not violated. He made no objection at trial; there was no testimony concerning defendant's use of counsel or his right to remain silent; and the State's questioning was designed solely to elicit a chronological version of the events involved in the investigation of the murders not the fact that the defendant requested an attorney during the State's investigation. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Defendant's conviction for capital murder was proper where he was not denied his right to counsel because, at the time of his confession, he was merely a suspect who had been brought to the sheriff's department for questioning and thus, his U.S. Const. amend. VI right to counsel had not yet attached. Further, as his confession occurred during a custodial interrogation, he had a U.S. Const. amends. V and XIV right to have counsel present, but the lower court found the testimony of the officers that defendant had not invoked his right to counsel more credible than defendant's assertion that he had done so. Brink v. State, 888 So. 2d 437 (Miss. Ct. App. 2004), writ of certiorari denied by 888 So. 2d 1177, 2004 Miss. LEXIS 1475 (Miss. 2004), writ of certiorari denied by 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744, 2005 U.S. LEXIS 3129, 73 U.S.L.W. 3620 (2005).

Once Sixth Amendment right to counsel has attached and been asserted, state must honor that right by doing more than simply not preventing accused from obtaining the assistance of counsel; Sixth Amendment also imposes on state an affirmative obligation to respect and preserve accused's choice to seek this assistance. Morgan v. State, 681 So. 2d 82 (Miss. 1996).

Statements made by a defendant's sister in the defendant's presence that she intended to get an attorney were not sufficient to trigger the defendant's right to counsel during police questioning and to preclude any subsequent waiver on his part where the record was devoid of any evidence that the defendant attempted to adopt, or even understood, the statements made by his sister. Lee v. State, 631 So. 2d 824 (Miss. 1994).

Requesting assistance of counsel at an initial appearance or bail hearing to defend a pending charge is not the same type of invocation of counsel contemplated by the Fifth Amendment Miranda-Edwards interest against compulsory self-incrimination, which is associated with police-initiated custodial interrogations; in order to invoke the Fifth Amendment right against compulsory self-incrimination, some "expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police" is required. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

An accused invoked her Fifth Amendment right to counsel at the time of her arrest when she asked for an attorney and stated that she was not going to sign any papers or answer any questions without having a lawyer present; the accused invoked her Sixth Amendment right to counsel and the state counterpart right secured by Article 3, § 26 of the Mississippi Constitution at her initial appearance when she indicated a desire for representation and an interest in contacting her family to ascertain their progress in hiring a lawyer for her. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

A defendant's question during interrogation —"Don't you think I need a lawyer?"— constituted an ambiguous request for an attorney, requiring the officers to cease interrogation except for that intended to clarify the defendant's request. The officers' response to the defendant's ambiguous request, which culminated in the defendant's decision to waive his rights, did not exceed constitutional parameters where the officers responded by twice explaining the defendant's option to exercise his Miranda rights or to relate "his side of the story." Holland v. State, 587 So. 2d 848 (Miss. 1991).

When an accused makes an equivocal statement suggesting a request for counsel, the interrogation may only continue "on the narrow road" to ascertain the meaning of the equivocal statement. The interrogating officer has an affirmative duty to attempt to clarify the request before proceeding with the substance of the interrogation; the officer's subsequent finding will determine whether or not interrogation may continue. Kuykendall v. State, 585 So. 2d 773 (Miss. 1991).

210. —Interrogation continued after counsel has been requested, right to counsel.

Confronting a suspect with the incriminating evidence compiled against him after he has invoked his right to counsel, and without any initiation on the part of the suspect, is precisely the kind of psychological ploy that definition of interrogation in Innis was designed to prohibit. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's right to counsel was violated by police-initiated interrogation after he asserted his right to counsel because an officer showed defendant the evidence file in an attempt to have him reconsider his request for counsel; a tactic that proved successful as defendant was not prompted to speak until he reviewed the evidence. Because the actions of the officer constituted police-initiated custodial interrogation, a valid waiver could not be established simply by showing that defendant responded to the interrogation. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

A trial court erred in admitting a defendant's confession evidence since the confession was tainted by the constitutional violation of the defendant's Sixth Amendment right to counsel and rights secured by Article 3, § 26 of the Mississippi Constitution, where the defendant "waived her rights" and made the confession after a sheriff department investigator and deputy initiated contact with her within less than 4 hours after she invoked the right to counsel at her initial appearance; the confession was also tainted by violation of the defendant's Fifth and Fourteenth Amendment rights since the defendant had also requested a lawyer and declined to waive any rights at the time of her arrest. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

Once an accused has asserted the Sixth Amendment right to counsel at arraignment or a similar proceeding, the police may not initiate interrogation; if the police initiate interrogation after the right has been asserted, any waiver by the defendant for that interrogation is invalid. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

The rule in Edwards v. Arizona (1981) 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct.

1880, reh. den. (1981) 452 U.S. 973, 69 L. Ed. 2d 984, 101 S. Ct. 3128 or Arizona v. Roberson (1988) 486 U.S. 675, 100 L. Ed. 2d 704, 108 S. Ct. 2093 concerning the interrogation of an accused on an unrelated charge after the Fifth Amendment right to counsel has been asserted, does not apply when the accused does not remain in continuous custody; a non-contrived, non-pretextual break in custody where the accused has reasonable opportunity to contact his or her attorney dissolves an Edwards or Roberson claim. Willie v. State, 585 So. 2d 660 (Miss. 1991).

A trial court's admission of a defendant's confession into evidence violated the defendant's Fifth and Fourth Amendment rights where the defendant had invoked her right to counsel and 2 officers subsequently told her that a codefendant had made a statement implicating her in their criminal activity, after which the defendant wrote a statement admitting to the crimes. The admission of the confession in violation of the defendant's constitutional rights was not harmless error where the confession in question was the only confession available. Balfour v. State, 580 So. 2d 1203 (Miss. 1991).

When a suspect requests counsel while being informed of his or her rights, the police should complete the reading of the suspect's rights, then ask the suspect to state clearly what he or she elects to do. If the suspect indicates that he or she wishes to remain silent, then the interrogation must cease. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

The explanation of lineup procedures did not constitute improper further interrogation of the defendant after he invoked his right to counsel, where the lineup procedures were not explained for the purpose of eliciting incriminating statements from the defendant, and the explanation of the lineup procedures did not constitute words or actions reasonably likely to elicit an incriminating response. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

211. —Critical stage, right to counsel.

Only an actual confrontation with the defendant at a lineup is the critical stage which requires the right to counsel. Thus, the presence of counsel was not required at a post-lineup encounter between the witness and the police, at which the defendant was not present, since there was no "actual confrontation" between the defendant and the witness. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

The period immediately after arrest for intoxication is not a "critical stage" of the proceedings for purposes of the right to counsel. Ewing v. State, 300 So. 2d 916, 95 A.L.R.3d 701 (Miss. 1974).

Although it is true that the preliminary hearing in a criminal case is a critical stage in the legal proceedings requiring the aid of counsel, such determination should not be enlarged to include a transcript of the preliminary proceedings in the absence of statutory authority therefor and particularly so when it does not appear that the lack of a transcript prejudiced the defendant. Henderson v. State, 284 So. 2d 42 (Miss. 1973).

An order waiving Youth Court jurisdiction over a 15-year-old minor charged with the offense of burglary which does not affirmatively show that a hearing was had in the presence of the minor and his parents, that the minor was represented by counsel, or that the right to counsel was properly waived, is fatally defective. Hopkins v. State, 209 So. 2d 841 (Miss. 1968).

The court's refusal to permit the defendant in a murder trial to confer with her counsel during a two-hour recess, immediately following the conclusion of her direct examination in her own behalf, was an unconstitutional denial of her right to counsel at a crucial stage of the trial, was highly prejudicial, and constituted reversible error. Pendergraft v. State, 191 So. 2d 830 (Miss. 1966), cert. denied and appeal dismissed, 394 U.S. 715, 89 S. Ct. 1453, 22 L. Ed. 2d 671 (1969).

212. —Trial preparation time, right to counsel.

The right to counsel extends to the preparation for trial as well as the trial itself. Watson v. State, 196 So. 2d 893 (Miss. 1967).

It is the duty of the court to see that one accused of a capital crime is represented by counsel, and where it became known to the court prior to the beginning of the trial that counsel had not conferred and advised with the accused, the court should have taken appropriate steps to assure to the accused the advantage guaranteed by him under Code 1942 § 2505, and failure to do so was failure to follow the mandatory provisions of the statute and constituted a denial of due process. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

Under Code 1942 § 2505, the right of the accused to have counsel, and the requirement that such counsel shall have access to the accused, includes the right on the part of the accused to be represented by counsel who have conferred with him prior to trial so that his case may be properly prepared. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

Where it was shown at the date of the trial that although nine court appointed defense attorneys had been appointed in ample time therefor, they had failed to confer with the accused, who was indicted for murder, either because the accused was in jail outside the county or otherwise, the accused's conviction, carrying with it the death penalty, was reversed. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

Where, following the granting to the accused of a continuance for one day for the purpose of obtaining counsel, the court on the next day denied accused's request for a further continuance for the same purpose, accused, who was thereupon tried and convicted upon a burglary charge, was not denied due process of law, since it appeared that the accused had had ample notice of the charge against him and opportunity to employ defense counsel if he so desired. Poole v. State, 229 Miss. 176, 90 So. 2d 212 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1286, 1 L. Ed. 2d 1144 (1957).

213. —Refusal to sign waiver form, right to counsel.

An accused's refusal to sign a waiver of rights form does not in and of itself constitute a demand for an attorney. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

214. —Waiver, right to counsel.

In a case in which defendant argued that the trial court should have suppressed her statements because they were taken in violation of her constitutional right to counsel. The record supported a finding that defendant received the Miranda warning, that she knowingly and intelligently waived the rights, and that she freely and voluntarily made the statements, and, pursuant to the Davis decision, she failed to make an unambiguous, unequivocal request for an attorney. Barnes v. State, 30 So. 3d 313 (Miss. 2010).

Even if an accused has procured an attorney, the accused may still waive the right to have the lawyer present during any police questioning; nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his or her own, to speak with police in the absence of an attorney. Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

The evidence was sufficient to support a finding that a defendant had knowingly and voluntarily waived his right to assistance of counsel when he made a statement to the police, even though the defendant testified that he had repeatedly requested an attorney and was not provided with one, where the defendant admitted that he understood his rights, and all of his contentions that he had made repeated requests for counsel were specifically refuted by 3 law enforcement officers. Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

If a defendant has not asserted his or her Fifth Amendment right to counsel, the fact that the defendant is appointed counsel to protect his or her Sixth Amendment right does not preclude interrogation on unrelated offenses. As long as the defendant is given the Miranda warning and makes a knowing and voluntary waiver, any statements obtained during the interrogation are admissible. Willie v. State, 585 So. 2d 660 (Miss. 1991).

A defendant knowingly and intelligently waived the right to counsel, and his subsequent statement was freely and voluntarily given, where the defendant initially invoked his constitutional right to counsel but indicated that he no longer wished to contact an attorney when given the opportunity to call, the defendant then indicated that he was willing to enter into a discussion of the crime, and the defendant was again advised of his Miranda rights, after which he confessed. The defendant "initiated" when he indicated that he no longer wished to telephone his attorneys; one cannot halt an inquiry by first indicating a desire to call an attorney, then declining to do so when offered the opportunity. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A writ of error coram nobis was granted and the original judgments against the defendant entered on his pleas of guilty to the crime of burglary were vacated and his case remanded for a new trial where he did not have counsel for his own defense, and had not competently and intelligently waived the right to counsel. Scott v. State, 190 So. 2d 875 (Miss. 1966).

215. —Sufficiency of evidence of denial of right to counsel.

A defendant was not denied effective assistance of counsel because he was not represented by counsel for approximately 2 months following his arraignment where he made no showing that he experienced any adverse effect or "untoward consequence flowing directly from denial of counsel" and there was no indication that the State took advantage of the situation or that any further proceedings were conducted. Johnson v. State, 631 So. 2d 185 (Miss. 1994).

Earlier it had been said that since the due process clause of the Fourteenth Amendment to the United States Constitution does not require states to afford defendants assistance of counsel in noncapital criminal cases, the contention of the defendant, who was accused of grand larceny, a noncapital felony, that he was denied due process of law by the failure and refusal of the court to appoint counsel for him was without merit. Fogle v. State, 231 Miss. 746, 97 So. 2d 645 (1957).

216. Ineffective assistance of counsel—In general.

While the disciplinary proceedings to which attorneys were subject were quasi-criminal in nature, there was no claim for ineffective assistance of counsel; a bar disciplinary proceeding was not sufficiently criminal in nature to trigger the protection of Strickland. Goeldner v. Miss. Bar, 891 So. 2d 130 (Miss. 2004).

A Louisiana attorney's failure to comply with court rules concerning appearances by foreign attorneys did not, per se, create ineffective assistance of counsel. Hubbard v. State, 628 So. 2d 1386 (Miss. 1993).

It is not per se professionally unreasonable for an attorney to allow a client to talk to the police and give a statement; where the evidence is otherwise overwhelming, confession may be a significant step toward prompt disposition of the case and mitigation of sentence. Thus, a defendant was not denied effective assistance of counsel on the ground that his attorney advised him to talk to the police, even though the attorney advised the defendant by telephone and did not go to the police station or further assist the defendant, where it appeared that the attorney "brought to bear independent scrutiny and judgment" before advising the defendant, and the evidence against the defendant was overwhelming. Riddle v. State, 580 So. 2d 1195 (Miss. 1991).

Ineffectiveness of counsel should not be excused simply because counsel has been privately retained. Therefore, that portion of Bennett v. State 293 So. 2d 1 (Miss. 1974), and any other case, which attempts to draw a relevant distinction between court-appointed and retained counsel where a defendant's right to appeal and effective assistance of counsel is concerned would be expressly overruled. Triplett v. State, 579 So. 2d 555 (Miss. 1991).

A defendant was not denied his right to effective assistance of counsel on the ground that his attorney gave the prosecution permission to interview the defense witnesses while allowing the prosecution to disallow the defendant from taking a deposition of the victim, since the defendant had no right to such a pre-trial deposition and the trial court lacked the authority to require the victim to talk with defense counsel where the victim was unwilling to do so; the defendant's counsel could not be faulted as ineffective for failing to secure that which the defendant had no right to obtain. Jordan v. State, 577 So. 2d 368 (Miss. 1990).

A defense attorney's failure to object when a prosecution witness, who was a nurse, was sent into the jury room to attend to a juror who had become ill, did not constitute ineffective assistance of counsel where no allegation or facts were presented as to how the attorney's failure to object resulted in any significant prejudice to the defendant at his trial. Jordan v. State, 577 So. 2d 368 (Miss. 1990).

Argument that trial counsel did not have requisite legal experience to properly try criminal case was rejected as basis for claim of ineffective assistance of counsel where trial counsel had 2 ½ years experience and had tried 5 criminal cases, none of which were capital cases, at time of first trial of defendant. Level of criminal trial experience is one factor to be considered in determining whether there was effective assistance of counsel. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

217. —Tests, ineffective assistance of counsel.

Nothing in the record affirmatively showed constitutional ineffectiveness and defendant failed to show prejudice; thus, defendant failed to meet his Strickland burden. Givens v. State, 967 So. 2d 1 (Miss. 2007).

Adversarial process protected by Sixth Amendment requires that accused have counsel acting in the role of an advocate, and the right to effective assistance of counsel is the right of accused to require that prosecution's case survive the crucible of meaningful adversarial testing. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Under Strickland, test to be applied in cases involving alleged ineffectiveness of counsel is (1) whether counsel's overall performance was deficient and (2) whether deficient performance, if any, prejudiced defense. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Target of appellate scrutiny in evaluating deficiency and prejudice prongs of Strickland test for ineffectiveness of counsel is counsel's "over-all" performance. Cole v. State, 666 So. 2d 767 (Miss. 1995).

218. —Time to raise issue, ineffective assistance of counsel.

Under Mississippi law, failure to raise ineffective assistance of counsel claim on direct review does not constitute procedural bar where litigant was represented by same counsel at trial and on direct appeal. Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

Defendant's merely raising ineffective assistance of counsel claim was insufficient to surmount procedural bar to his untimely post-conviction petition. Bevill v. State, 669 So. 2d 14 (Miss. 1996).

Prima facie claim must be stated by defendant in post-conviction petition to lower court in order to obtain evidentiary hearing on merits of ineffective assistance of counsel issue. Robertson v. State, 669 So. 2d 11 (Miss. 1996).

219. —Trial strategy, ineffective assistance of counsel.

Counsel was not deficient in arguing to jury that justice was not justice unless it was complete justice and that defendant was taking all of the blame when it was not all his, as counsel did not explicitly concede guilt and was merely utilizing trial strategy of creating reasonable doubt that defendant did not commit the crime charged because it was done by others. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Strategic decision to pursue less than all plausible lines of defense will rarely, if ever, be deemed ineffective counsel, if counsel first adequately investigated the rejected alternative. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after prosecution called so-called "surprise" witness who subsequently identified defendant, where counsel interviewed witness for 25 minutes during recess called specifically for that purpose, and defendant showed nothing that continuance would have further gained. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to file certain motions, call certain witnesses, ask certain questions, and make certain objections, where counsel's actions fell within ambit of trial strategy. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after State introduced into evidence during sentencing phase 2 prior convictions for manslaughter and attempted rape, where there was no prejudice to defendant, in that the prior convictions were valid and not subject to collateral attack. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Defendant charged with sexual battery and attempted sexual battery was not denied effective assistance of counsel; record was replete with objections lodged by defense counsel, and defendant showed no prejudice from counsel's decision to refrain from making opening statement, from counsel's failure to offer instruction on theory of defense, and from counsel's alleged inadequacy in jury selection. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

In a prosecution for possession of cocaine with intent to distribute, the defendant was denied his constitutional right to effective assistance of counsel where the defense strategy was to admit guilt to the charge of simple possession of cocaine, but to deny any intent to sell or distribute, the defense counsel failed to object to evidence of the defendant's past drug sales, which was the most damaging piece of evidence presented, he failed to preserve any objection relating to the sufficiency of the evidence for trial court or appellate review, and the evidence was insufficient as a matter of law to support the charge. Holland v. State, 656 So. 2d 1192 (Miss. 1995).

A defendant was not denied his right to effective assistance of counsel on the ground that his attorney failed to file any motion for discovery where the defendant provided no evidence to show that the omission was anything other than his attorney's trial strategy, there was no allegation of critical evidence that may have come to light as a result of discovery, the record did not reflect any surprise to the defendant's attorney as a result of the State's case, and the defense attorney was sufficiently familiar with the State's case and its witnesses that a discovery motion would not have elicited any change in the defense. Ivy v. State, 589 So. 2d 1263 (Miss. 1991).

An attorney did not render ineffective assistance merely because he did not put the defendant on the witness stand during a hearing on the defendant's motion to suppress his confession, since the attorney's decision to keep the defendant off the stand may have been a deliberate trial strategy. Even if the attorney made a mistake, it did not rise to the level of ineffective assistance of counsel necessary to violate the Sixth Amendment right to counsel; there is a strong presumption that an attorney's performance was within the wide range of reasonable, professional, and acceptable conduct. Mohr v. State, 584 So. 2d 426 (Miss. 1991).

A defense counsel's failure to pursue an alibi defense was not unsound trial strategy, and therefore did not constitute ineffective assistance of counsel, where the defendant had admitted to the offenses but challenged the dates in the indictment as being incorrect. Schmitt v. State, 560 So. 2d 148 (Miss. 1990).

Ineffective assistance of counsel was not shown where defendant argued that counsel made decision to pursue defense of lack of intent to kill, but failed to follow up on this strategic choice, where counsel elicited evidence of defendant's having "shot up" to negate argument that defendant intended to kill. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Ineffective assistance of counsel was not shown where defendant complained that counsel made absolutely no investigation of psychological evidence, while defendant submitted psychological evidence showing, inter alia, functional I.Q. of 73, lower academic I.Q., alcoholism, and genuine remorse for crime; as trial strategy, counsel could have judged that psychological report may have been harmful. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that counsel was ineffective based on opening statement conceding to jury that his client was guilty of crime charged in indictment was rejected because it may have been trial strategy. Candor at guilt phase may help defendant in sentencing phase because attorney who, while sincerely trying to help his client, at same time is open and honest with jury, is more likely to receive sympathetic and open ear in his other arguments. Counsel also argued crime was not capital murder and jurors must therefore return verdict of not guilty. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

220. —Suppression of evidence, ineffective assistance of counsel.

Petitioner's claim that his counsel failed to adequately argue motion to suppress evidence that was obtained in violation of his Fourth Amendment rights or to raise that issue on appeal would be remanded for district court to consider whether counsel was professionally deficient in failing to successfully move to suppress evidence and to determine whether exclusion of that evidence would have had effect on outcome of petitioner's case, so as to establish cause and prejudice for procedural default. Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996).

221. —Guilty plea, ineffective assistance of counsel.

Valid guilty plea operated as a waiver of all non-jurisdictional rights or defects that were incident to trial; defendant was fully advised of his rights and the maximum sentences he faced if he chose to go to trial, and he was provided a detailed admonishment prior to accepting his guilty plea, such that defendant's plea was made knowingly, intelligently, and voluntarily and he waived any rights regarding the allegedly coerced confession. Swindoll v. State, 859 So. 2d 1063 (Miss. Ct. App. 2003).

Defendant who pled guilty to capital murder in order to avoid trial that would have subjected him to possible death sentence failed to show he was prejudiced, as required to support ineffective assistance of counsel claim; only thing that might have been different had case gone to trial was sentence defendant received. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

Allegations by defendant who had pleaded guilty to charge of capital murder in order to avoid death penalty that sentences received by his accomplices were substantially less than his were insufficient to state claim of ineffective assistance of counsel; record indicated that accomplices, with one exception, were not given extremely reduced sentences as compared to defendant, and prosecutor stated that accomplice who received substantially reduced sentence had been involved in murder to lesser extent than others. Simpson v. State, 678 So. 2d 712 (Miss. 1996).

Allegation by post-conviction petitioner, who had pleaded guilty to charge of capital murder, that he had received ineffective assistance of counsel on basis that his guilty plea was induced by misrepresentations of his attorney was rebutted by transcript of plea hearing and could be summarily denied without hearing; record indicated that petitioner had remained silent both when given opportunity to inform court of terms of alleged "real plea bargain," and also when accomplice received shorter sentence. Simpson v. State, 678 So. 2d 712 (Miss. 1996).

Defendant did not receive ineffective assistance of counsel in entering guilty plea to 2 counts of armed robbery, where counsel gave defendant accurate information about consequences of being found guilty after trial, defendant swore under oath that plea was voluntary, trial court questioned defendant as to voluntariness of plea prior to plea hearing, and defendant had prior experience in dealing with felony charges and was familiar with court proceedings. Roland v. State, 666 So. 2d 747 (Miss. 1995).

Standard generally applicable to determine claims of ineffective assistance of counsel is also applicable to judge counsel's performance in entry of guilty plea. Roland v. State, 666 So. 2d 747 (Miss. 1995).

A defendant who was convicted of armed robbery was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether he was afforded ineffective assistance of counsel during the plea process, where the defendant alleged that his attorney erroneously informed him that if he accepted the prosecution's plea bargain offer of 15 years imprisonment he would be eligible for parole after serving 3 years and 9 months of his sentence, and that he would not have accepted the prosecution's plea bargain offer had he known that he would be ineligible for parole for 10 years pursuant to § 47-7-3(1)(d), which provides that a person convicted of robbery and sentenced to more than 10 years imprisonment shall not be eligible for parole until after serving at least 10 years of the sentence. Alexander v. State, 605 So. 2d 1170 (Miss. 1992).

A defendant's complaints of ineffective assistance of counsel in his post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel were insufficient as a matter of law where the defendant failed to allege that the asserted errors of his attorney proximately resulted in his guilty plea and that, but for these errors, he would not have entered the plea. Garlotte v. State, 597 So. 2d 641 (Miss. 1992).

222. Preparation for trial, ineffective assistance of counsel.

In a murder case, defendant was not denied effective assistance of counsel, because the denial of a continuance did not mean that counsel was unprepared, as counsel filed the necessary pretrial motions, conducted a voir dire examination, offered challenges for cause, provided compelling opening and closing statements, objected to the admission of certain evidence, and cross-examined witnesses. Rinehart v. State, — So. 2d —, 2003 Miss. LEXIS 558 (Miss. Oct. 23, 2003), opinion withdrawn by, substituted opinion at 883 So. 2d 573, 2004 Miss. LEXIS 1228 (Miss. 2004).

Defense counsel's failure to note the race of the jurors on the jury list did not raise an issue under Batson, nor was it ineffective representation, since it related to a matter of trial strategy. Al-Fatah v. State, 856 So. 2d 494 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 315, 2003 Miss. LEXIS 714 (Miss. 2003).

Defendant who alleges that trial counsel's failure to investigate constituted ineffectiveness must also state with particularity what investigation would have revealed and specify how it would have altered outcome of trial or how such additional investigation would have significantly aided his cause at trial. Cole v. State, 666 So. 2d 767 (Miss. 1995).

223. —Admission of evidence, ineffective assistance of counsel.

Defense counsel's failure to place murder defendant on stand to testify did not constitute ineffective assistance of counsel, where defendant personally waived her right to testify and defendant's version of events was already before jury. Rhodes v. State, 676 So. 2d 275 (Miss. 1996).

Counsel for capital murder defendant was not ineffective for failing to object to introduction of defendant's prior convictions of grand larceny and simple robbery, where both were relevant to aggravating circumstances set forth under capital sentencing statute, and thus objection would have been futile. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to make offer of proof concerning excluded mitigation-of-sentence testimony about defendant's religious convictions and effect on him of death of his stepchild, where the evidence was adequately established via testimony of other witnesses. Cole v. State, 666 So. 2d 767 (Miss. 1995).

224. —Objections to evidence or instructions, ineffective assistance of counsel.

Counsel was not ineffective for failing to object to the absence of the word "knowing" in indictment for aggravated assault which charged that defendant wilfully and feloniously caused serious bodily injury. Moore v. State, 676 So. 2d 244 (Miss. 1996).

In a prosecution for possession of cocaine with intent to distribute, the defendant's trial counsel was not constitutionally ineffective for failing to object to allegedly inadmissible testimony portraying the defendant as a drug dealer where the attorney's failure to object to the testimony in question might reasonably have been trial strategy related to a "personal vendetta" defense since the attorney argued from the time of opening statements that a deputy sheriff had a vendetta against the defendant and there was support for the "vendetta" defense throughout the trial record, the attorney could have concluded that any objections to the testimony in question would have magnified the comments to the detriment of the defendant, and the defendant failed to demonstrate any prejudice as there was eyewitness testimony which was "sufficient to have absolutely sealed his fate with the jury." Edwards v. State, 615 So. 2d 590 (Miss. 1993).

In a prosecution for possession of cocaine with intent to distribute, the defendant's trial counsel was not constitutionally ineffective for failing to object to an admission made by the defendant at the scene of his arrest concerning his involvement in trafficking drugs where the admission was unsolicited, voluntary, and spontaneous, and the defendant's attorney could have reasonably expected any objection to be futile. Edwards v. State, 615 So. 2d 590 (Miss. 1993).

A burglary defendant was not deprived of his constitutional right to effective assistance of counsel on the ground that his trial counsel failed to object to leading questions about the homes that were burglarized where the questions asked by the prosecutor could have been rephrased to elicit the same testimony, and therefore the defendant did not suffer any disadvantage because of the failure to object. Jackson v. State, 614 So. 2d 965 (Miss. 1993).

A defendant was denied his right to effective assistance of counsel by his attorney's failure to object to testimony submitted by the State that his accomplice had been tried and found guilty on the same offense for which the defendant was being tried, since the testimony was highly prejudicial and its admission was reversible error. Johns v. State, 592 So. 2d 86 (Miss. 1991).

225. —Arguments to jury, ineffective assistance of counsel.

A murder defendant was not denied her Sixth Amendment right to the effective assistance of counsel due to her attorney's failure to object to statements made by the prosecution in their closing argument, referring to the fact that the victim was not present at trial to explain the events surrounding the killing, since it was reasonable for the prosecution to argue that the victim was no longer in existence in a murder trial in which the jury was required to determine whether the killing was justified. Hiter v. State, 660 So. 2d 961 (Miss. 1995).

A murder defendant's trial counsel was not ineffective for arguing that the case was one of self-defense, even though the prosecution witnesses were consistent in testifying that the defendant initiated the confrontation that lead to the victim's death so that, with the benefit of hindsight, it was apparent that a self-defense argument did not have a strong possibility of success, where the defendant failed to show that his trial counsel's arguments and strategy were deficient as judged from the time offered, and there was no significant probability that the result would have been different but for the alleged errors of trial counsel since the evidence against the defendant was substantial. Brown v. State, 626 So. 2d 114 (Miss. 1993).

Claim of ineffective assistance of counsel based on counsel's failure to object to closing argument of prosecutor at sentencing phase was rejected, such failure to object being presumed to be strategic, and presumption having not been rebutted. Additionally, in light of wide range of permissible argument, it was court's opinion that arguments were within proper parameters. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

226. —Instructions to jury, ineffective assistance of counsel.

Counsel for capital murder defendant was not ineffective for failing to object to transitional jury instruction stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, where defendant was granted lesser included offense instruction defining crime of murder less than capital, and defendant showed no prejudice flowing from transitional instruction. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to jury instruction that the murder was "especially heinous, atrocious and cruel," where, at time of trial, there was no viable basis under state law for objecting to this instruction. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A murder defendant was not denied her Sixth Amendment right to the effective assistance of counsel by her attorney's refusal of a manslaughter instruction, even though there was a strong evidentiary basis for the submission of such an instruction, where the attorney's decision to refuse a manslaughter instruction coupled with his decision to employ a defense based entirely on self-defense was a calculated trial strategy. Hiter v. State, 660 So. 2d 961 (Miss. 1995).

A murder defendant was not denied effective assistance of counsel by his attorney's admission of his guilt of the crime where the evidence of guilt was overwhelming, and the attorney admitted that the defendant was guilty of simple murder, not capital murder, and submitted a lesser-included offense instruction in accordance with the argument. Woodward v. State, 635 So. 2d 805 (Miss. 1993).

227. —Burden of proof, ineffective assistance of counsel.

Burden is on defendant to prove both prongs of ineffective assistance of counsel test. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

To establish prejudice, defendant claiming ineffective assistance of counsel must show that there was reasonable probability that, but for counsel's unprofessional errors, result would have been different. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

Burden is on defendant to show both prongs of the Strickland test for ineffective assistance of counsel or at least to present prima facie claim as to any deficiencies and the prejudice resulting therefrom. Moore v. State, 676 So. 2d 244 (Miss. 1996).

If defendant is to be successful on ineffective assistance of counsel claim, he must prove that counsel's performance was deficient and that deficient performance prejudiced the defense; burden of proving both prongs of the test is on defendant. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Defendant claiming ineffective assistance of counsel must show that there is reasonable probability that, but for the errors, outcome of the case would have been different. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In order to be successful on ineffective assistance claim, defendant must overcome presumption that defense counsel's statements were within the realm of reasonable trial tactics. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Burden is on defendant to demonstrate both deficiency and prejudice prongs of Strickland test for ineffectiveness of counsel. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Under prejudice prong of Strickland test for ineffectiveness of counsel, movant must show that there is reasonable probability that, but for counsel's unprofessional errors, result of proceedings would have been different, with "reasonable probability" being probability sufficient to undermine confidence in outcome. Cole v. State, 666 So. 2d 767 (Miss. 1995).

To be entitled to evidentiary hearing on merits of ineffectiveness of counsel claim, defendant must establish prima facie claim on both prongs of Strickland test by alleging with specificity and detail that his counsel's performance was deficient and that the deficient performance prejudiced defense so as to deprive him of fundamentally fair trial. Cole v. State, 666 So. 2d 767 (Miss. 1995).

To successfully claim ineffective assistance of counsel, defendant must show deficiency of counsel's performance sufficient to constitute prejudice to defense. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

A post-conviction relief petitioner, who is seeking to overturn a conviction or sentence on the grounds of ineffective assistance of counsel, must demonstrate factual proof by a preponderance of the evidence of an identifiable lapse by counsel and of some actual adverse impact on the fairness of the trial resulting from that lapse. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

In order to prove that he received ineffective assistance of counsel during the guilt phase of a capital murder prosecution, the defendant was required to show deficient performance and that his counsel's errors were so serious as to deprive him of a fair trial with a reliable result; unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

228. —Presumptions, ineffective assistance of counsel.

There is strong, yet rebuttable, presumption that counsel's conduct falls within wide range of reasonable professional assistance, for purposes of applying Strickland test for ineffectiveness of counsel, as there is presumption that decisions made by defense counsel are strategic. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Burden to demonstrate ineffective assistance of counsel is on defendant, who faces strong but rebuttable presumption that counsel's performance falls within broad spectrum of reasonable professional assistance. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

229. —Penalty phase practice and procedure, ineffective assistance of counsel.

Counsel was not deficient for arguing to the jury at the penalty phase "if you want to kill him, kill him," as counsel was strategically attempting to argue that such a penalty would not punish or teach a lesson to the people who were primarily responsible for defendant's shortcomings, including his mother, his grandmother, and society. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Counsel's closing argument at penalty phase of capital murder prosecution in which he told the jurors "if you want to sentence him to death, don't let me persuade you not to. If you don't want to sentence him to death, don't let the District Attorney persuade you to" was reasonable trial strategy encouraging jurors to make up their own minds when determining penalties without being influenced by either party. Blue v. State, 674 So. 2d 1184 (Miss. 1996), reh'g denied, cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A capital murder defendant was denied effective assistance of counsel at the penalty phase where his attorneys presented almost no facts in mitigation upon which the jury could have acted to spare the defendant's life, they failed to make the most of the available evidence in mitigation, and in closing argument one of the defendant's attorneys stated that the only way the jury could spare the defendant's life was on "redeeming love," which was not one of the factors which the jury could have considered under the court's instructions. Woodward v. State, 635 So. 2d 805 (Miss. 1993).

A defense counsel's performance at the sentencing phase of a capital murder prosecution constituted ineffective assistance of counsel where the defendant faced a potential death penalty, and the defense counsel failed to conduct any investigation at all in a search for mitigation evidence; the defense counsel conducted little or no investigation into the defendant's background, he spent negligible time interviewing the defendant and preparing a defense, he made no effort to contact or interview any potential character witnesses other than the defendant's mother who was contacted only after the trial had commenced, and the lack of preparation left the defense counsel unable to blunt the prosecution's forceful case. At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case; it is critical that mitigating evidence be presented at capital sentencing proceedings. Psychiatric and psychological evidence is crucial to the defense of a capital murder case, and there is a critical interrelation between expert psychiatric assistance and minimally effective representation. Thus, the defendant's counsel was unreasonable in not pursuing psychological evidence in support of the defense that the defendant was under the domination of his accomplice where evidence was presented in the post-conviction proceeding that the defendant was immature, dependent and easily lead. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

Argument that counsel was ineffective was without merit where counsel presented proof concerning defendant's absence of criminal record, cooperation in investigation, his being model prisoner, and testimony of victim's wife that defendant was non-violent. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Ineffective assistance of counsel was not shown concerning investigation of and failure to present mitigating circumstances where there was some mitigation by cross-examination and, strategically, it may be safer to obtain mitigating evidence from state's witnesses than to risk aggravating evidence from witnesses called by defense. Additionally, trial counsel has no absolute duty to present mitigating evidence; strategic choices made after less than complete investigation are reasonable to extent that reasonable professional judgment supports limitations on investigation; court must apply heavy measure of deference to counsel's judgments. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that counsel was ineffective for failing to explain to jury inapplicability and/or insignificance of aggravating circumstances and how to weigh aggravating and mitigating circumstances was rejected where counsel made excellent arguments as to aggravating circumstances, and closing argument contained variety of mitigating evidence. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that counsel should have requested presentence report in light of his failure to investigate mitigating evidence, was rejected as basis for ineffective assistance of counsel claim where question was counsel's competence in not investigating and presenting mitigating evidence; if this was reasonable strategic choice, there was no need for investigation by other means. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Counsel was not ineffective for failing to move for change of venue before guilt phase of trial because defense counsel is under no duty to make such motion, and thus this would fall into realm of trial strategy. Neither newspaper articles, nor anything else, indicated that, absent change of venue, defendant would lose right to fair trial. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

230. —Appellate representation, ineffective assistance of counsel.

A defendant was not deprived of his constitutional right to effective assistance of counsel on the ground that his attorney failed to perfect a timely appeal where his attorney filed for a new trial and J.N.O.V., thereby protecting the defendant's right of appeal to the Supreme Court. Jackson v. State, 614 So. 2d 965 (Miss. 1993).

A capital murder defendant was not denied effective assistance of counsel on direct appeal by his attorney's alleged failure to bring to the Supreme Court's attention a plea bargain with an accomplice who testified as a witness, where the Supreme Court was well aware that the accomplice had been permitted to plead guilty to manslaughter and that he had been sentenced to 15 years' imprisonment but had served only 2 ½ years. Culberson v. State, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991).

Claim of ineffective assistance of counsel is not procedurally viable where defendant waived issue when he declined to assert that point in his error coram nobis pleading; defendant had not shown sufficient cause to excuse this waiver where record reflected that trial counsel exited state court proceedings at conclusion of direct appeal and did not participate in presentation of error coram nobis pleading. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

231. —Totality of circumstances, ineffective assistance of counsel.

Adequacy of counsel's performance, as to its deficiency and prejudicial effect, should be measured by totality of circumstances. Taylor v. State, 682 So. 2d 359 (Miss. 1996).

In determining effectiveness of counsel issues, court must consider whether overall performance was deficient and whether defense was prejudiced by any such deficiencies. Moore v. State, 676 So. 2d 244 (Miss. 1996).

Viewed as a whole, it was ineffective assistance for defense counsel to fail to subpoena possible witnesses, to fail to seek a continuance until he could interview every possible eyewitness, to fail to seek special venire, to fail to raise Batson, which prohibits peremptory challenges based solely on race, and to fail to seek jury instruction specifically embracing facts that defendant and witness testified occurred, which would have made killing excusable accident. Triplett v. State, 666 So. 2d 1356 (Miss. 1995).

Defense counsel's failure to subpoena possible witnesses, to seek a continuance until he could interview every possible eyewitness, to seek special venire, to raise Batson, which prohibits peremptory challenges based solely on race, and to seek jury instruction specifically embracing facts that defendant and witness testified occurred, which would have made killing excusable accident, was prejudicial to defendant. Triplett v. State, 666 So. 2d 1356 (Miss. 1995).

Right to effective assistance of counsel includes right to representation by attorney who does not owe conflicting duties to other defendants. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Whether counsel's performance was both deficient and prejudicial under Strickland test for ineffectiveness of counsel must be determined from totality of circumstances. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for conducting cross-examination of witness that produced responses which allegedly strongly suggested to jury that defendant could not be rehabilitated, where most of the cross-examination was in abstract and was not related directly to defendant, and defendant had previous convictions for rape, manslaughter, robbery and grand larceny based upon which jury could have easily reached conclusion that there was little hope for defendant's rehabilitation. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Supreme Court must determine whether counsel's performance was both deficient and prejudicial based upon totality of circumstances. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

232. —Different outcome, ineffective assistance of counsel.

Counsel for capital murder defendant was not ineffective for failing to investigate and develop fact of defendant's low intelligence quotient, where absence of that evidence did not reasonably undermine confidence in outcome of trial, in that it was merely additional evidence of defendant's mental aptitude, since counsel argued that defendant had very minimal education and deprived childhood. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Claim of ineffective assistance of counsel is judged by whether counsel's performance was deficient, and, if so, whether deficient performance was prejudicial to defendant in sense that court's confidence in correctness of outcome is undermined. Roland v. State, 666 So. 2d 747 (Miss. 1995).

Supreme Court will find ineffective representation by counsel only where there is reasonable probability that without counsel's errors, outcome of trial would have been different. Hughes v. State, 665 So. 2d 852 (Miss. 1995), reh'g denied (Miss. Dec. 21, 1995).

A defendant's counsel was not ineffective at the guilt phase of a capital murder trial where the defense counsel adequately investigated, filing discovery motions and obtaining the State's entire file, and there was no reasonable probability that the outcome of the trial would have been different had evidence been presented that the defendant's accomplice, rather than the defendant, delivered the fatal injuries, because it was clearly established that the defendant was present at the planning and execution of the murder and was therefore a principal. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

233. —Sufficiency of evidence, ineffective assistance of counsel.

Defendants' claim of ineffective assistance of counsel based on allegation that if they had known that their attorneys would not call any witnesses, they would have themselves testified, amounted to a sham, and therefore defendants were not entitled to evidentiary hearing to set aside validly imposed sentences based upon this claim, considering that, prior to testimony commencing, trial judge made detailed and lengthy presentation to defendants on subject of their right to testify and defendants affirmatively responded to judge's questions as to whether they understood that they had right to testify regardless of what any other person wished or ordered them to do. King v. State, 679 So. 2d 208 (Miss. 1996).

Defendants were denied effective assistance of counsel where their trial counsel failed to question the jury panel during voir dire, failed to make an opening statement, failed to object to questionable identification testimony, placed into evidence a photograph of the defendants taken at the police station while they were wearing handcuffs, failed to call available alibi defense witnesses, failed to assure that the defendants were aware of their right to testify, admitted during closing argument that he had failed to bring his trial notes to court, and failed to present available mitigation evidence at sentencing. Moody v. State, 644 So. 2d 451 (Miss. 1994).

A defendant did not present sufficient evidence to show that he received ineffective assistance of counsel where the defendant simply cited actions of his attorney without explaining or justifying his contention that they should be characterized as deficient and prejudicial, and the defendant made no showing that his attorney's alleged errors affected the outcome of the case. Ahmad v. State, 603 So. 2d 843 (Miss. 1992).

A defendant was denied effective assistance of counsel where his attorney failed to conduct discovery, failed to object to the admissibility of statements made by the defendant after he was questioned by a police officer without being advised of his Miranda rights, failed to inquire into the constitutionality of a warrantless, nonconsensual search of the defendant's automobile, and failed to raise at the trial level the issue of a speedy trial, though the prosecution missed the statutory deadline for a speedy trial by 148 days. Barnes v. State, 577 So. 2d 840 (Miss. 1991).

A defendant was not denied his right to effective assistance of counsel merely because his attorney failed to procure a preliminary hearing where no allegation or facts were presented as to the way in which this matter operated to the defendant's prejudice. Jordan v. State, 577 So. 2d 368 (Miss. 1990).

A defendant's post-conviction claim of ineffective assistance of counsel, which was based on allegations that the defendant's counsel failed to object to allegedly defective indictments and erroneously advised the defendant to plead guilty, was properly dismissed without the benefit of an evidentiary hearing because it was manifestly without merit where the defendant failed to allege with the "specificity and detail" required that his counsel's performance was deficient and that the deficient performance prejudiced the defense, the facts alleged and the brief submitted were not supported by any affidavits other than his own, the indictments were not defective and therefore the defendant's counsel could not be faulted for failing to challenge their validity, and the defendant failed to identify the "deficient and erroneous advice" of his counsel that allegedly resulted in his pleas of guilty. Brooks v. State, 573 So. 2d 1350 (Miss. 1990).

Claim that counsel was ineffective because certain issues were procedurally barred due to ineffective assistance of counsel did not have merit because none of issues claimed had merit and thus failure to assert them could not constitute ineffective assistance of counsel. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

In a prosecution for possession with intent to deliver a controlled substance, in violation of §§ 41-29-115, 41-29-117, and 41-29-119, the record failed affirmatively to establish denial of defendants' right to effective assistance of counsel; nevertheless, affirmance of the judgment of conviction would not preclude defendants from litigating the issue via proper post-conviction proceedings. Read v. State, 430 So. 2d 832 (Miss. 1983).

234. Interrogation.

Defendant's motion to suppress his confession, contending that his rights under Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, Miss. Const. art. 3, §§ 14, 26 and 28, and Miss. Unif. Crim. R. Cir. Ct. Prac. 6.03 were violated was properly denied where a psychiatrist testified that defendant was not so impaired by mental disease or defect as to make him clearly incompetent to make a confession. Further, in defendant's original direct appeal, he challenged the admission of his confession on five separate grounds and that adverse decision constituted the law of the case. Thorson v. State, 895 So. 2d 85 (Miss. 2004), writ of certiorari denied by 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177, 74 U.S.L.W. 3203 (2005), remanded by 994 So. 2d 707, 2007 Miss. LEXIS 497 (Miss. 2007).

235. Environment and pollution.

Where the Mississippi Commission on Environmental Quality found that the tire company had committed numerous violations under a National Pollutant Discharge Elimination System (NPDES) permit, the tire company failed to demonstrate that it was singled out, or that it was selected for prosecution based upon protected classifications. Further, the appellate court deferred to the Mississippi Department of Environmental Quality's decision regarding the methodology limits implemented by the agency which were based on concentration limits rather than mass limits; in the latter context, the Commission acted within its power in determining that the permit was not "fatally flawed" under the methodology implemented. Titan Tire of Natchez, Inc. v. Miss. Comm'n on Envtl. Quality, 891 So. 2d 195 (Miss. 2004); Rucker v. State, 909 So. 2d 137 (Miss. Ct. App. 2005).

Cited in: Barnes v. State, 920 So. 2d 1019 (Miss. Ct. App. 2005), writ of certiorari dismissed by 920 So. 2d 1008, 2005 Miss. LEXIS 602 (Miss. 2005), writ of certiorari dismissed by 921 So. 2d 344, 2005 Miss. LEXIS 761 (Miss. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 79 (Miss. 2006).

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593.

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Validity of statutory classifications based on population — zoning, building, and land use statutes. 98 ALR3d 679.

Validity of statutory classifications based on population — tax statutes. 98 ALR3d 1083.

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Right of jailed or imprisoned parent to visit from minor child. 15 ALR4th 1234.

Oral communications insulting to particular state judge, made to third party out of judge's physical presence, as criminal contempt. 30 ALR4th 155.

What constitutes employment discrimination on basis of "marital status" for purposes of state civil rights laws. 44 ALR4th 1044.

Inverse condemnation state court class actions. 49 ALR4th 618.

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Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking. 53 ALR4th 801.

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Tenants' rights, under due process clause of Federal Constitution, to notice and hearing prior to imposition of higher rents or additional service charges for government-owned or government-subsidized housing. 28 ALR Fed 739.

Action of private institution of higher education as constituting state action, or action under color of law, for purposes of Fourteenth Amendment and 42 USCS § 1983. 37 ALR Fed 601.

Refusal to hire, or dismissal from employment, on account of plaintiffs sexual lifestyle or sexual preference as violation of Federal Constitution or federal civil rights statutes. 42 ALR Fed 189.

Exclusion of women from employment involving risk of fetal injury as violative of title VII of Civil Rights Act of 1964 (42 USCA §§ 2000e et seq.). 66 ALR Fed 968.

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What constitutes "an opportunity for full and fair litigation" in state court precluding habeas corpus review under 28 USCA § 2254 in federal court of state prisoner's Fourth Amendment claims. 75 ALR Fed 9.

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What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes — public employment cases.

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Necessity and sufficiency of service of process under due process clause of Federal Constitution's Fourteenth Amendment — Supreme Court cases. 100 L Ed 2d 1015.

State regulation of appellate procedure in civil case as violating equal protection clause of Federal Constitution's Fourteenth Amendment-Supreme Court cases. 100 L Ed 2d 947.

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Constitutional Limits on State Taxation of a Nonresident Trustee: Gavin Misinterprets and Misapplies Both Quill and McCulloch, 76 Miss. L.J. 1, Fall, 2006.

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AMENDMENT XV

UNIVERSAL MALE SUFFRAGE

Section 1. — The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2. — The Congress shall have power to enforce this article by appropriate legislation.

Proposal and Ratification. The fifteenth amendment to the Constitution of the United States was proposed to the Legislatures of the several States by the Fortieth Congress, on the 26th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the Legislatures of twenty-nine of the thirty-seven States. The dates of ratification were: Nevada, March 1, 1869; West Virginia, March 3, 1869; Illinois, March 5, 1869; Louisiana, March 5, 1869; North Carolina, March 5, 1869; Michigan, March 8, 1869; Wisconsin, March 9, 1869; Maine, March 11, 1869; Massachusetts, March 12, 1869; Arkansas, March 15, 1869; South Carolina, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (and the legislature of the same State passed a resolution January 5, 1870, to withdraw its consent to it, which action it rescinded on March 30, 1970); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Missouri, January 7, 1870; Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870; Ohio, January 27, 1870 (after having rejected it on April 30, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870.

Ratification was completed on February 3, 1870, unless the withdrawal of ratification by New York was effective; in which event ratification was completed on February 17, 1870, when Nebraska ratified.

The amendment was subsequently ratified by Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected it on February 7, 1870); Delaware, February 12, 1901 (after having rejected it on March 18, 1869); Oregon, February 24, 1959; California, April 3, 1962 (after having rejected it on January 28, 1870); Kentucky, March 18, 1976 (after having rejected it on March 12, 1869).

The amendment was approved by the Governor of Maryland, May 7, 1973; Maryland having previously rejected it on February 26, 1870.

The amendment was ratified by Tennessee on April 8, 1997; Tennessee having previously rejected it on November 16, 1869.

Cross References — Failure to pay poll tax, see USCS Const Amend XXIV.

Right of eighteen-year-olds to vote, see USCS Const Amend XXVI.

Womens' right to vote, see USCS Const Amend XIX.

JUDICIAL DECISIONS

1. In general.
2. Racial discrimination.
3. Voter registration.

1. In general.

A city's annexation of a particular area was constitutionally valid, where the population of the annexed area was roughly 50 percent white and 50 percent black, and where the annexation left the overall population and the voting age population in roughly the same racial makeup as it had been prior to the annexation, notwithstanding the allegation that a particular area had been excluded from the annexation on the basis that all its residents were black. Enlargement of Boundaries v. Yazoo City, 452 So. 2d 837 (Miss. 1984).

2. Racial discrimination.

Black voters failed to show that failure to repeal the provision of § 37-59-17 requiring that school bond referenda be passed by a 60 percent majority vote rather than a simple majority was motivated by racial factors, and thus they failed to show that the 60 percent requirement violated the Fourteenth and Fifteenth amendments, where the predominant theme of legislators who voted against repeal was opposition to raising property taxes; the fact that some House members perceived that repeal of the 60 percent requirement involved racial considerations did not make it so. Armstrong v. Allain, 893 F. Supp. 1320 (S.D. Miss. 1994).

Use of 1982 reapportionment plan, which had been found unconstitutional, rather than court-drawn plan or plan proposed by parties, was constitutional and could properly be used on interim basis in order that primary and general elections for state legislature could take place as scheduled prior to implementation of valid, permanent plan, despite fact that 1982 plan did not maximize members of majority black districts; because of swiftness with which population changes, and high cost of creating new election districts, and in view of lack of sufficient time to conduct full hearings and fact that proponents of one proposed plan failed to show that plan cured objections by United States Attorney General, and since possibility of corrective relief at later date existed, use was appropriate. Watkins v. Mabus, 771 F. Supp. 789 (S.D. Miss. 1991), aff'd in part, vacated in part 502 U.S. 954, 116 L. Ed. 2d 433.

The fact that a black had never won an at-large election in a city in which blacks comprised a majority of its total population as well as a majority of its voting age population was not sufficient in itself to prove an unconstitutional dilution of black voting strength in an action challenging the apportionment of the city's municipal wards. Canton Branch, NAACP v. City of Canton, 472 F. Supp. 859 (Miss. 1978).

Code 1972 § 21-3-7 is a purposeful device conceived and operated to further racial discrimination in the voting process, and is therefore violative of the Fourteenth and Fifteenth Amendments to the United States Constitution. Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975).

3. Voter registration.

Plaintiffs who showed that challenged statutes either impinged upon their protected rights to register to vote or burdened organizational efforts to assist prospective voters in registering had standing to sue to challenge Mississippi's dual registration requirement and prohibition on satellite registration as violative of their rights and all persons similarly situated. Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd sub nom. Mississippi State Chapter, Operation Push v. Mabus, 932 F.2d 400 (5th Cir. 1991).

RESEARCH REFERENCES

CJS. C.J.S. Elections §§ 6, 8 to 13.

AMENDMENT XVI

INCOME TAX

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

Proposal and Ratification. The sixteenth amendment to the Constitution of the United States was proposed to the Legislatures of the several States by the Sixty-first Congress on the 12th of July, 1909, and was declared, in a proclamation of the Secretary of State, dated the 25th of February, 1913, to have been ratified by 36 of the 48 States. The dates of ratification were: Alabama, August 10, 1909; Kentucky, February 8, 1910; South Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland, April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 30, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 3, 1911; Nebraska, February 9, 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Kansas, February 18, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected it earlier); Wisconsin, May 26, 1911; New York, July 12, 1911; Arizona, April 6, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West Virginia, January 31, 1913; New Mexico, February 3, 1913.

Ratification was completed on February 3, 1913.

The amendment was subsequently ratified by Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected it on March 2, 1911).

The amendment was rejected (and not subsequently ratified) by Connecticut, Rhode Island, and Utah.

Cross References — Apportionment of direct taxes, see USCS Const Art I, § 2, cl. 3 and Art I, § 9, cl. 4.

JUDICIAL DECISIONS

1. In general.

The Sixteenth Amendment to the Federal Constitution enlarged the power of Congress to levy income taxes without apportionment among the several states and without regard to enumeration; but it did not confer upon the states any power, and their power remains as it existed prior to the Sixteenth Amendment. Mississippi State Tax Comm'n v. Brown, 188 Miss. 483, 193 So. 794, 127 A.L.R. 919 (1940), error overruled, 188 Miss. 516, 195 So. 465, 127 A.L.R. 919 (1940).

RESEARCH REFERENCES

Am Jur. 16 Am Jur 2d, Constitutional Law § 14.

16A Am Jur 2d, Constitutional Law § 419.

CJS. C.J.S. Internal Revenue § 12.

AMENDMENT XVII

POPULAR ELECTION OF SENATORS

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

Proposal and Ratification. The seventeenth amendment to the Constitution of the United States was proposed to the Legislatures of the several States by the Sixty-second Congress on the 13th of May, 1912, and was declared, in a proclamation of the Secretary of State, dated the 31st of May, 1913, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Maine, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 1913; New Jersey, March 17, 1913; Tennessee, April 1, 1913; Pennsylvania, April 2, 1913; Connecticut, April 8,1913.

Ratification was completed on April 8, 1913.

The amendment was subsequently ratified by Louisiana, June 11, 1914.

The amendment was rejected by Utah (and not subsequently ratified) on February 26, 1913.

JUDICIAL DECISIONS

1. Construction and application.
2. Writ of election.

1. Construction and application.

Miss. Code Ann. § 23-15-855 is silent regarding the situation in which a senatorial vacancy occurs after a general state or congressional election, and the statute fails to implement the specific power granted to the legislature by the Seventeenth Amendment for directing the filling of the vacancy by election. As such, the general power granted to the executive branch of the state by the Seventeenth Amendment to issue writs of election is controlling. Barbour v. State ex rel. Hood, 974 So. 2d 232 (Miss. 2008).

2. Writ of election.

Writ of election issued by the Governor on December 20, 2007, designating November 4, 2008, as the general election day for electing a U.S. Senator to complete the term of office of a Senator who had resigned was not constitutionally infirm. The circuit court erred, as a matter of law, in finding that the writ of election exceeded the Governor's constitutional and statutory authority. Barbour v. State ex rel. Hood, 974 So. 2d 232 (Miss. 2008).

RESEARCH REFERENCES

CJS. C.J.S. Elections § 16.
C.J.S. United States §§ 16-18, 20-22.

AMENDMENT XVIII

LIQUOR PROHIBITION [REPEALED]

Repeal of Amendment. Former Amendment XVIII to the United States Constitution, which was repealed by Amendment XXI to the United States Constitution ratified on December 5, 1933, provided as follows:

"**Section 1.** After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"**Section 2.** The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"**Section 3.** This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Proposal and Ratification. The eighteenth amendment to the Constitution of the United States was proposed to the Legislatures of the several States by the Sixty-fifth Congress, on the 18th of December, 1917, and was declared, in a proclamation of the Secretary of State, dated the 29th of January, 1919, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 25, 1918; South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts, April 2, 1918; Arizona, May 24, 1918; Georgia, June 26, 1918; Louisiana, August 3, 1918; Florida, December 3, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 9, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington, January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919.

Ratification was completed on January 16, 1919.

The amendment was subsequently ratified by Minnesota on January 17, 1919; Wisconsin, January 17, 1919; New Mexico, January 20, 1919; Nevada, January 21, 1919; New York, January 29, 1919; Vermont, January 29, 1919; Pennsylvania, February 25, 1919; Connecticut, May 6, 1919; and New Jersey, March 9, 1922.

The amendment was rejected (and not subsequently ratified) by Rhode Island.

Cross References — Repeal of this amendment, see USCS Const Amend XXI.

JUDICIAL DECISIONS

1. In general.

State prohibition laws are not superseded by the 18th Amendment. Kyzar v State, 125 M 79, 87 So 415; Meriwether v State, 125 M 435, 87 So 411. Meriwether v. State, 125 Miss. 435, 87 So. 411 (1921).

AMENDMENT XIX

WOMAN SUFFRAGE

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Proposal and Ratification. The nineteenth amendment to the Constitution of the United States was proposed to the Legislatures of the several States by the Sixty-sixth Congress, on the 4th of June, 1919, and 424 was declared, in a proclamation of the Secretary of State, dated the 26th of August, 1920, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Illinois, June 10, 1919 (and that State readopted its resolution of ratification June 17, 1919); Michigan, June 10, 1919; Wisconsin, June 10, 1919; Kansas, June 16, 1919; New York, June 16, 1919; Ohio, June 16, 1919; Pennsylvania, June 24, 1919; Massachusetts, June 25, 1919; Texas, June 28, 1919; Iowa, July 2, 1919; Missouri, July 3, 1919; Arkansas, July 28, 1919; Montana, August 2, 1919; Nebraska, August 2, 1919; Minnesota, September 8, 1919; New Hampshire, September 10, 1919; Utah, October 2, 1919; California, November 1, 1919; Maine, November 5, 1919; North Dakota, December 1, 1919; South Dakota, December 4, 1919; Colorado, December 15, 1919; Kentucky, January 6, 1920; Rhode Island, January 6, 1920; Oregon, January 13, 1920; Indiana, January 16, 1920; Wyoming, January 27, 1920; Nevada, February 7, 1920; New Jersey, February 9, 1920; Idaho, February 11, 1920; Arizona, February 12, 1920; New Mexico, February 21, 1920; Oklahoma, February 28, 1920; West Virginia, March 10, 1920; Washington, March 22, 1920; Tennessee, August 18, 1920.

Ratification was completed on August 18, 1920.

The amendment was subsequently ratified by Connecticut on September 14, 1920 (and that State reaffirmed on September 21, 1920); Vermont, February 8, 1921; Delaware, March 6, 1923 (after rejecting it on June 2, 1920); Maryland, March 29, 1941 (after rejecting it on February 24, 1920; ratification certified on February 25, 1958); Virginia, February 21, 1952 (after rejecting it on February 12, 1920); Alabama, September 8, 1953 (after rejecting it on September 22, 1919); Florida, May 13, 1969; South Carolina, July 1, 1969 (after rejecting it on January 28, 1920; ratification certified on August 22, 1973); Georgia, February 20, 1970 (after rejecting it on July 24, 1919); Louisiana, June 11, 1970 (after rejecting it on July 1, 1920); North Carolina, May 6,1971; Mississippi, March 22, 1984 (after rejecting it on March 29, 1920).

Cross References — Failure to pay poll tax, see USCS Const Amend XXIV.

Right of eighteen-year-olds to vote, see USCS Const Amend XXVI.

Right to vote regardless of race, color, or previous condition of servitude, see USCS Const Amend XV.

RESEARCH REFERENCES

Am Jur. 16A Am Jur 2d, Constitutional Law §§ 222, 419.

25 Am Jur 2d, Elections § 157.

32 Am Jur 2d, Federal Courts § 460.

CJS. C.J.S. Elections § 8.

AMENDMENT XX

LAME DUCK AMENDMENT

Section 1. — The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. — The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

Section 3. — If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. — The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. — Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. — This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Proposal and Ratification. — The twentieth amendment to the Constitution was proposed to the legislatures of the several states by the Seventy-Second Congress, on the 2d day of March, 1932, and was declared, in a proclamation by the Secretary of State, dated on the 6th day of February, 1933, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Virginia, March 4, 1932; New York, March 11, 1932; Mississippi, March 16, 1932; Arkansas, March 17, 1932; Kentucky, March 17, 1932; New Jersey, March 21, 1932; South Carolina, March 25, 1932; Michigan, March 31, 1932; Maine, April 1, 1932; Rhode Island, April 14, 1932; Illinois, April 21, 1932; Louisiana, June 22, 1932; West Virginia, July 30, 1932; Pennsylvania, August 11, 1932; Indiana, August 15, 1932; Texas, September 7, 1932; Alabama, September 13, 1932; California, January 4, 1933; North Carolina, January 5, 1933; North Dakota, January 9, 1933; Minnesota, January 12, 1933; Arizona, January 13, 1933; Montana, January 13, 1933; Nebraska, January 13, 1933; Oklahoma, January 13, 1933; Kansas, January 16, 1933; Oregon, January 16, 1933; Delaware, January 19, 1933; Washington, January 19, 1933; Wyoming, January 19, 1933; Iowa, January 20, 1933; South Dakota, January 20, 1933; Tennessee, January 20, 1933; Idaho, January 21, 1933; New Mexico, January 21, 1933; Georgia, January 23, 1933; Missouri, January 23, 1933; Ohio, January 23, 1933; Utah, January 23, 1933.

Ratification was completed on January 23, 1933.

The amendment was subsequently ratified by Massachusetts on January 24, 1933; Wisconsin, January 24, 1933; Colorado, January 24, 1933; Nevada, January 26, 1933; Connecticut, January 27, 1933; New Hampshire, January 31, 1933; Vermont, February 2, 1933; Maryland, March 24, 1933; Florida, April 26, 1933.

Cross References — Number of terms permitted President, see USCS Const Amend XXII.

Incapacity of President, see USCS Const Amend XXV, §§ 3 and 4.

Removal, death, or resignation of President, see USCS Const Amend XXV, § 1.

RESEARCH REFERENCES

Am Jur. 16A Am Jur 2d, Constitutional Law § 419.

63C Am Jur 2d, Public Officers and Employees §§ 117, 118, 121, 137-145, 428, 431, 432.

CJS. C.J.S. United States §§ 45, 46.

AMENDMENT XXI

REPEAL OF PROHIBITION AMENDMENT

Section 1. — The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. — The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. — This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the congress.

Proposal and Ratification. — The twenty-first amendment to the Constitution was proposed to the several states by the Seventy-Second Congress, on the 20th day of

February, 1933, and was declared, in a proclamation by the Secretary of State, dated on the 5th day of December, 1933, to have been ratified by 36 of the 48 States. The dates of ratification were: Michigan, April 10, 1933; Wisconsin, April 25, 1933; Rhode Island, May 8, 1933; Wyoming, May 25, 1933; New Jersey, June 1, 1933; Delaware, June 24, 1933; Indiana, June 26, 1933; Massachusetts, June 26, 1933; New York, June 27, 1933; Illinois, July 10, 1933; Iowa, July 10, 1933; Connecticut, July 11, 1933; New Hampshire, July 11, 1933; California, July 24, 1933; West Virginia, July 25, 1933; Arkansas, August 1, 1933; Oregon, August 7, 1933; Alabama, August 8, 1933; Tennessee, August 11, 1933; Missouri, August 29, 1933; Arizona, September 5, 1933; Nevada, September 5, 1933; Vermont, September 23, 1933;Colorado, September 26, 1933; Washington, October 3, 1933; Minnesota, October 10, 1933; Idaho, October 17, 1933; Maryland, October 18, 1933; Virginia, October 25, 1933; New Mexico, November 2, 1933; Florida, November 14, 1933; Texas, November 24, 1933; Kentucky, November 27, 1933; Ohio, December 5, 1933; Pennsylvania, December 5, 1933; Utah, December 5, 1933.

Ratification was completed on December 5, 1933.

The amendment was subsequently ratified by Maine, on December 6, 1933, and by Montana, on August 6, 1934.

The amendment was rejected (and not subsequently ratified) by South Carolina, on December 4, 1933.

JUDICIAL DECISIONS

1. In general.
2. Construction with Commerce Clause.
3. Local ordinances.

1. In general.

Wholesale markup applied to liquor sold to federal military installations in Mississippi constituted a sales tax, the legal incidence of which rested upon instrumentalities of the United States as the purchasers, and therefore the markup was unconstitutional as a tax imposed upon the United States and its instrumentalities; The Twenty-First Amendment did not abolish federal immunity with respect to taxes on the sales of liquor to the concurrent jurisdiction bases. United States v. Mississippi Tax Comm'n, 421 U.S. 599, 95 S. Ct. 1872, 44 L. Ed. 2d 404 (1975).

Since this Amendment allows the states constitutionally to prohibit the use of intoxicating liquor, it allows the states also to prohibit the possession of intoxicating liquor, since possession is an essential and vital part of the delivery or use of intoxicants. State v. Wood, 187 So. 2d 820 (Miss. 1966).

2. Construction with Commerce Clause.

State liquor tax exemption for locally produced alcoholic beverages violates commerce clause because it has purpose and effect of discriminating in favor of local products, and tax is not saved by Twenty-First Amendment because tax violates central tenet of commerce clause without indication that it is useful in combating perceived evils of unrestricted traffic of liquor. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984).

3. Local ordinances.

Pursuant to § 67-3-65, a city was authorized to enact ordinances regulating light wine and beer on adult entertainment premises without showing any secondary effects or showing that such establishments were conducive to criminal behavior; accordingly, any artistic or communicative value that might attach to topless dancing was overridden by the city's exercise of its broad powers arising under the Twenty-First Amendment, and the city's prohibition of light wine and beer in a lounge featuring topless dancing was constitutionally permissible. Steverson v. City of Vicksburg, 900 F. Supp. 1 (S.D. Miss. 1994).

RESEARCH REFERENCES

ALR. Federal regulation of competitive practices in liquor industry under § 5 of Federal Alcohol Administration Act (27 USCS § 205). 58 A.L.R. Fed. 797.

AMENDMENT XXII

LIMITATION ON PRESIDENTIAL TERMS

Section 1. — No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. — This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Proposal and Ratification. — This amendment was proposed to the legislatures of the several States by the Eightieth Congress on Mar. 21, 1947 by House Joint Res. No. 27, and was declared by the Administrator of General Services, on Mar. 1, 1951, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Maine, March 31, 1947; Michigan, March 31, 1947; Iowa, April 1, 1947; Kansas, April 1, 1947; New Hampshire, April 1, 1947; Delaware, April 2, 1947; Illinois, April 3, 1947; Oregon, April 3, 1947; Colorado, April 12, 1947; California, April 15, 1947; New Jersey, April 15, 1947; Vermont, April 15, 1947; Ohio, April 16, 1947; Wisconsin, April 16, 1947; Pennsylvania, April 29, 1947; Connecticut, May 21, 1947; Missouri, May 22, 1947; Nebraska, May 23, 1947; Virginia, January 28, 1948; Mississippi, February 12, 1948; New York, March 9, 1948; South Dakota, January 21, 1949; North Dakota, February 25, 1949; Louisiana, May 17, 1950; Montana, January 25, 1951; Indiana, January 29, 1951; Idaho, January 30, 1951; New Mexico, February 12, 1951; Wyoming, February 12, 1951; Arkansas, February 15, 1951; Georgia, February 17, 1951; Tennessee, February 20, 1951; Texas, February 22, 1951; Nevada, February 26, 1951; Utah, February 26, 1951; Minnesota, February 27, 1951.

Ratification was completed on February 27, 1951.

The amendment was subsequently ratified by North Carolina on February 28, 1951; South Carolina, March 13, 1951; Maryland, March 14, 1951; Florida, April 16, 1951; Alabama, May 4, 1951.

The amendment was rejected (and not subsequently ratified) by Oklahoma in June 1947, and Massachusetts on June 9, 1949.

Cross References — Ending of terms of President and Vice-President, see USCS Const Amend XX, § 1.

RESEARCH REFERENCES

Am Jur. 16A Am Jur 2d, Constitutional Law § 419.

77 Am Jur 2d, United States § 18.

CJS. C.J.S. United States §§ 45, 46.

AMENDMENT XXIII

PRESIDENTIAL ELECTORS FOR DISTRICT OF COLUMBIA

Section 1. — The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State, they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. — The Congress shall have power to enforce this article by appropriate legislation.

Proposal and Ratification. — This amendment was proposed by the Eighty-sixth Congress on June 17, 1960 and was declared by the Administrator of General Services on Apr. 3, 1961, to have been ratified by 38 of the 50 States. The dates of ratification were: Hawaii, June 23, 1960 (and that State made a technical correction to its resolution on June 30, 1960); Massachusetts, August 22, 1960; New Jersey, December 19, 1960; New York, January 17, 1961; California, January 19, 1961; Oregon, January 27, 1961; Maryland, January 30, 1961; Idaho, January 31, 1961; Maine, January 31, 1961; Minnesota, January 31, 1961; New Mexico, February 1, 1961; Nevada, February 2, 1961; Montana, February 6, 1961; South Dakota, February 6, 1961; Colorado, February 8, 1961; Washington, February 9, 1961; West Virginia, February 9, 1961; Alaska, February 10, 1961; Wyoming, February 13, 1961; Delaware, February 20, 1961; Utah, February 21, 1961; Wisconsin, February 21, 1961; Pennsylvania, February 28, 1961; Indiana, March 3, 1961; North Dakota, March 3, 1961; Tennessee, March 6, 1961; Michigan, March 8, 1961; Connecticut, March 9, 1961; Arizona, March 10, 1961; Illinois, March 14, 1961; Nebraska, March 15, 1961; Vermont, March 15, 1961; Iowa, March 16, 1961; Missouri, March 20, 1961; Oklahoma, March 21, 1961; Rhode Island, March 22, 1961; Kansas, March 29, 1961; Ohio, March 29, 1961.

Ratification was completed on March 29, 1961.

The amendment was subsequently ratified by New Hampshire on March 30, 1961 (when that State annulled and then repeated its ratification of March 29, 1961).

The amendment was rejected (and not subsequently ratified) by Arkansas on January 24, 1961.

RESEARCH REFERENCES

CJS. C.J.S. United States § 46.

AMENDMENT XXIV

QUALIFICATIONS OF ELECTORS; POLL TAX

Section 1. — The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. — The Congress shall have power to enforce this article by appropriate legislation.

Proposal and Ratification. — This amendment was proposed by the Eighty-seventh Congress by Senate Joint Resolution No. 29, which was approved by the Senate on Mar. 27, 1962, and by the House of Representatives on Aug. 27, 1962. It was declared by the Administrator of General Services on Feb. 4, 1964, to have been ratified by the legislatures of 38 of the 50 States.

This amendment was ratified by the following States:

Illinois, Nov. 14, 1962; New Jersey, Dec. 3, 1962; Oregon, Jan. 25, 1963; Montana, Jan. 28, 1963; West Virginia, Feb. 1, 1963; New York, Feb. 4, 1963; Maryland, Feb. 6, 1963; California, Feb. 7, 1963; Alaska, Feb. 11, 1963; Rhode Island, Feb. 14, 1963; Indiana, Feb. 19, 1963; Utah, Feb. 20, 1963; Michigan, Feb. 20, 1963; Colorado, Feb. 21, 1963; Ohio, Feb. 27, 1963; Minnesota, Feb. 27, 1963; New Mexico, Mar. 5, 1963; Hawaii, Mar. 6, 1963; North Dakota, Mar. 7, 1963; Idaho, Mar. 8, 1963; Washington, Mar. 14, 1963; Vermont, Mar. 15, 1963; Nevada, Mar. 19, 1963; Connecticut, Mar. 20, 1963; Tennessee, Mar. 21, 1963; Pennsylvania, Mar. 25, 1963; Wisconsin, Mar. 26, 1963; Kansas, Mar. 28, 1963; Massachusetts, Mar. 28, 1963; Nebraska, Apr. 4, 1963; Florida, Apr. 18, 1963; Iowa, Apr. 24, 1963; Delaware, May 1, 1963; Missouri, May 13, 1963; New Hampshire, June 12, 1963; Kentucky, June 27, 1963; Maine, Jan. 16, 1964; South Dakota, Jan. 23, 1964; Virginia, Feb. 25, 1977; North Carolina, May 3, 1989.

Ratification was completed on January 23, 1964.

The amendment was rejected by Mississippi (and not subsequently ratified) on December 20, 1962.

Cross References — Right to vote regardless of race, color, or previous condition of servitude, see USCS Const Amend XV.

Womens' right to vote, see USCS Const Amend XIX.

Right of eighteen-year-olds to vote, see USCS Const Amend XXVI.

RESEARCH REFERENCES

CJS. C.J.S. Elections § 29.

AMENDMENT XXV

SUCCESSION TO PRESIDENCY AND VICE PRESIDENCY; DISABILITY OF PRESIDENT

Section 1. — In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. — Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. — Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as acting President.

Section 4. — Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the congress, within twenty-one days after receipt of the latter written declaration, or, if congress is not in session, within twenty-one days after congress is required to assemble, determines by two-thirds vote of both houses that the president is unable to discharge the powers and duties of his office, the vice president shall continue to discharge the same as acting president; otherwise, the president shall resume the powers and duties of his office.

Proposal and Ratification. — This amendment was proposed by the Eighty-ninth Congress by Senate Joint Resolution No. 1, which was approved by the Senate on Feb. 19, 1965, and by the House of Representatives, in amended form, on Apr. 13, 1965. The House of Representatives agreed to a Conference Report on June 30, 1965, and the Senate agreed to the Conference Report on July 6, 1965. It was declared by the Administrator of General Services, on Feb. 23, 1967, to have been ratified by the legislatures of 39 of the 50 States.

This amendment was ratified by the following States:

Nebraska, July 12, 1965; Wisconsin, July 13, 1965; Oklahoma, July 16, 1965; Massachusetts, Aug. 9, 1965; Pennsylvania, Aug. 18, 1965; Kentucky, Sept. 15, 1965; Arizona, Sept. 22, 1965; Michigan, Oct. 5, 1965; Indiana, Oct. 20, 1965; California, Oct. 21, 1965; Arkansas, Nov. 4, 1965; New Jersey, Nov. 29, 1965; Delaware, Dec. 7, 1965; Utah, Jan. 17, 1966; West Virginia, Jan. 20, 1966; Maine, Jan. 24, 1966; Rhode Island, Jan. 28, 1966; Colorado, Feb. 3, 1966; New Mexico, Feb. 3, 1966; Kansas, Feb. 8, 1966; Vermont, Feb. 10, 1966; Alaska, Feb. 18, 1966; Idaho, Mar. 2, 1966; Hawaii, Mar. 3, 1966; Virginia, Mar. 8, 1966; Mississippi, Mar. 10, 1966; New York, Mar. 14, 1966; Maryland, Mar. 23, 1966; Missouri, Mar. 30, 1966; New Hampshire, June 13, 1966; Louisiana, July 5, 1966; Tennessee, Jan. 12, 1967; Wyoming, Jan. 25, 1967; Washington, Jan. 26, 1967; Iowa, Jan. 26, 1967; Oregon, Feb. 2, 1967; Minnesota, Feb. 10, 1967; Nevada, Feb. 10, 1967.

Ratification was completed on Feb. 10, 1967.

The amendment was subsequently ratified by Connecticut, Feb. 14, 1967; Montana, Feb. 15, 1967; South Dakota, Mar. 6, 1967; Ohio, Mar. 7, 1967; Alabama, Mar. 14, 1967; North Carolina, Mar. 22, 1967; Illinois, Mar. 22, 1967; Texas, April 25, 1967; Florida, May 25, 1967.

Cross References — Failure of President-elect and Vice-President-elect to qualify, see USCS Const Amend XX, § 3.

RESEARCH REFERENCES

CJS. C.J.S. United States §§ 45, 46.

AMENDMENT XXVI

RIGHT TO VOTE; CITIZENS EIGHTEEN YEARS OF AGE OR OLDER

Section 1. — The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. — The Congress shall have power to enforce this article by appropriate legislation.

Proposal and Ratification. — This amendment was proposed by the Ninety-second Congress by Senate Joint Resolution No. 7, which was approved by the Senate on Mar. 10, 1971, and by the House of Representatives on Mar. 23, 1971. It was declared by the Administrator of General Services on July 5, 1971, to have been ratified by the legislatures of 39 of the 50 States.

This amendment was ratified by the following States: Alabama, June 30, 1971; Alaska, April 8, 1971; Arizona, May 14, 1971; Arkansas, March 30, 1971; California, April 19, 1971; Colorado, April 27, 1971; Connecticut, March 23, 1971; Delaware, March 23, 1971; Hawaii, March 24, 1971; Idaho, March 30, 1971; Illinois, June 29, 1971; Indiana, April 8, 1971; Iowa, March 30, 1971; Kansas, April 7, 1971; Louisiana, April 17, 1971; Maine, April 9, 1971; Maryland, April 8, 1971; Massachusetts, Michigan, April 7, 1971; Minnesota, March 23, 1971; Missouri, June 14, 1971; Montana, March 29, 1971; Nebraska, April 2, 1971; New Hampshire, May 13, 1971; New Jersey, April 3, 1971; New York, June 2, 1971; North Carolina, July 1, 1971; Ohio, June 30, 1971; Oklahoma, July 1, 1971; Oregon, June 4, 1971; Pennsylvania, April 27, 1971; Rhode Island, May 27, 1971; South Carolina, April 28, 1971; Tennessee, March 23, 1971; Texas, April 27, 1971; Vermont, April 16, 1971; Washington, March 23, 1971; West Virginia, April 28, 1971; and Wisconsin, June 22, 1971.

Ratification was completed on July 1, 1971.

The amendment was subsequently ratified by Virginia, July 8, 1971; Wyoming, July 8, 1971; Georgia, October 4, 1971.

Cross References — Right to vote regardless of race, color, or previous condition of servitude, see USCS Const Amend XV.

Womens' right to vote, see USCS Const Amend XIX.

Failure to pay poll tax, see USCS Const Amend XXIV.

RESEARCH REFERENCES

CJS. C.J.S. Elections § 17.

AMENDMENT XXVII

COMPENSATION OF SENATORS AND REPRESENTATIVES

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Proposal and Ratification. The Twenty-seventh Amendment was proposed on September 25, 1789. The State Legislatures ratified this Amendment on the following dates: Maryland, North Carolina, South Carolina, Delaware, Vermont, Virginia, 1789-1791; Ohio, May 6, 1873; Wyoming, March 6, 1978; Maine, April 27, 1983; Colorado, April 22, 1984; South Dakota, February 1985; New Hampshire, March 7, 1985; Arizona, April 3, 1985; Tennessee, May 28, 1985; Oklahoma, July 10, 1985; New Mexico, February 14, 1986; Indiana, February 24, 1986; Utah, February 25, 1986; Arkansas, March 13, 1987; Montana, March 17, 1987; Connecticut, May 13, 1987; Wisconsin, July 15, 1987; Georgia, February 2, 1988; West Virginia, March 10, 1988; Louisiana, July 7, 1988; Iowa, February 9, 1989; Idaho, March 23, 1989; Nevada, April 26, 1989; Alaska, May 6, 1989; Oregon, May 19, 1989; Minnesota, May 22, 1989; Texas, May 25, 1989; Kansas, April 5, 1990; Florida, May 31, 1990; North Dakota, March 25, 1991; Alabama, May 5, 1992; Missouri, May 5, 1992; Michigan, May 7, 1992. The State of New Jersey later ratified this amendment on May 7, 1992.

Ratification was completed on May 7, 1992.

The amendment was subsequently ratified by California, June 26, 1992; Illinois, May 12, 1992; and Rhode Island, June 10, 1993; Hawaii, April 29, 1994; Washington, April 6, 1995; Kentucky, March 21, 1996.

Certification of Validity.

Publication of the certifying statement of the Archivist of the United States, pursuant to 1 U.S.C.S. § 106b, that the amendment has become valid was made on May 19, 1992. F.R.Doc. 92-11951, 57 F.R.21187.

Cross References — Compensation of members of Congress, see also, USCS Const Art 1, § VI, cl. 1.

RESEARCH REFERENCES

ALR. Construction and operation of twenty-seventh Amendment to United States Constitution relating to congressional compensation. 95 A.L.R.5th 459.

THE CONSTITUTION OF THE STATE OF MISSISSIPPI

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ADOPTED NOVEMBER 1, A.D., 1890

PREAMBLE

We, the people of Mississippi in convention assembled, grateful to Almighty God, and invoking his blessing on our work, do ordain and establish this constitution.

Cross References — Political power and rights of the people, see Miss. Const. Art. 3, §§ 5, 6.

JUDICIAL DECISIONS

1. In general.

The Constitution must be construed on the theory that it is to last for all time. L.N. Dantzler Lumber Co. v. State, 97 Miss. 355, 53 So. 1 (1910).

A court in construing the Constitution must look alone to the perfected work-the Constitution itself. Dixon v. State, 74 Miss. 271, 20 So. 839 (1896).

Ratification of the Constitution by the people was unnecessary to its validity. Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892), overruled on other grounds, O'Neal v. Simpson, 350 So. 2d 998 (Miss. 1997).

A constitutional convention has no power to impair vested rights of individuals. Lawson v. Jeffries, 47 Miss. 686, 12 Am. R. 342 (1873).

Article 1.

Distribution of Powers.

Sec.	
1.	Powers of government
2.	Encroachment of power

§ 1. Powers of government

The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

SOURCES: 1817 art II § 1; 1832 art II § 1; 1869 art III § 1.

JUDICIAL DECISIONS

1. In general.
2. Legislative powers and functions—In general.
3. — — Review of administrative decisions, legislative powers and functions.
4. — — Crimes, legislative powers and functions.
5. — — Education, legislative powers and functions.
6. — — Delegation of legislative powers, legislative powers and functions.
7. — — Incorporation of municipalities, legislative powers and functions.
8. Judicial powers and functions—In general.
9. — — Crimes, judicial powers and functions.
10. — — Elections, judicial powers and functions.
11. — — Determining validity of legislation, judicial powers and functions.
12. — — Construction of legislation, judicial powers and functions.
13. — — Municipal ordinances, judicial powers and functions.
14. — — Review of administrative decisions, judicial powers and functions.
15. Executive powers and functions.
16. Encroachment—In general.
17. — — Upon legislative power, encroachment.
18. — — Upon judicial power, encroachment.
19. — — Discretion of prosecutor, encroachment.
20. — — Upon executive power, encroachment.

1. In general.

The portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) requiring that all claims against the State be governed by case law governing sovereign immunity as it existed immediately prior to the decision in Pruett v. City of Rosedale (Miss. 1982) 421 So. 2d 1046 is unconstitutional as it violates the doctrine of separation of powers and the prohibition against reviving or amending a law by reference to its title only. Presley v. Mississippi State Hwy. Comm'n, 608 So. 2d 1288 (Miss. 1992).

The participation of the Lieutenant Governor on the Joint Legislative Budget Committee was not a violation of the constitutional provision for separation of executive and legislative powers. The Lieutenant Governor is constitutionally an officer of both the executive and legislative departments and is eligible as President of the Senate to receive the legislative powers conferred upon him by the legislation creating the Joint Legislative Budget Committee. Neither the statute creating the Joint Legislative Budget Committee nor the Lieutenant Governor's service on the committee constituted a violation of the constitutionally mandated separation of powers. Kirksey v. Dye, 564 So. 2d 1333 (Miss. 1990).

Claim upon which relief can be granted is stated where allegation is that member of Executive Department of Government is exercising legislative powers within Senate; court has authority and responsibility to decide question where it is alleged that one arguably member of executive department is exercising legislative powers, where court had for many years entertained and decided controversies wherein parties claimed that members of one department of government were exercising powers in another in violation of constitutional mandate for separation of powers. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

Workmen's Compensation Law does not violate § 1 of the state constitution which provides that the powers of the government of the state shall be divided into three distinct departments and each of them confided to a separate magistracy. Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).

Constitutional provision dividing powers of government into departments impliedly prohibits advisory opinions by one department to another, except as Constitution provides therefor. In re Justices, 148 Miss. 427, 114 So. 887 (1927).

The separation of the legislative, judicial and executive powers of government is fundamental under the federal and state Constitutions and an ordinance of a constitutional convention cannot violate it. Lawson v. Jeffries, 47 Miss. 686, 12 Am. R. 342 (1873).

2. Legislative powers and functions—In general.

Circuit court's overruling of the Mississippi Public Employees' Retirement System's denial of disability benefits to a teacher was reversed, as substantial evidence supported the agency's decision. However, the teacher was to submit to an evaluation by a physician of the agency's choice, as well as an updated exam by her physician if she so chose. Public Emples. Ret. Sys. v. Howard, 905 So. 2d 1279 (Miss. 2005).

State constitution does not grant specific legislative powers, but limits them. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

Legislative and not judicial power held exercised in reducing authority of revenue agent, though it work abatement of a suit. Miller v. Globe-Rutgers Fire Ins. Co., 143 Miss. 489, 108 So. 180 (1926).

3. — — Review of administrative decisions, legislative powers and functions.

It is beyond the power of the legislature to grant a trial de novo to permit the court or jury to substitute their own judgment for that of the Civil Service Commission, when the commission has exercised a purely executive function. City of Meridian v. Davidson, 211 Miss. 683, 53 So. 2d 48 (1951).

4. — — Crimes, legislative powers and functions.

Under the Uniform Controlled Substances Law, the penalties prescribed for violations thereof are inextricably tied to the various schedules, and therefore the portions of Code 1972, § 41-29-111 by which the state board of health is given the authority to move a substance from one schedule to another, to add substances to any schedule, and to delete substances from any schedule are an unconstitutional attempt to delegate the authority to define crimes and fix the punishments therefor which is vested exclusively in the legislature; such unconstitutional portions are separable from the remaining provisions of the Uniform Controlled Substances Law. Howell v. State, 300 So. 2d 774 (Miss. 1974).

5. — — Education, legislative powers and functions.

The abolition of fraternal societies at state educational institutions is within the power of the legislature and is not violative of this section. Board of Trustees v. Waugh, 105 Miss. 623, 62 So. 827, Am. Ann. Cas. 1916E,522 (1913), aff'd, 237 U.S. 589, 35 S. Ct. 720, 59 L. Ed. 1131 (1915).

6. — — Delegation of legislative powers, legislative powers and functions.

The provision in § 11-46-6 [repealed] providing that, until the Sovereign Immunity Act (§§ 11-46-1 et seq.) becomes effective, all claims against the State and political subdivisions "shall not be affected by this act but shall continue to be governed by the case law governing sovereign immunity as it existed immediately prior to the decision in the case of Pruett v. City of Rosedale, 421 So. 2d 1046" and relevant statutory law governing sovereign immunity delegates all authority to the court, as the court is told to apply the "case law," which is not even confined to Mississippi case law, on sovereign immunity as it existed on November 10, 1982; the court is required to go beyond the 4 corners of the statute to find the substantive law governing sovereign immunity, a legislatively imposed responsibility on the court "which comes perilously close to delegation to the court the power to legislate on this particular subject," which under the Mississippi Constitution only the legislature may do. Presley v. Mississippi State Hwy. Comm'n, 608 So. 2d 1288 (Miss. 1992).

A statute directing organization of a water district if the court finds the project feasible from an engineering standpoint and practical, and that its creation will meet a public necessity and be conducive to the public welfare of the state as a whole, is not unconstitutional as conferring on the judiciary authority to answer legislative questions. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

The last two sentences of Code 1942, § 5825, providing that the insurance commission shall obtain from every stock fire company authorized to do business in the state a written opinion as to the amount of commission such company should pay local agents and that the majority opinion shall fix the amount or rate of commissions to paid local agents in the state, are unconstitutional, since even assuming some power to fix agents' commission rates is delegated to the insurance commission, the statute constitutes an improper delegation of legislative authority because it fails to provide adequate standards for the guidance of the administrative agency, and constitutes an improper delegation of legislative authority to private groups. State v. Allstate Ins. Co., 231 Miss. 869, 97 So. 2d 372 (1957).

Statute providing for supervision and inspection of public offices and public institutions did not contravene this section as attempting to confer judicial and legislative powers upon executive officers. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

The statutes giving the board of supervisors the right to regulate the taking of fish in their respective counties do not give a judicial body legislative authority. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. R. 700 (1905).

7. — — Incorporation of municipalities, legislative powers and functions.

The commingling of powers in the chancellor to determine the question of the existence of public convenience and necessity for the incorporation of a new municipality, as well as that of the reasonableness of the incorporation, does not violate the prohibition against unlawful delegation of governmental powers, since a finding by the chancellor of the existence of specified requirements for such incorporation is largely ministerial, affording little if any discretion on the part of the chancellor. Rouse v. City of Pascagoula, 230 So. 2d 543 (Miss. 1970).

The statutory power given the governor to determine the right to incorporate municipalities is not violative of the Constitution. City of Jackson v. Whiting, 84 Miss. 163, 36 So. 611 (1904).

8. Judicial powers and functions—In general.

Power to grant the authority to require parents in Mississippi to support their adult children financially was confided to the Mississippi Legislature. The Mississippi courts were without the constitutional power to declare otherwise. Hays v. Alexander, 114 So. 3d 704 (Miss. 2013).

Sections 43-21-119 and 43-21-123, which govern the development and implementation of the annual budget for a youth court in Mississippi, do not violate Mississippi's constitutional separation of powers doctrine with respect to youth court judges' ability to participate in the development and implementation of the budget as approved by the board of supervisors. Moore v. Board of Supvrs., 658 So. 2d 883 (Miss. 1995).

In an action by an employee for actual and punitive damages against an employer on the ground that the employee had been discharged when he refused to drop a workman's compensation claim against the employer, the trial court properly sustained the employer's demurrer where there is no provision in the Mississippi Workman's Compensation Law for relief in cases of retaliatory discharge and where such an exception to the common law rule that a contract of employment for an indefinite term may be terminated at the will of either party rests solely within the power of the Legislature and should not be undertaken by the judiciary. Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981).

Statute (Laws of 1944, ch 208, § 10, § 3825-11) providing for appeal to the circuit court from the determination of the Civil Service Commission in removing, suspending, demoting or discharging municipal firemen or policemen for misconduct and that on such appeal the accused shall have the right to a trial by jury, is not unconstitutional as foisting upon the judiciary the performance of nonjudicial powers by providing for a trial de novo in the circuit court, where the statute by its express terms limits the judicial function to determining whether or not the judgment of the commission had such a basis in substantial evidence as not to affirmatively show that the commission had acted in bad faith or without cause. City of Meridian v. Davidson, 211 Miss. 683, 53 So. 2d 48 (1951).

School trustees are not judicial officers, but administrative bodies; and while they may determine primarily whether a child is white or colored, their finding is not judicial and does not preclude the court from determining the fact. Moreau v. Grandich, 114 Miss. 560, 75 So. 434 (1917).

The determination of a constitutional provision is a judicial and not a legislative matter. State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927 (1900), overruled on other grounds, Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

It is the province of the court and not the legislature to declare what is a nuisance. Quintini v. Mayor of Bay St. Louis, 64 Miss. 483, 1 So. 625, 60 Am. R. 62 (1887).

9. — — Crimes, judicial powers and functions.

Capital rape statute which requires imposition of death sentence or life imprisonment did not violate separation of powers doctrine since power to determine appropriate punishment for criminal acts lies in legislative branch. Fisher v. State, 690 So. 2d 268 (Miss. 1996).

10. — — Elections, judicial powers and functions.

Equity might well interfere to prevent elections authorizing bond issues directly affecting property-rights where such election is attempted to be held without authority of law. Power v. Ratliff, 112 Miss. 88, 72 So. 864, Am. Ann. Cas. 1918E,1446 (1916).

An election will be enjoined which is to be held in violation of the Constitution and laws of the state, at the instance of a party who will be directly injured thereby. Conner v. Gray, 88 Miss. 489, 41 So. 186 (1906); Power v. Ratliff, 112 Miss. 88, 72 So. 864, Am. Ann. Cas. 1918E,1446 (1916).

The judiciary are not empowered to grant writs of supersedeas to prevent the holding of local option elections. Bond v. State, 68 Miss. 648, 9 So. 353 (1891).

11. — — Determining validity of legislation, judicial powers and functions.

Adoption of Senate rules challenged in current case, without record of dissent, would not serve as estoppel against Senators challenging validity of rules, because such would have effect of establishing new method of amending Constitution, by waiver and estoppel; exhaustion of nonjudicial remedies of constitutional challenge is not required before filing lawsuit. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

The court must uphold a statute where there is a reasonable doubt of its constitutionality. Natchez & S.R. Co. v. Crawford, 99 Miss. 697, 55 So. 596 (1911).

Until the contrary is shown courts presume statutes to be constitutional. Smith County v. Eastman Gardner Co., 53 So. 7

(Miss. 1910); Beasley v. McElhaney, 53 So. 8 (Miss.); L.N. Dantzler Lumber Co. v. State, 97 Miss. 355, 53 So. 1 (1910); Richards v. City Lumber Co., 101 Miss. 678, 57 So. 977 (1911).

A statute susceptible of a construction which upholds its validity will be upheld. State v. Louisville & N.R.R., 97 Miss. 35, 51 So. 918, Am. Ann. Cas. 1912C,1150 (1910), error overruled, 97 Miss. 58, 53 So. 454, Am. Ann. Cas. 1912C,1150 (1910).

Statutes not in palpable conflict with the Constitution will not be condemned. Hart v. State, 87 Miss. 171, 39 So. 523, 112 Am. St. R. 437 (1905).

A case in which § 4936, Code of 1906, is held to be unconstitutional when it relates to jurisdiction, but not as to procedure. Arbuckle v. State, 80 Miss. 15, 31 So. 437 (1901).

Unless it is necessary to a determination of the issues, the Supreme Court will not pass on the constitutionality of any statute. Hallum v. Mobile & O.R. Co., 24 So. 909 (Miss. 1899); Hendricks v. State, 79 Miss. 368, 30 So. 708 (1901); Bell v. Kerr, 80 Miss. 177, 31 So. 708 (1902); Alabama & V. Ry. Co. v. Overstreet, 85 Miss. 78, 37 So. 819 (1904); Native Lumber Co. v. Harrison County, 89 Miss. 171, 42 So. 665 (1906); Flora v. American Express Co., 92 Miss. 66, 45 So. 149 (1907); Ex parte Jones, 112 Miss. 27, 72 So. 845 (1916); Power v. Ratliff, 112 Miss. 88, 72 So. 864, Am. Ann. Cas. 1918E,1446 (1916).

The Supreme Court will not determine the wisdom or policy of a statute. Daily v. Swope, 47 Miss. 367 (1872); State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152 (1905); Bobo v. Board of Levee Comm'rs, 92 Miss. 792, 46 So. 819 (1908); Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 56 So. 466 (1911); State v. J.J. Newman Lumber Co., 102 Miss. 802, 59 So. 923 (1912), error overruled, 103 Miss. 263, 60 So. 215 (1912) (suggestion of error overruled in 103 M 263, 60 So. 215); Darnell v. Johnston, 109 Miss. 570, 68 So. 780 (1915).

12. — — Construction of legislation, judicial powers and functions.

Trial judge is not required, prior to accepting a guilty plea, to inform a defendant of the sex offender registration laws, Miss. Code Ann. §§ 45-33-25 through 31 because Miss. Code Ann. § 45-33-39(1) confers no right on a criminal defendant charged with a sex crime and imposes no duty on trial judges, and judicial rules, such as the rules of evidence, civil procedure, criminal procedure, and professional conduct, neither come from the Legislature nor require legislative approval; the Mississippi legislative branch of government may not, through procedural legislation, control the function of the judiciary, and subservience to legislation that mandates what trial judges must say to a defendant in a courtroom during a plea hearing would be tantamount to both an abdication of judicial duty, as well as tacit approval of legislative usurpation of the judicial prerogative. Magyar v. State, 18 So. 3d 807 (Miss. 2009), writ of certiorari denied by 560 U.S. 903, 130 S. Ct. 3274, 176 L. Ed. 2d 1182, 2010 U.S. LEXIS 3999, 78 U.S.L.W. 3667 (2010).

Whether law is needed and advisable in general government is a matter solely for the wisdom of the legislature, but it is duty of courts to construe the law and apply it to cases presented and determine whether the state constitution authorizes the legislation. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

It is the province of the Supreme Court to construe penal statutes as they are written. Hatton v. State, 92 Miss. 651, 46 So. 708 (1908).

Courts cannot change a statute. Yerger v. State, 91 Miss. 802, 45 So. 849 (1908); Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 56 So. 466 (1911); State v. Traylor, 100 Miss. 544, 56 So. 521 (1911).

Construction of laws is within the province of the courts and not the legislature. Planters' Bank v. Black, 19 Miss. (11 S. & M.) 43 (1848); Lawson v. Jeffries, 47 Miss. 686 (1873); McCulloch v. Stone, 64 Miss. 378, 8 So. 236 (1886).

13. — — Municipal ordinances, judicial powers and functions.

No violation of this section is involved in the court's modification of an ordinance annexing territory to a municipality. In re City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959).

14. — — Review of administrative decisions, judicial powers and functions.

In an action arising out of the termination of an affiliation agreement, a chancellor violated the doctrine of separation of powers, Miss. Const. Art. 1, § 1, by not affording deference to the Board of Trustees of Mississippi State Institutions of Higher Learning's interpretation and implementation of its own policy regarding the independence of affiliated entities. Limbert v. Miss. Univ. for Women Alumnae Ass'n, 998 So. 2d 993 (Miss. 2008).

This section does not preclude an appeal to the courts from an order of the Educational Finance Commission. Board of Educ. v. State Educ. Fin. Comm'n, 243 Miss. 782, 138 So. 2d 912 (1962).

15. Executive powers and functions.

The court rejected the argument that local governments operate subject to the separation of powers theory of government wherein the mayor is the executive power and board of aldermen are the legislative power and that, therefore, they cannot both exercise appointment powers because that would be a solely executive power vested entirely in the Mayor. Tisdale v. Clay, 728 So. 2d 1084 (Miss. 1998).

A suit cannot be maintained against the state for the recovery of an award which the governor has refused to order paid, since the offering and payment of rewards for the arrest of escaped criminals is intrusted solely to the discretion of the executive. State v. Dinkins, 77 Miss. 874, 27 So. 832 (1900).

16. Encroachment—In general.

Legislator could not simultaneously serve dual roles as a state representative and a city's selectman because the service in both roles violated separation of powers; the role of state representative was legislative in nature, and the role of selectman was a mixed legislative and executive role. Myers v. City of McComb, 943 So. 2d 1 (Miss. 2006).

The Board of Trustees of State Institutions of Higher Learning is an executive rather than a legislative body as indicated by the enumeration of the Board of Trustees' powers and duties contained within the Mississippi Constitution and applicable statutes; thus, appointment of the Board of Trustees by the Governor rather than the legislature is not an encroachment upon the powers of the legislative branch of the government. Van Slyke v. Board of Trustees of State Insts. of Higher Learning, 613 So. 2d 872 (Miss. 1993).

17. — — Upon legislative power, encroachment.

Senate possesses power to make rules regarding the exercise of legislative powers that inhere in it, and it may confer these powers upon one or more of its members, one of which is Lieutenant Governor by virtue of § 129 of Constitution; therefore, separation of powers doctrine is not violated by Lieutenant Governor's exercising power in Senate pursuant to Senate rules. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

Although an act of the legislature may appear to the court as morally wrong and unjust, yet it is not for the courts to define the limits of legislative discretion in the absence of constitutional inhibition. Martin v. Dix, 52 Miss. 53, 24 Am. R. 661 (1876).

18. — — Upon judicial power, encroachment.

Because Miss. Code Ann. § 11-1-60(2)(b) does not apply to the verdict, it cannot affect a trial court's application or non-application of remittitur pursuant to Miss. Code Ann. § 11-1-55. Therefore, § 11-1-60(2)(b) does not directly conflict with remittitur (a judicial procedure), and does not violate the Mississippi Constitution's Separation of Powers Clauses, Miss. Const. art. I, §§ 1, 2. Learmonth v. Sears, Roebuck and Co., 710 F.3d 249 (5th Cir. 2013).

Miss. Code Ann. § 11-51-81's "three-court rule" is unconstitutional because it usurps the Mississippi Supreme Court's constitutional rule-making power and violates the doctrine of separation of powers. Thus, any litigant whose case originates in either justice court or municipal court, and whose case is ultimately decided by the circuit court, whether it be via a trial de novo or on appellate review from a final judgment of the county court conducted by the circuit court under the applicable statute, shall have the right to appeal to the Mississippi Supreme Court. Jones v. City of Ridgeland, 48 So. 3d 530 (Miss. 2010).

The portion of § 11-46-6 [repealed] requiring Mississippi courts in determining sovereign immunity to apply the case law as it existed on November 10, 1982, is unconstitutional and void because it "freezes in time and place the common law as it existed at that particular moment," and does not permit a judge to apply the common law as it exists the moment the judge makes his or her decision; while a court may be told by a statute to apply common law principles in its interpretation, the court cannot also be told that the common law it applies cannot grow or change with the experience of mankind, as such a mandate suffocates the judicial function. Presley v. Mississippi State Hwy. Comm'n, 608 So. 2d 1288 (Miss. 1992).

The provisions of Code 1942, § 6334-05 providing for trial de novo before a jury on an appeal in the Circuit court are unconstitutional and invalid as a violation of the provisions of state constitution relating to separation of powers. Loftin v. George County Bd. of Educ., 183 So. 2d 621 (Miss. 1966).

It is usurpation of judicial power for legislature to declare suit abated and give permission to others to revive it, though object, reduction of power of officer, be within legislative power, if properly exercised. Miller v. Hay, 143 Miss. 471, 109 So. 16 (1926).

It is not a violation of this section to provide that all questions of negligence and contributory negligence be left to the jury. Natchez & S.R. Co. v. Crawford, 99 Miss. 697, 55 So. 596 (1911).

A direction by the legislature that in estimating damages accruing to the owner of land taken for public use the benefits which will result to the owner shall be allowed in extinguishment of the claim, is judicial, and therefore void. Isom v. Mississippi Cent. R.R., 36 Miss. 300 (1858).

Legislature not authorized to construe laws. Planters' Bank v. Black, 19 Miss. (11 S. & M.) 43 (1848); Lawson v. Jeffries, 47 Miss. 686 (1873); McCulloch v. Stone, 64 Miss. 378, 8 So. 236 (1886).

19. — — Discretion of prosecutor, encroachment.

Exercise of prosecutorial discretion in electing, or refusing, to indict criminal defendant under habitual criminal statute (§ 99-19-81) does not constitute encroachment by prosecutor on judicial power to determine appropriate criminal sentence. Washington v. State, 478 So. 2d 1028 (Miss. 1985).

20. — — Upon executive power, encroachment.

There was no violation of the separation of powers requirement where one person served both as chairman of a solid waste management authority and as a county administrator; although involving many duties which could be characterized either as executive or ministerial, the offices were primarily ministerial because the positions existed to carry out the will of the board of supervisors, in whose hands the ultimate decision making power resided. Zimmerman v. Three Rivers Planning & Dev. Dist., 747 So. 2d 853 (Miss. Ct. App. 1999).

Section 37-13-91, the compulsory school attendance law, is unconstitutional insofar as it requires the selection and supervision of school attendance officers to be undertaken by youth court judges; the youth court judge's selection and supervision of school attendance officers as provided for in the statute violates Article I, §§ 1 and 2 of the Mississippi Constitution-the separation of powers provisions-because the judge is charged with the executive function of administering an existing law, far removed from judiciary functions. In re R.G., 632 So. 2d 953 (Miss. 1994).

An employee's positions of veteran service clerk and inventory control clerk for the county, and his position as a member of the city council, were not held in violation of the separation of powers provision of the Mississippi Constitution, in that his positions with the county were ministerial and did not require that he exercise executive or judicial powers. Ball v. Fitzpatrick, 602 So. 2d 873 (Miss. 1992).

Statute providing for the regulation, supervision and control of motor carriers is not unconstitutional in providing that in addition to other available remedies, the state, or any party aggrieved by any final finding, order, or judgment of the public service commission, shall have the right, regardless of the amount involved, of appeal to the first judicial district circuit court of Hinds County, Mississippi, since the provision in question merely provides a new method or procedure by which orders of such administrative board may be reviewed by a court, conferring no new judicial power on the court, but simply creating a new procedure by which existing judicial power may be exercised. Dixie Greyhound Lines v. Mississippi Pub. Serv. Comm'n, 190 Miss. 704, 200 So. 579 (1941), error overruled, 190 Miss. 727, 1 So. 2d 489 (1941).

Supreme Court held unauthorized to answer questions whether lieutenant governor's duty to preside over new senate should be discharged by president pro tempore of preceding senate. In re Justices, 148 Miss. 427, 114 So. 887 (1927).

Statute providing for auditing and inspection of public offices did not violate this section as attempting to confer upon executive officers legislative and judicial powers. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

This section is not violated by c 57, Laws of 1904, reimbursing an ex-tax collector whose money had been erroneously paid into the state treasury. Henry v. Carter, 88 Miss. 21, 40 So. 995 (1906).

Acts of the penitentiary board of control within the scope of authority granted by a constitutional act of the legislature will not be reviewed by the courts. Henry v. State, 87 Miss. 1, 39 So. 856 (1906).

The courts will not undertake to control the attorney-general in the matter of his official opinions. Woodbury v. McClurg, 78 Miss. 831, 29 So. 514 (1901).

The governor cannot be compelled by mandamus to perform any act. Vicksburg & M.R.R. v. Lowry, 61 Miss. 102, 48 Am. R. 76 (1883).

ATTORNEY GENERAL OPINIONS

Clerk at WIC distribution center of county welfare agency is ministerial position and not office; therefore, separation of powers doctrine does not prohibit alderlady from holding this position. Crawford, Sept. 16, 1992, A.G. Op. #92-0707.

Because city councilman and state senator are both within legislative branch, separation of powers does not prohibit person from serving simultaneously in both capacities. Moore, Sept. 24, 1992, A.G. Op. #92-0720.

Administrative law judge for Workers' Compensation Commission may serve on school board for public schools without violating separation of powers doctrine. Ellis, Nov. 18, 1992, A.G. Op. #92-0819.

Serving in dual capacity of city councilman/state senator would not be violation of doctrine of separation of powers. Jordan, Nov. 25, 1992, A.G. Op. #92-0910.

Because administrative authority to assign courtrooms for convenience of defendants in justice court would not constitute exercise of any core power of judiciary, there would be no violation of doctrine of separation of powers for one person holding offices of mayor and justice court clerk. Young, Dec. 3, 1992, A.G. Op. #92-0914.

Service in two branches of government simultaneously is contrary to the separation of powers doctrine when the acts are ongoing and are in the upper level of governmental affairs and have a substantial policy-making character; since an alderman exercises power at the core of the legislative branch, while a natural gas commissioner performs discretionary, policy making functions, that is, exercises core power in the executive branch, a person would be prohibited from serving simultaneously as an alderman and a commissioner. Gerhart, January 30, 1998, A.G. Op. #98-0040.

Holding the positions of Full Professor of Marine Science, Associate Director of Research and Sponsored Programs and Commissioner on the Commission on Marine Resources, presents no violation of the doctrine of separation of powers. Aston, April 17, 1998, A.G. Op. #98-0172.

A municipal judge may not hold an office or position in the executive branch which involves formulation of economic development policy, zoning or land use, or other policies of the city. Wise, July 24, 1998, A.G. Op. #98-0371.

A person may not simultaneously be a school attendance officer and a county supervisor since a school attendance officer is in the executive branch of government and a county supervisor is an officer of the judicial branch of government. Lanford, July 31, 1998, A.G. Op. #98-0384.

The separation of powers doctrine does not prohibit a person from serving as a city council member and as a bookkeeper in the office of the county tax collector. Fitzpatrick, Jan. 7, 2000, A.G. Op. #99-0719.

The separation of powers doctrine prohibits a person from serving simultaneously as a director of a juvenile detention center and a justice court judge. Perkins, Sr., Jan. 14, 2000, A.G. Op. #99-0724.

A position of Youth Court Investigator and Compliance Officer is not a de facto violation of the separation of powers clause. McGehee, Nov. 17, 2000, A.G. Op. #2000-0640.

A municipal alderman cannot serve as a municipal police officer while continuing to hold the office of alderman, even if the service in question is in two separate municipalities. White, Jan. 11, 2002, A.G. Op. #01-0779.

A county board of supervisors may not appoint a member of the board as Emergency Management Director. Walley, Mar. 15, 2002, A.G. Op. #02-0106.

Service in the national guard simultaneously with service as a municipal alderman would not violate the Mississippi Constitution. Purnell, June 7, 2002, A.G. Op. #02-0257.

A member of the state legislature may simultaneously serve as an elected municipal alderman, as both positions are squarely within the legislative branch of government. White, July 3, 2002, A.G. Op. #02-0134.

The powers and duties of the director of a resources development council the council do not involve the exercise of core powers of the executive branch, and therefore a legislator's employment as executive director does not give rise to constitutional concern. Ruffin, Sept. 6, 2002, A.G. Op. #02-0516.

City councilman also serving as the executive director of the county emergency communications commission would exercise substantial policy making powers at the core of two branches of government and would be prohibited under separation of powers from simultaneously serving in both capacities. Faneca, Nov. 15, 2002, A.G. Op. #02-0625.

A municipal alderman may serve as a member of the National Guard without running afoul of Miss. Const., art. 1, §§ 1 and 2. Moore, Nov. 15, 2002, A.G. Op. #02-0663.

An individual may not serve as both a correctional officer (executive branch) and a county supervisor (judicial branch) without violating Miss. Const., art. 1, §§ 1 and 2. Epps, Mar. 21, 2003, A.G. Op. #03-0098.

A municipal court judge is in the judicial branch of government and a youth court prosecutor is in the executive branch of government, thereby making the holding of both offices simultaneously a violation of the separation of powers doctrine. Littleton, Mar. 14, 2003, A.G. Op. #03-0122.

The separation of powers doctrine prohibits a person from serving simultaneously as a justice court judge and as a city clerk. Byrd, Mar. 28, 2003, A.G. Op. #03-0119.

A person may not serve as a member of a county board of supervisors while also serving as an elected school board member. Chaney, May 16, 2003, A.G. Op. 03-0232.

The separation of powers doctrine set forth in the Mississippi Constitution prohibits a person from serving simultaneously as a member of the Mississippi House of Representatives and as a member of the Mississippi Civil War Battlefield Commission. Lingle, Sept. 19, 2003, A.G. Op. 03-0456.

A deputy sheriff, upon being sworn in as a city councilman, must vacate his position as a deputy sheriff. Stokes, May 21, 2004, A.G. Op. 04-0206.

A deputy sheriff of a county is an officer in the executive branch of government, therefore, the separation of powers provision of the Mississippi Constitution would apply to this situation and prohibit the party in question from holding both offices. Stokes, May 21, 2004, A.G. Op. 04-0206.

The separation of powers doctrine would prohibit a member of the county board of supervisors from also serving as an investigator with the district attorney's office. Abron, June, 21, 2004, A.G. Op. 04-0241.

A member of the county board of supervisors would not violate the separation of powers doctrine by also being employed by UPS or Fed Ex. Abron, June, 21, 2004, A.G. Op. 04-0241.

The separation of powers doctrine would not prohibit a member of the county board of supervisors from also serving as a guidance counselor employed by the Department of Corrections in a state prison, or being employed by a private prison. Abron, June, 21, 2004, A.G. Op. 04-0241.

A member of the county board of supervisors would not violate the separation of powers doctrine by also being employed as a security guard by a local bingo hall. Abron, June, 21, 2004, A.G. Op. 04-0241.

The Mississippi Constitution prohibits an individual from holding both the office of alderman and deputy sheriff at the same time. Curtis, July 23, 2004, A.G. Op. 04-0341.

Argument that a city councilman is not subject to the separation of powers doctrine because under the city's special charter that office exercises both legislative and executive powers lacks merit. McGee, Aug. 6, 2004, A.G. Op. 04-0333.

Upon being sworn in as a member of the House of Representatives, a person vacated his position as a school district trustee. Kemp, Aug. 6, 2004, A.G. Op. 04-0365.

Asking questions and seeking information on the operations of a municipal department by a city councilman for the purposes of reporting back to the full council is permitted. However, if the line is crossed between gathering information and actually making administrative decisions for the department, a violation of the separation of powers doctrine may exist. Rupp, Oct. 1, 2004, A.G. Op. 04-0449.

Any authority a board of aldermen may have with regard to employment, termination, and/or suspension without pay, must be exercised by the body as a whole. An individual alderman has no authority in this regard and no authority to direct the actions of individual employees. Cook, Oct. 15, 2004, A.G. Op. 04-0503.

If the Legislature has decided not to renew the authority of a state agency, then the Governor lacks the authority to re-create that agency using an executive order. McCoy, May 20, 2004, A.G. Op. 04-0227.

An individual can serve as a city alderman and bailiff simultaneously without being in violation of this section. Stockton, Apr. 11, 2005, A.G. Op. 05-0197.

The Separation of Powers doctrine, Miss. Const. of 1890, Art. 1, §§ 1-2, prohibits an individual from holding two offices in two different branches of government simultaneously. An individual may simultaneously serve as a member of a county school board and as county circuit clerk because both offices are within the executive branch of the government. Maples, February 16, 2007, A.G. Op. #07-00074, 2007 Miss. AG LEXIS 22.

Under the separation of powers doctrine, Miss. Const. of 1890, Art. 1, §§ 1-2, one may not simultaneously hold the offices of alderman and school board member because the office of alderman is in the legislative branch of government and the office of school board member is in the executive branch of government. Gibbs, March 9, 2007, A.G. Op. #07-107, 2007 Miss. AG LEXIS 73.

RESEARCH REFERENCES

ALR. Constitutionality of statute making mere filing of affidavit of bias or prejudice sufficient to disqualify judge. 5 A.L.R. 1275, 46 A.L.R. 1179.

Power of judiciary to compel legislature to make apportionment of representatives or election districts as required by Constitution. 46 A.L.R. 964.

Constitutionality of city manager or commission form of municipal government. 67 A.L.R. 737.

Constitutionality of statutes for formation or change of political districts or municipal corporations as affected by objection that they confer nondelegable powers, or impose nonjudicial functions, on a court. 69 A.L.R. 266.

Office of lieutenant governor as primarily executive or legislative. 70 A.L.R. 1095.

Constitutionality of statute providing for refund of taxes illegally or erroneously exacted. 98 A.L.R. 284.

Power of legislature, absent constitutional provision in that regard, to authorize or require court or justices thereof to render advisory opinion upon request of governor or of either house of legislature. 103 A.L.R. 1087.

Mandamus to governor. 105 A.L.R. 1124.

Availability of writ of prohibition as means of controlling administrative or executive boards or officers. 115 A.L.R. 3, 159 A.L.R. 627.

Power to detach land from municipal corporation, towns, or villages. 117 A.L.R. 267.

Power of legislature respecting admission to bar. 144 A.L.R. 150.

Constitutionality of arbitration statutes. 55 A.L.R.2d 432.

Implied cause of action for damages for violation of provisions of state constitutions. 75 A.L.R.5th 619.

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 202 et seq.

CJS. C.J.S. Constitutional Law §§ 54 to 59, 111 to 227, 441.

C.J.S. Courts §§ 2 to 15.

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Southwick, Separation of Powers at the State Level: Interpretations and Challenges in Mississippi, 72 Miss. L.J. 927, Spring, 2003.

Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

§ 2. Encroachment of power

No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

SOURCES: 1817 art II § 2; 1832 art II § 2; 1869 art III § 1.

JUDICIAL DECISIONS

1. Encroachment of power — In general.
2. — — Legislative branch, encroachment of power.
3. — — Executive branch, encroachment of power.
4. — — Judicial branch, encroachment of power.
5. Determination of criminal penalties.
6. Judicial review of administrative decisions.
7. Incompatible offices and vacation thereof.
8. Ratification of de facto or improperly appointed officer's acts.
9. Regulation of public employment.
10. Reimbursement of officials.

1. Encroachment of power — In general.

Senate possesses power to make rules regarding the exercise of legislative powers that inhere in it, and it may confer these powers upon one or more of its members, one of which is Lieutenant Governor by virtue of § 129 of Constitution; therefore, separation of powers doctrine is not violated by Lieutenant Governor's exercising power in Senate pursuant to Senate rules. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

The statute giving the circuit judge and governor authority to determine reasonableness and correctness of account for services of accountant in auditing county books is not violative of the Constitution. Jackson County v. Neville, 131 Miss. 599, 95 So. 626 (1923).

2. — — Legislative branch, encroachment of power.

2000 Miss. Laws 304, § 3, which abates any suits brought by a municipality to recover additional payments under Miss. Code Ann. § 27-65-75 (1972) in excess of the amounts authorized in 2000 Miss. Laws 304, does not violate the separation of powers doctrine, as the Legislature did not revive the right to bring the same suit in the name of another. City of Belmont v. Miss. State Tax Comm'n, 860 So. 2d 289 (Miss. 2003).

The 1989 Public Trust Tidelands Act (§§ 29-15-1 through 29-15-23) did not violate the separation of powers doctrine in Article 1, § 2 of the Mississippi Constitution by granting the Secretary of State, as a member of the executive branch, discretion in drawing and revising the preliminary tideland boundary map, in spite of the argument that the discretion afforded him in drawing the final boundary map gave him the authority to convey public trust lands which could otherwise be conveyed only by legislative enactment, since his discretion was limited to comments and/or documentation regarding the preliminary map submitted within a 60-day period, and any disagreements or discrepancies resulting from the preliminary map could be either negotiated or brought to trial; the Act did not give the Secretary of State the power or authority to make laws, but rather it provided that he be used as a tool in the implementation of the Act. Secretary of State v. Wiesenberg, 633 So. 2d 983 (Miss. 1994).

The Board of Trustees of State Institutions of Higher Learning is an executive rather than a legislative body as indicated by the enumeration of the Board of Trustees' powers and duties contained within the Mississippi Constitution and applicable statutes; thus, appointment of the Board of Trustees by the Governor rather than the legislature is not an encroachment upon the powers of the legislative branch of the government. Van Slyke v. Board of Trustees of State Insts. of Higher Learning, 613 So. 2d 872 (Miss. 1993).

Claim upon which relief can be granted is stated where allegation is that member of Executive Department of Government is exercising legislative powers within Senate; Court has authority and responsibility to decide question where it is alleged that one arguably member of executive department is exercising legislative powers, where court had for many years entertained and decided controversies wherein parties claimed that members of one department of government were exercising powers in another in violation of constitutional mandate for separation of powers. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

No violation of this section is involved in the court's modification of an ordinance annexing territory to a municipality. In re City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959).

A statute directing organization of a water district if the court finds the project feasible from an engineering standpoint and practical, and that its creation will meet a public necessity and be conducive to the public welfare of the state as a whole, is not unconstitutional as conferring on the judiciary authority to answer legislative questions. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

Statutes cannot be saved where the language applies to employees of all corporations, by construing it to apply to corporations engaged in a hazardous business; this is not severance between constitutional and unconstitutional provisions, but judicial legislation. Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 Am. St. R. 476 (1903).

3. — — Executive branch, encroachment of power.

There was no violation of the separation of powers requirement where one person served both as chairman of a solid waste management authority and as a county administrator; although involving many duties which could be characterized either as executive or ministerial, the offices were primarily ministerial because the positions existed to carry out the will of the board of supervisors, in whose hands the ultimate decision making power resided. Zimmerman v. Three Rivers Planning & Dev. Dist., 747 So. 2d 853 (Miss. Ct. App. 1999).

The court rejected the argument that local governments operate subject to the separation of powers theory of government wherein the mayor is the executive power and board of aldermen are the legislative power and that, therefore, they cannot both exercise appointment powers because that would be a solely executive power vested entirely in the Mayor. Tisdale v. Clay, 728 So. 2d 1084 (Miss. 1998).

Section 37-13-91, the compulsory school attendance law, is unconstitutional insofar as it requires the selection and supervision of school attendance officers to be undertaken by youth court judges; the youth court judge's selection and supervision of school attendance officers as provided for in the statute violates Article I, §§ 1 and 2 of the Mississippi Constitution-the separation of powers provisions-because the judge is charged with the executive function of administering an existing law, far removed from judiciary functions. In re R.G., 632 So. 2d 953 (Miss. 1994).

Duties and responsibilities, including allowing authority for Educational Television to contract (§ 37-63-11), giving concurrence for the use of funds to travel outside the continental United States (§ 25-3-41), advertising for and accepting bids on equipment for the State Crime Laboratory (§ 63-11-47), granting authority for the purchase of motor vehicles by state departments, institutions, or agencies (§ 25-1-77), and approving dispersement of funds by the Mississippi Air and Water Pollution Commission (§ 49-17-13), are administrative functions within the prerogative of the executive department, and statutes vesting those powers and functions in members of the legislature violate Miss Const Art 1 § 2 and are unconstitutional. Alexander v. State ex rel. Allain, 441 So. 2d 1329 (Miss. 1983).

4. — — Judicial branch, encroachment of power.

Because Miss. Code Ann. § 11-1-60(2)(b) does not apply to the verdict, it cannot affect a trial court's application or non-application of remittitur pursuant to Miss. Code Ann. § 11-1-55. Therefore, § 11-1-60(2)(b) does not directly conflict with remittitur (a judicial procedure), and does not violate the Mississippi Constitution's Separation of Powers Clauses, Miss. Const. art. I, §§ 1, 2. Learmonth v. Sears, Roebuck and Co., 710 F.3d 249 (5th Cir. 2013).

Miss. Code Ann. § 11-51-81's "three-court rule" is unconstitutional because it usurps the Mississippi Supreme Court's constitutional rule-making power and violates the doctrine of separation of powers. Thus, any litigant whose case originates in either justice court or municipal court, and whose case is ultimately decided by the circuit court, whether it be via a trial de novo or on appellate review from a final judgment of the county court conducted by the circuit court under the applicable statute, shall have the right to appeal to the Mississippi Supreme Court. Jones v. City of Ridgeland, 48 So. 3d 530 (Miss. 2010).

Trial judge is not required, prior to accepting a guilty plea, to inform a defendant of the sex offender registration laws, Miss. Code Ann. §§ 45-33-25 through 31 because Miss. Code Ann. § 45-33-39(1) confers no right on a criminal defendant charged with a sex crime and imposes no duty on trial judges, and judicial rules, such as the rules of evidence, civil procedure, criminal procedure, and professional conduct, neither come from the Legislature nor require legislative approval; the Mississippi legislative branch of government may not, through procedural legislation, control the function of the judiciary, and subservience to legislation that mandates what trial judges must say to a defendant in a courtroom during a plea hearing would be tantamount to both an abdication of judicial duty, as well as tacit approval of legislative usurpation of the judicial prerogative. Magyar v. State, 18 So. 3d 807 (Miss. 2009), writ of certiorari denied by 560 U.S. 903, 130 S. Ct. 3274, 176 L. Ed. 2d 1182, 2010 U.S. LEXIS 3999, 78 U.S.L.W. 3667 (2010).

The provisions of Code 1942 § 6334-05 providing for trial de novo before a jury on an appeal in the Circuit court are unconstitutional and invalid as a violation of the provisions of constitution relating to separation of powers. Loftin v. George County Bd. of Educ., 183 So. 2d 621 (Miss. 1966).

This section and § 144 of the Constitution, providing that judicial power shall be vested in the courts, are not violated by Code 1942, § 4073, authorizing Land Commissioner, with written approval of Attorney General, to strike land from lists of lands sold to State for delinquent taxes, when tax sale was void, since § 4073 does not empower Attorney General to usurp function of courts or to act judicially, but requires him to perform a constitutional duty of his office by making his legal learning and discretionary opinion available to proper state officer in exercise of state function in a matter of public policy. State v. Southern Pine Co., 205 Miss. 80, 38 So. 2d 442 (1949).

Legislative and not judicial power held exercised in reducing authority of revenue agent, though it work abatement of a suit. Miller v. Globe-Rutgers Fire Ins. Co., 143 Miss. 489, 108 So. 180 (1926).

Statute providing for supervision and inspection of public offices and public institutions did not contravene this section as attempting to confer judicial and legislative powers upon executive officers. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

5. Determination of criminal penalties.

Exercise of prosecutorial discretion in electing, or refusing, to indict criminal defendant under habitual criminal statute (§ 99-19-81) does not constitute encroachment by prosecutor on judicial power to determine appropriate criminal sentence. Washington v. State, 478 So. 2d 1028 (Miss. 1985).

Under the Uniform Controlled Substances Law, the penalties prescribed for violations thereof are inextricably tied to the various schedules, and therefore the portions of Code 1972, § 41-29-111 by which the state board of health is given the authority to move a substance from one schedule to another, to add substances to any schedule, and to delete substances from any schedule are an unconstitutional attempt to delegate the authority to define crimes and fix the punishments therefor which is vested exclusively in the legislature; such unconstitutional portions are separable from the remaining provisions of the Uniform Controlled Substances Law. Howell v. State, 300 So. 2d 774 (Miss. 1974).

6. Judicial review of administrative decisions.

This section does not preclude an appeal to the courts from an order of the Educational Finance Commission. Board of Educ. v. State Educ. Fin. Comm'n, 243 Miss. 782, 138 So. 2d 912 (1962).

7. Incompatible offices and vacation thereof.

Legislator could not simultaneously serve dual roles as a state representative and a city's selectman because the service in both roles violated separation of powers; the role of state representative was legislative in nature, and the role of selectman was a mixed legislative and executive role. Myers v. City of McComb, 943 So. 2d 1 (Miss. 2006).

Although § 21-23-5, which allows a mayor or mayor pro tempore of a small municipality to serve as municipal judge, is not unconstitutional under the sections of the state constitution dealing with separation of powers, there is an unavoidable conflict of interest in the holding of the dual offices of mayor and municipal judge, and thus the statute will have no future application as it is contrary to the proper functioning of the judiciary. In re Grant, 631 So. 2d 758 (Miss. 1994).

An employee's positions of veteran service clerk and inventory control clerk for the county, and his position as a member of the city council, were not held in violation of the separation of powers provision of the Mississippi Constitution, in that his positions with the county were ministerial and did not require that he exercise executive or judicial powers. Ball v. Fitzpatrick, 602 So. 2d 873 (Miss. 1992).

The participation of the Lieutenant Governor on the Joint Legislative Budget

Committee was not a violation of the constitutional provision for separation of executive and legislative powers. The Lieutenant Governor is constitutionally an officer of both the executive and legislative departments and is eligible as President of the Senate to receive the legislative powers conferred upon him by the legislation creating the Joint Legislative Budget Committee. Neither the statute creating the Joint Legislative Budget Committee nor the Lieutenant Governor's service on the committee constituted a violation of the constitutionally mandated separation of powers. Kirksey v. Dye, 564 So. 2d 1333 (Miss. 1990).

Adjutant general of Mississippi Air National Guard is not prohibited by Mississippi Constitution from appointing state senator to position of major general; however, senator may be prohibited from accepting appointment. Roberts v. Troutt, 475 So. 2d 421 (Miss. 1985).

Under Miss Const Art I §§ 1 and 2, a justice court judge, a member of the judicial branch of government, could not serve in that office and at the same time hold a job as a law enforcement official, since law enforcement officials are members of the executive branch and a person may not lawfully be a part of both branches at the same time. In re Anderson, 451 So. 2d 232 (Miss. 1984).

Duly elected Justice Court Judge, who in such capacity is a member of the judicial branch of government, may not simultaneously serve as a policeman, which said position designates a person as a member of the executive branch of government; pursuant to the constitution, no person may serve in two branches of government at the same time. In re Anderson, 447 So. 2d 1275 (Miss. 1984).

§ 57-1-3(4), which regulates the Board of Economic Development, § 25-11-15, which regulates the Board of Trustees of the Public Employees' Retirement System, § 25-53-7, which regulates the Central Data Processing Authority, § 25-9-109, which regulates the State Personnel Board, § 43-13-107, which regulates the Medicaid Commission, § 29-5-1, which regulates the Capitol Commission, § 49-5-61, which regulates the Wild Life Heritage Committee, and § 47-5-12 [repealed], which regulates the Board of Corrections, are unconstitutional, insofar as they create executive boards and commissions with legislative members, in violation of Miss Const Art 1 § 2, and, accordingly, named legislators could not constitutionally perform any of the executive functions of those boards and commissions; moreover, §§ 27-103-1, 29-5-1, 57-1-3, 43-13-107, 25-53-7, 25-9-109, and 49-5-61, are unconstitutional insofar as they mandate legislative appointments to executive offices. Alexander v. State ex rel. Allain, 441 So. 2d 1329 (Miss. 1983).

Where members of the Commission of Budget and Accounting, whose activities include the budget-making process, the budget-control process, regulating purchases made by state agencies, administering state employees' life and health insurance plans, and miscellaneous duties, held office in the legislative department of government, and were voting members of each, the Commission as constituted violated Miss Const Art 1 § 2, and § 27-101-1(1), insofar as it was composed simultaneously of members of both the legislative and executive departments as voting members. Alexander v. State ex rel. Allain, 441 So. 2d 1329 (Miss. 1983).

Acceptance of office of school trustee does not vacate office of supervisor. Broadus v. State, 132 Miss. 828, 96 So. 745 (1923).

Statute making the mayor of a town ex-officio justice of the peace does not violate this section. Poplarville Sawmill Co. v. A. Marx & Sons, 117 Miss. 10, 77 So. 815 (1918).

A supervisor accepting an appointment as a member of the board of commissioners of the Yazoo Mississippi Delta board vacates the former office. Haley v. State, 108 Miss. 899, 67 So. 498 (1915).

A justice of the peace accepting the office of mayor automatically vacates the former office. State ex rel. Att'y Gen. v. Armstrong, 91 Miss. 513, 44 So. 809 (1907); Poplarville Sawmill Co. v. A. Marx & Sons, 117 Miss. 10, 77 So. 815 (1917).

8. Ratification of de facto or improperly appointed officer's acts.

Indictment in murder prosecution held not void because grand juror allegedly served both as election commissioner and grand juror in finding and presentment of indictment. Robinson v. State, 178 Miss. 568, 173 So. 451 (1937).

The official acts of a de facto officer made valid by the statutes is not violative of the Constitution although he is incompetent to hold the office. B. Altman & Co. v. Wall, 111 Miss. 198, 71 So. 318 (1916).

9. Regulation of public employment.

Administration of public purchasing, administration of state employee's group insurance program, and authority to approve rules adopted by the State Auditor for establishing a merit system for his employees, are administrative functions within the prerogative of the executive department, and thus, named legislators could not constitutionally perform any of those functions because they properly belonged to the executive department; moreover, the statutes vesting those powers in members of the legislature are unconstitutional. Alexander v. State ex rel. Allain, 441 So. 2d 1329 (Miss. 1983).

10. Reimbursement of officials.

Chapter 57, Laws of 1904, reimbursing an ex-tax collector for money erroneously paid into state treasury is not in violation of this section. Henry v. Carter, 88 Miss. 21, 40 So. 995 (1906).

ATTORNEY GENERAL OPINIONS

Service by county supervisor or county port authority commissioner on board of private nonprofit organization does not present separation of powers issue and does not constitute a violation of Article 1 Section 2 of Mississippi Constitution. Mullins, Jan. 27, 1993, A.G. Op. #93-0026.

Serving as a member of a Port Commission in the executive branch of government and as an Alderman of a municipality in the legislative branch of government violates the separation of powers doctrine, and an individual that accepts the Office of Alderman would at once vacate the office of Port Commissioner. O'Neal, July 25, 1997, A.G. Op. #97-0392.

The Mississippi Constitution prohibits a person from serving simultaneously as a city council member within the legislative branch of government and as a commissioner of the Pine Belt Regional Solid Waste Management Authority within the executive branch of government. Bailey, July 18, 1997, A.G. Op. #97-0411.

An alderman may also serve a municipality as a volunteer librarian, unless the State Ethics Commission finds otherwise. Williamson, Aug. 1, 1997, A.G. Op. #97-0436.

No separation of powers problem is presented where a municipal clerk also serves as a part time librarian, since both positions are part of the executive branch of government. Estep, Aug. 29, 1997, A.G. Op. #97-0491.

A person cannot simultaneously serve as a municipal councilman in the legislative branch of government and as a park commissioner appointed by a board of supervisors in the executive branch of government. Magee, Aug. 8, 1997, A.G. Op. #97-0492.

Service in two branches of government simultaneously is contrary to the separation of powers doctrine when the acts are ongoing and are in the upper level of governmental affairs and have a substantial policy-making character; since an alderman exercises power at the core of the legislative branch, while a natural gas commissioner performs discretionary, policy making functions, that is, exercises core power in the executive branch, a person would be prohibited from serving simultaneously as an alderman and a commissioner. Gerhart, January 30, 1998, A.G. Op. #98-0040.

Holding the positions of Full Professor of Marine Science, Associate Director of Research and Sponsored Programs and Commissioner on the Commission on Marine Resources, presents no violation of the doctrine of separation of powers. Aston, April 17, 1998, A.G. Op. #98-0172.

A municipal judge may not hold an office or position in the executive branch which involves formulation of economic development policy, zoning or land use, or other policies of the city. Wise, July 24, 1998, A.G. Op. #98-0371.

A person may not simultaneously be a school attendance officer and a county supervisor since a school attendance officer is in the executive branch of government and a county supervisor is an officer of the judicial branch of government. Lanford, July 31, 1998, A.G. Op. #98-0384.

The separation of powers doctrine does not prohibit a person from serving as a city council member and as a bookkeeper in the office of the county tax collector. Fitzpatrick, Jan. 7, 2000, A.G. Op. #99-0719.

The separation of powers doctrine prohibits a person from serving simultaneously as a director of a juvenile detention center and a justice court judge. Perkins, Sr., Jan. 14, 2000, A.G. Op. #99-0724.

A position of Youth Court Investigator and Compliance Officer is not a de facto violation of the separation of powers clause. McGehee, Nov. 17, 2000, A.G. Op. #2000-0640.

A municipal alderman cannot serve as a municipal police officer while continuing to hold the office of alderman, even if the service in question is in two separate municipalities. White, Jan. 11, 2002, A.G. Op. #01-0779.

A county board of supervisors may not appoint a member of the board as Emergency Management Director. Walley, Mar. 15, 2002, A.G. Op. #02-0106.

Service in the national guard simultaneously with service as a municipal alderman would not violate the Mississippi Constitution. Purnell, June 7, 2002, A.G. Op. #02-0257.

A member of the state legislature may simultaneously serve as an elected municipal alderman, as both positions are squarely within the legislative branch of government. White, July 3, 2002, A.G. Op. #02-0134.

The powers and duties of the director of a resources development council do not involve the exercise of core powers of the executive branch, and therefore a legislator's employment as executive director does not give rise to constitutional concern. Ruffin, Sept. 6, 2002, A.G. Op. #02-0516.

Serving both as a member of the Mississippi Legislature and as a director on the board of a human resource agency violates the constitutional prohibition against a person in one branch of government exercising any power belonging to any other branch of government. Cockrell, Oct. 25, 2002, A.G. Op. #02-0584.

Since community action agencies are "private, non-profit, non-government bodies", the separation of powers doctrine would have no application. Cockrell, Oct. 25, 2002, A.G. Op. #02-0584.

City councilman also serving as the executive director of the county emergency communications commission would exercise substantial policy making powers at the core of two branches of government and would be prohibited under separation of powers from simultaneously serving in both capacities. Faneca, Nov. 15, 2002, A.G. Op. #02-0625.

A municipal alderman may serve as a member of the National Guard without running afoul of Miss. Const., Art. 1, §§ 1 and 2. Moore, Nov. 15, 2002, A.G. Op. #02-0663.

An individual may not serve as both a correctional officer (executive branch) and a county supervisor (judicial branch) without violating Miss. Const., Art. 1, §§ 1 and 2. Epps, Mar. 21, 2003, A.G. Op. #03-0098.

A municipal court judge is in the judicial branch of government and a youth court prosecutor is in the executive branch of government, thereby making the holding of both offices simultaneously a violation of the separation of powers doctrine. Littleton, Mar. 14, 2003, A.G. Op. #03-0122.

The separation of powers doctrine prohibits a person from serving simultaneously as a justice court judge and as a city clerk. Byrd, Mar. 28, 2003, A.G. Op. #03-0119.

A person may not serve as a member of a county board of supervisors while also serving as an elected school board member. Chaney, May 16, 2003, A.G. Op. 03-0232.

The separation of powers doctrine set forth in the Mississippi Constitution prohibits a person from serving simultaneously as a member of the Mississippi House of Representatives and as a member of the Mississippi Civil War Battlefield Commission. Lingle, Sept. 19, 2003, A.G. Op. 03-0456.

The separation of powers doctrine applies to local government. Griffin, May 21, 2004, A.G. Op. 04-0200.

A person holding both the positions of city councilman and trustee for a county owned hospital would violate the separation of powers clause of the Mississippi Constitution. Griffin, May 21, 2004, A.G. Op. 04-0200.

A deputy sheriff, upon being sworn in as a city councilman, must vacate his position as a deputy sheriff. Stokes, May 21, 2004, A.G. Op. 04-0206.

A deputy sheriff of a county is an officer in the executive branch of government, therefore, the separation of powers provision of the Mississippi Constitution would apply to this situation and prohibit the party in question from holding both offices. Stokes, May 21, 2004, A.G. Op. 04-0206.

The separation of powers doctrine would prohibit a member of the county board of supervisors from also serving as an investigator with the district attorney's office. Abron, June, 21, 2004, A.G. Op. 04-0241.

A member of the county board of supervisors would not violate the separation of powers doctrine by also being employed by UPS or Fed Ex. Abron, June, 21, 2004, A.G. Op. 04-0241.

The separation of powers doctrine would not prohibit a member of the county board of supervisors from also serving as a guidance counselor employed by the Department of Corrections in a state prison, or being employed by a private prison. Abron, June, 21, 2004, A.G. Op. 04-0241.

A member of the county board of supervisors would not violate the separation of powers doctrine by also being employed as a security guard by a local bingo hall. Abron, June, 21, 2004, A.G. Op. 04-0241.

The Mississippi Constitution prohibits an individual from holding both the office of alderman and deputy sheriff at the same time. Curtis, July 23, 2004, A.G. Op. 04-0341.

Argument that a city councilman is not subject to the separation of powers doctrine because under the city's special charter that office exercises both legislative and executive powers lacks merit. McGee, Aug. 6, 2004, A.G. Op. 04-0333.

Upon being sworn in as a member of the House of Representatives, a person vacated his position as a school district trustee. Kemp, Aug. 6, 2004, A.G. Op. 04-0365.

Asking questions and seeking information on the operations of a municipal department by a city councilman for the purposes of reporting back to the full council is permitted. However, if the line is crossed between gathering information and actually making administrative decisions for the department, a violation of the separation of powers doctrine may exist. Rupp, Oct. 1, 2004, A.G. Op. 04-0449.

Any authority a board of aldermen may have with regard to employment, termination, and/or suspension without pay, must be exercised by the body as a whole. An individual alderman has no authority in this regard and no authority to direct the actions of individual employees. Cook, Oct. 15, 2004, A.G. Op. 04-0503.

If the Legislature has decided not to renew the authority of a state agency, then the Governor lacks the authority to re-create that agency using an executive order. McCoy, May 20, 2004, A.G. Op. 04-0227.

Service by one individual in the positions of police chief and alderman simultaneously would be a violation of Miss. Const. Art. 1, § 2. Miller, Jan. 21, 2005, A.G. Op. 05-0013.

Firefighter employed by one municipality may lawfully run for the position of alderman in another municipality and, if elected may simultaneously serve in those two positions. Davis, Mar. 11, 2005, A.G. Op. 05-0106.

An individual can serve as a city alderman and bailiff simultaneously without being in violation of this section. Stockton, Apr.11, 2005, A.G. Op. 05-0197.

The separation of powers provision of the Mississippi Constitution would not prohibit someone from simultaneously being employed in a non-law enforcement administrative capacity for the sheriff's office and on the city council for a municipality in the same county. Faneca, July 1, 2005, A.G. Op. 05-0328.

Simultaneous service as a justice court judge and a municipal employee would not automatically be a violation of the separation of powers clause. Only if each position exercises core powers of the branch of government in which it may be found will a violation occur. Glover, July 8, 2005, A.G. Op. 05-0342.

It would be a violation of the separation of powers doctrine for a county prosecuting attorney to simultaneously serve as a municipal court judge, and likewise for a town board attorney to simultaneously serve as a municipal court judge. Ready, Aug. 8, 2005, A.G. Op. 05-0363; but see Fondren, Dec. 16, 2005, A.G. Op. 05-0562.

Since the position of county fire coordinator and the office of alderman exercise core powers of two different departments of government, executive and legislative, Miss. Const., Art. 1, § 2, would prohibit an individual from occupying said position and office at the same time. Smith, Aug. 8, 2005, A.G. Op. 05-0380.

The separation of powers doctrine would not prohibit a legislator from being employed as a physician by a community hospital. Smith, Aug. 12, 2005, A.G. Op. 05-0424.

A city attorney may also serve as a member of the house of representatives in the state legislature. Croft, Aug. 26, 2005, A.G. Op. 05-0431.

Under the separation of powers doctrine there is no prohibition against an individual's simultaneously serving as city alderman and a county "fire training officer." Cobbins, Oct. 7, 2005, A.G. Op. 05-0486.

There would be no separation of powers violation for an individual to serve as municipal court judge and as the board attorney for the county utility district. To the extent this opinion conflicts with prior opinions on the issue of board attorneys/separation of powers conflicts, they are hereby withdrawn, including, but not limited to: Ready, August 8, 2005, A.G. Op. 05-0363 and Lowrey, Aug. 23, 1995, A.G. Op. 95-0505, Fondren, Dec. 16, 2005, A.G. Op. 05-0562.

Since a county board of supervisors exercises judiciary branch powers, and a regional solid waste management authority is in the executive branch, the separation of powers doctrine prohibits a supervisor in a non-situs county or district for the facility from serving on the waste management authority board. Akins, July 17, 2006, A.G. Op. 06-0335.

For purposes of application of the separation of powers doctrine, under a council-manager form of government, a council member is an officer in the legislature branch of government. Tynes, July 27, 2006, A.G. Op. 06-0277.

For purposes of application of the separation of powers doctrine, a local school board member is an officer exercising powers in the executive branch of government. Bounds, July 27, 2006, A.G. Op. 06-0276.

There is no constitutional prohibition against an individual serving simultaneously as a member of the county school board and as a member of the county zoning commission. Meadows, Sept. 1, 2006, A.G. Op. 06-0418.

The separation of powers doctrine would prohibit persons from simultaneously serving on the county board of supervisors and the initial board of directors for a public improvement district. Dulaney, Oct. 13, 2006, A.G. Op. 06-0497.

An individual serving as both a state representative and a member of a city preservation commission would violate the doctrine of separation of powers. Collins, Nov. 10, 2006, A.G. Op. 06-0565.

A justice court judge may also serve as city attorney without violating the separation of powers doctrine. Perkins, Nov. 10, 2006, A.G. Op. 06-0577.

Where transfer of title to a building by a company to a county is followed by temporary retention of possession by the donating company, and the eighteen-months possession of the building by the company is presumably far less than the building's appraisal value, therefore, the possession of the building after transfer would not be an impermissible donation. Crow, Dec. 8, 2006, A.G. Op. 06-0583.

An individual is prohibited from simultaneously serving as director of parks and recreation for a city and as a member of the county board of supervisors. Wilcox, Dec. 8, 2006, A.G. Op. 06-0591.

There is no prohibition against an alderman being a candidate for county school superintendent. Shoemake, Dec. 22, 2006, A.G. Op. 06-0630.

The Separation of Powers doctrine, Miss. Const. of 1890, Art. 1, §§ 1-2, prohibits an individual from holding two offices in two different branches of government simultaneously. An individual may simultaneously serve as a member of a county school board and as county circuit clerk because both offices are within the executive branch of the government. Maples, February 16, 2007, A.G. Op. #07-00074, 2007 Miss. AG LEXIS 22.

Under the separation of powers doctrine, Miss. Const. of 1890, Art. 1, §§ 1-2, one may not simultaneously hold the offices of alderman and school board member because the office of alderman is in the legislative branch of government and the office of school board member is in the executive branch of government. Gibbs, March 9, 2007, A.G. Op. #07-107, 2007 Miss. AG LEXIS 73.

The separation of powers doctrine, Miss. Const. of 1890, Art. 1, § 2, does not prohibit a city firefighter from serving simultaneously as a county supervisor. Although the two positions are within separate branches of the county government, a firefighter does not exercise substantial policy-making power at the core of the executive branch so there is no conflict. Inquiries concerning potential ethics issues should be referred to the Ethics Commission. Bowen, March 2, 2007, A.G. Op. #07-00094, 2007 Miss. AG LEXIS 85.

RESEARCH REFERENCES

ALR. Resignation of one office as affecting eligibility to another office during term of former office. 5 A.L.R. 117, 40 A.L.R. 945.

Effect of election to or acceptance of one office by incumbent of another where both cannot be held by same person. 100 A.L.R. 1162.

Other public offices or employments within prohibition as regards judicial officers of constitutional or statutory provisions against holding more than one office. 89 A.L.R. 1113.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 63 et seq.

42 Am. Jur. (1st ed), Public Officers and Employees §§ 60 et seq.

CJS. C.J.S. Constitutional Law §§ 54 to 59, 111 to 227, 441.

C.J.S. Officers and Public Employees §§ 37-42, 119, 120.

Law Reviews. 1983 Mississippi Supreme Court Review: State legislators serving on state executive boards. 54 Miss L. J. 46, March 1984.

1987 Mississippi Supreme Court Review, Civil procedure. 57 Miss. L. J. 443, August, 1987.

Morton, Rules, rulemaking, and the ruled: the Mississippi Supreme Court as self-proclaimed ruler. 12 Miss. C. L. Rev. 293, Fall, 1991.

Southwick, Separation of Powers at the State Level: Interpretations and Challenges in Mississippi, 72 Miss. L.J. 927, Spring, 2003.

Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

ARTICLE 2.

BOUNDARIES OF THE STATE.

Sec.
3. Repealed.
4. Acquisition of territory; disputed boundaries

§ 3. Repealed

Repealed by Laws, 1990, ch. 692, eff December 19, 1990.
[Preamble, const 1817]

Editor's Note — Former Section 3 stated the limits and boundaries of the state of Mississippi.

The repeal of Section 3 of Article 2 of the Mississippi Constitution of 1890 was proposed by Laws, 1990, Ch. 692 (Senate Concurrent Resolution No. 520), and upon ratification by the electorate on November 6, 1990, was deleted from the Constitution by proclamation of the Secretary of State on December 19, 1990.

§ 4. Acquisition of territory; disputed boundaries

The Legislature shall have power to consent to the acquisition of additional territory by the state, and to make the same a part thereof; and the Legislature may settle disputed boundaries between this state and its coterminus states whenever such disputes arise.

JUDICIAL DECISIONS

1. In general.

Resolution of disagreement between United States, Mississippi and Alabama with respect to state borders, in connection with waters of Mississippi Sound. United States v. Louisiana, 507 U.S. 7, 113 S. Ct. 1238, 122 L. Ed. 2d 381 (1993).

Private plaintiffs having initiated action against private defendants in District Court to quiet title to property riparian to Mississippi River, Louisiana having filed a third-party complaint against Mississippi seeking to determine boundary between states, and District Court having denied leave to Louisiana to file bill and then finding land to be part of Mississippi uncompromising language of 28 USCS § 1251(a), which gives original and exclusive jurisdiction to Supreme Court over controversies between two or more States, deprived District Court of jurisdiction over Louisiana's third-party complaint. While District Court's adjudication of private action involving boundary did not violate section, adjudication of such action would not be binding on states in any way. However, because both District Court and Court of Appeals intermixed questions of title and location of boundary, matter would be remanded to determine whether, on record, claims of title may fairly be decided without additional proceedings in District Court. Mississippi v. Louisiana, 506 U.S. 73, 113 S. Ct. 549, 121 L. Ed. 2d 466 (1992), on remand, 984 F.2d 642 (5th Cir. 1993).

Luna Bar came into existence by accretion to Carter Point and is, and was, part of Mississippi. Mississippi v. Arkansas, 415 U.S. 289, 94 S. Ct. 1046, 39 L. Ed. 2d 333 (1974).

The Supreme Court will take judicial knowledge of the territorial boundaries of the state. Graham v. State, 196 Miss. 382, 17 So. 2d 210 (1944).

For a decision with reference to boundary line between Louisiana and Mississippi see Louisiana v. Mississippi, 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913 (1906).

The jurisdiction of the state extends as far out into the sea as may be necessary for public safety. Martin v. O'Brien, 34 Miss. 21 (1857), construing former Art. 2, § 3.

RESEARCH REFERENCES

ALR. Right of political division to challenge acts or proceedings by which its boundaries or limits are affected. 86 A.L.R. 1367.

CJS. C.J.S. States §§ 12-36.

Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

ARTICLE 3.

BILL OF RIGHTS.

SEC.
5. Government originating in the people
6. Regulation of government; right to alter
7. Secession prohibited
8. Citizens of state
9. Subordination of military to civil power
10. Treason
11. Peaceful assemblage; right to petition government
12. Right to bear arms
13. Freedom of speech and press; libel
14. Due process
15. Slavery and involuntary servitude prohibited; punishment for crime
16. Ex post facto laws; impairment of contract
17. Taking property for public use; due compensation
17A. Taking private property by eminent domain; transfer to others prohibited for ten years; exceptions
18. Freedom of religion
19. Repealed.
20. Specific term of office
21. Writ of habeas corpus
22. Double jeopardy
23. Searches and seizures
24. Open courts; remedy for injury
25. Access to courts
26. Rights of accused; state grand jury proceedings
26A. Victims' rights; construction of provisions; legislative authority
27. Proceeding by indictment or information
28. Cruel or unusual punishment prohibited
29. Excessive bail prohibited; revocation or denial of bail
30. Imprisonment for debt
31. Trial by jury
32. Construction of enumerated rights

§ 5. Government originating in the people

All political power is vested in, and derived from, the people; all government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.

SOURCES: 1817 art I § 2; 1832 art I § 2.

JUDICIAL DECISIONS

1. Elections.
2. Initiative and referendum.
3. Employment and labor relations.
4. Commerce and trade.
5. Access to courts.

1. Elections.

The appointment of members to the Board of Trustees of State Institutions of Higher Learning does not violate the principle of "one-man, one-vote"; the "one-man, one-vote" rule does not apply to appointed positions, and therefore is not applicable to appointed members of the Board of Trustees. Van Slyke v. Board of Trustees of State Insts. of Higher Learning, 613 So. 2d 872 (Miss. 1993).

The statute which provides for the issuance of county road bonds for construction or reconstruction of roads and bridges in cases of emergency without a submission of the question to a vote of the electors is not unconstitutional. Hutchins v. Board of Supvrs., 227 Miss. 766, 87 So. 2d 54 (1956).

2. Initiative and referendum.

Mississippi Constitution Article III, §§ 5 and 6 do not compel a resurrection of the initiative and referendum petition procedure, which vested in the electorate the power to enact constitutional amendments and legislative measures and the power to reject acts passed by the legislature. State ex rel. Moore v. Molpus, 578 So. 2d 624 (Miss. 1991).

3. Employment and labor relations.

The statute making it unlawful for a certain class of employers to work their employees over ten hours per day is not violative of this section. State v. J.J. Newman Lumber Co., 102 Miss. 802, 59 So. 923 (1912), error overruled, 103 Miss. 263, 60 So. 215 (1912).

4. Commerce and trade.

Code 1942, § 1108, known as "Fair Trade Act," permitting producer, manufacturer or owner to contract with retailer as to resale price of his own product which is in fair and open competition with commodities of same general class produced by others, does not violate this section. W.A. Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950).

5. Access to courts.

Circuit court properly dismissed a prisoner's 42 U.S.C.S. § 1983 action against a circuit court clerk alleging she violated his access to courts right; based on the prisoner's own dilatory actions related to certain summonses, the isolated failure of the clerk to issue the summonses was not an actionable interference with the prisoner's access to courts right. Duncan v. Johnson, 14 So. 3d 760 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 374 (Miss. 2009).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 1, 2, 33.

Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond. 56 Miss L. J. 73, April, 1986.

§ 6. Regulation of government; right to alter

The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; Provided, Such change be not repugnant to the constitution of the United States.

SOURCES: 1817 art I § 2; 1832 art I § 2.

JUDICIAL DECISIONS

1. In general.
2. Relation back of constitutional amendment.
3. Initiative and referendum.
4. Cooperation between State and Federal governments.
5. Subjects of police power—In general.
6. Businesses and occupations, subjects of police power.
7. Corporations, subjects of police power.
8. Drainage legislation, subjects of police power.
9. Fishing, subjects of police power.
10. Labor relations and employment, subjects of police power.
11. Railroads, subjects of police power.
12. Telegraphs and telephones, subjects of police power.

1. In general.

Regulation of business or profession to come within police power of state must have reasonable relation to promotion of public convenience, general prosperity, public health, public morals or public safety. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

The State exists to promote welfare of its citizens, that is, their peace, happiness, and prosperity. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

The State is sovereign over matters confided or reserved to it by the Tenth Amendment to the Federal Constitution. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

The legislature may adopt statutes for the general welfare and convenience of the public. State v. J.J. Newman Lumber Co., 102 Miss. 802, 59 So. 923 (1912), error overruled, 103 Miss. 263, 60 So. 215 (1912) (suggestion of error overruled in 103 M 263, 60 So. 215); State v. Armstead, 103 Miss. 790, 60 So. 778 (1913), Am. Ann. Cas. 1915B, 495.

Under the police power of the state is embraced authority to promote public convenience. State v. Louisville & N.R.R., 97 Miss. 35, 51 So. 918, Am. Ann. Cas. 1912C,1150 (1910), error overruled, 97 Miss. 58, 53 So. 454, Am. Ann. Cas. 1912C,1150 (1910).

The legislature can constitutionally confer on municipalities the power, by ordinance, to punish as an offense against the municipality an act which constitutes a crime against the state. Town of Ocean Springs v. Green, 77 Miss. 472, 27 So. 743 (1900).

2. Relation back of constitutional amendment.

Statutes enacted in anticipation of the adoption, or the taking effect, of constitutional amendments that prescribe the manner of effectuating such amendments, are valid in the absence of a constitutional provision prohibiting such legislation at the time of passage. Ratification of such an amendment relates back and validates the legislation. Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

3. Initiative and referendum.

Mississippi Constitution Article III, §§ 5 and 6 do not compel a resurrection of the initiative and referendum petition procedure, which vested in the electorate the power to enact constitutional amendments and legislative measures and the power to reject acts passed by the legislature. State ex rel. Moore v. Molpus, 578 So. 2d 624 (Miss. 1991).

4. Cooperation between State and Federal governments.

The State Constitution declaring that the State has sole power over its affairs does not prevent cooperation between the State and Federal governments, where each acts within its appropriate sphere, and may at any time reassert its full control over the subject matter. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

5. Subjects of police power—In general.

The people may change the method of selecting any of its officers. State ex rel. Collins v. Jones, 106 Miss. 522, 64 So. 241 (1914), error overruled, 64 So. 469 (Miss. 1914).

6. Businesses and occupations, subjects of police power.

Code 1942, § 8912, prohibiting under penalty any person other than a certified public accountant or an attorney from receiving compensation for making or preparing any tax return is not a reasonable exercise of the police power, is not in promotion of the public welfare, and is without reasonable relation to the advancement of public convenience, health, morals, or safety, is arbitrarily discriminatory, and is an infringement of the right to pursue an occupation gainfully, and hence is in violation of the Constitution. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

Code 1942, §§ 8905-8911, establishing a class of certified public accountants, providing for their regulation and prohibiting others from holding themselves out as such, is a valid exercise of the police power of the State. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

Under the police power the right of every person to pursue a lawful business is subject to uniform regulation. City of Vicksburg v. Mullane, 106 Miss. 199, 63 So. 412 (1913).

Under the police power of the state the legislature has authority to enact laws regulating or suppressing pool and billiard halls. City of Corinth v. Crittenden, 94 Miss. 41, 47 So. 525 (1908).

7. Corporations, subjects of police power.

It [the State] may limit the rights of corporation to contract and regulate its methods of doing business. Yazoo & Miss. V. Ry. v. Searles, 85 Miss. 520, 37 So. 939 (1905).

The legislature may pass all necessary laws for the public convenience requiring public service corporations to maintain cattle guards where the line of road passes through inclosed plantations. Kansas City, M. & B.R. Co. v. Spencer, 72 Miss. 491, 17 So. 168 (1894); Yazoo & Miss. V. Ry. v. Harrington, 85 Miss. 366, 37 So. 1016 (1905).

8. Drainage legislation, subjects of police power.

Under the police power of the state the legislature can enact drainage laws. Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911).

9. Fishing, subjects of police power.

By virtue of the police power, the state has the right to regulate the time, manner and extent of taking of fish in running streams and lakes with outlets into other waters. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. R. 700 (1905).

10. Labor relations and employment, subjects of police power.

The Unemployment Compensation Law does not infringe any of the sovereign powers retained by the State and recited in the State Constitution. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

11. Railroads, subjects of police power.

Section 4058, Code of 1906 (see Code 1942, § 7781), making it the duty of railroad companies to maintain cattle guards where their tracks pass through inclosed land, is within the police power of the state, and, therefore, the Fourteenth Amendment of the Constitution of the United States is not involved. Yazoo & Miss. V. Ry. v. Harrington, 85 Miss. 366, 37 So. 1016, 3 Am. Ann. Cas. 181 (1905).

Section 4053, Code of 1906, providing that when a railroad is constructed so as to cross a highway, and a bridge is necessary for passage along the highway across the railroad, it shall be the duty of the railroad company to erect and maintain the bridge, is within the police power of the state. Illinois Cent. R.R. v. Copiah County, 81 Miss. 685, 33 So. 502 (1903).

12. Telegraphs and telephones, subjects of police power.

A telegraph company, engaged in domestic as well as interstate business, is subject to such reasonable police regulations as the state may impose, it being immaterial that the company was chartered by another state and secured its right to erect its lines along the post roads in this state under an act of Congress. Western Union Tel. Co. v. Mississippi R.R. Comm'n, 74 Miss. 80, 21 So. 15 (1896).

RESEARCH REFERENCES

ALR. Constitutionality of statute regulating or imposing tax or license fee upon newspapers or magazines. 35 A.L.R. 7, 110 A.L.R. 327.

Public regulation or control of insurance agents or brokers. 10 A.L.R.2d 950.

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 260 et seq.

CJS. C.J.S. Constitutional Law § 6.

C.J.S. States §§ 75-77.

Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Southwick and Welsh, Methods of Constitutional Revision: Which Way Mississippi? 56 Miss L. J. 17, April, 1986.

Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond, 56 Miss L. J. 73, April, 1986.

§ 7. Secession prohibited

The right to withdraw from the Federal Union on account of any real or supposed grievance, shall never be assumed by this state, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this state to the government of the United States.

SOURCES: 1869 art I § 20.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 9-11.

Law Reviews. Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond, 56 Miss. L. J. 73, April, 1986.

§ 8. Citizens of state

All persons, resident in this State, citizens of the United States, are hereby declared citizens of the State of Mississippi.

SOURCES: 1869 art I § 1.

RESEARCH REFERENCES

CJS. C.J.S. Citizens §§ 7, 12, 28, 29.

Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond, 56 Miss L. J. 73, April, 1986.

§ 9. Subordination of military to civil power

The military shall be in strict subordination to the civil power.

SOURCES: 1869 art I § 25.

JUDICIAL DECISIONS

1. Authority of governor.
2. Authority of military officer.

1. Authority of governor.

What Governor does in execution of laws, and acts of militia under his authority, must be as civil officers, and in strict subordination to the general law of the land. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Requirement that Governor shall see that laws are executed means that laws shall be carried into effect, and not arbitrary enforcement by executive of what he considers law. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Governor's decision as to whether exigency justifies calling out militia, held subject to judicial review. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

2. Authority of military officer.

Member of militia who by rank has any executive authority may receive, and as lawful officer execute warrant, or have it done under his supervision, and make return upon it as sheriff or constable. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

RESEARCH REFERENCES

Am Jur. 53A Am. Jur. 2d, Military, and Civil Defense §§ 241-244, 246.

CJS. C.J.S. Armed Services §§ 11-20, 48, 49, 60, 341, 342.

Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond, 56 Miss L. J. 73, April, 1986.

§ 10. Treason

Treason against the state shall consist only in levying war against the same or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

SOURCES: 1817 art VI § 3; 1832 art VII § 3; 1869 art I § 26.

RESEARCH REFERENCES

ALR. Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency. 73 A.L.R. 1494.

Validity, under First Amendment and 42 USCS § 1983, of public college or university's refusal to grant formal recognition to, or permit meetings of, student homosexual organizations on campus. 50 A.L.R. Fed. 516.

CJS. C.J.S. Treason §§ 3, 5, 14, 15.

Lawyers' Edition. The Supreme Court and the First Amendment right to petition the Government for a redress of grievances. 30 L. Ed. 2d 914.

The Supreme Court and the First Amendment right of association. 33 L. Ed. 2d 865.

Law Reviews. Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond, 56 Miss. L. J. 73, April, 1986.

§ 11. Peaceful assemblage; right to petition government

The right of the people peaceably to assemble and petition the government on any subject shall never be impaired.

SOURCES: 1817 art I, § 22; 1832 art I, § 22; 1869 art I, § 6.

JUDICIAL DECISIONS

1. Fees and permits.
2. Freedom of speech.
3. Immunity of government agents.

1. Fees and permits.

County ordinance requiring permits for parades, demonstrations, assemblies, and other private uses of public property and requiring permit fee of up to $1,000 per day, and empowering county administrator to adjust fee amount to meet expense incidental to administering ordinance and maintaining public order in connection with licensed activity, as implemented and construed by county, violated free speech guarantee as there were no narrowly drawn, reasonable, and definite standards guiding hand of county administrator to prevent him from encouraging some views and discouraging others through arbitrary imposition of fees, and fee would depend on administrator's measure of amount of hostility likely to be created by speech, based on speech's content. Forsyth County v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992), cert. denied, 519 U.S. 1058, 117 S. Ct. 688, 136 L. Ed. 2d 612 (1997).

2. Freedom of speech.

City ordinance making it a misdemeanor to place on public or private property symbol, object, appellation, characterization, or graffiti which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on basis of race, color, creed, religion or gender was, even as narrowly construed by state Supreme Court, facially violative of First Amendment when applied to prosecute person who allegedly burned cross inside fenced yard of family; ordinance did not fall within any exception to prohibition against content discrimination, and although ordinance could be said to promote compelling state interest its content discrimination was not reasonably necessary to achieve such interest. R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

3. Immunity of government agents.

Federal Bureau of Investigation agents were absolutely immune from claims that they violated §§ 11 and 13 of Article 3 of of Mississippi Constitution where they acted within outer perimeter of their duties, and there were no implied damage remedies under such constitutional provisions. Kenyatta v. Moore, 623 F. Supp. 220 (S.D. Miss. 1985).

RESEARCH REFERENCES

ALR. Validity of statute or ordinance prohibiting or regulating holding of meeting in street. 10 A.L.R. 1483, 25 A.L.R. 114.

Constitutionality of statute regulating or imposing tax or license fee upon newspapers or magazines. 35 A.L.R. 7, 110 A.L.R. 327.

Validity of statute or ordinance against picketing. 35 A.L.R. 1200; 108 A.L.R. 1119; 122 A.L.R. 1043; 125 A.L.R. 963; 130 A.L.R. 1303.

Public speaking in street. 62 A.L.R. 404.

Use of streets or parks for religious purposes. 133 A.L.R. 1402.

Validity of Restrictions Imposed during National Political Conventions Impinging upon Rights to Freedom of Speech and Assembly under First Amendment. 46 A.L.R.6th 465.

Validity, under First Amendment and 42 USCS § 1983, of public college or university's refusal to grant formal recognition to, or permit meetings of, student homosexual organizations on campus. 50 A.L.R. Fed. 516.

When Does Use of Pepper Spray, Mace, or Other Similar Chemical Irritants Constitute Violation of Constitutional Rights. 65 A.L.R.6th 93

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 390-392.

CJS. C.J.S. Constitutional Law §§ 462, 466, 612 to 629.

Lawyers' Edition. The Supreme Court and the First Amendment right to petition the Government for a redress of grievances. 30 L. Ed. 2d 914.

The Supreme Court and the First Amendment right of association. 33 L. Ed. 2d 865.

Law Reviews. Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond, 56 Miss. L. J. 73, April, 1986.

§ 12. Right to bear arms

The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the Legislature may regulate or forbid carrying concealed weapons.

SOURCES: 1817 art I § 23; 1832 art I § 23; 1869 art I § 15.

Cross References — Governor's power to call militia, see Miss. Const. Art. 9, § 217.

JUDICIAL DECISIONS

1. Carrying concealed weapons.
2. Possession of firearm by convicted felon.

1. Carrying concealed weapons.

A person, not a tramp, traveling 62 miles from his place of residence and beyond the circle of his friends in the pursuit of legitimate business, and having a substantial sum of money on his person, is not guilty of unlawfully carrying a concealed weapon. Patterson v. State, 251 Miss. 565, 170 So. 2d 635 (1965).

This section does not authorize carrying concealed weapons on the person in one's home. Wilson v. State, 81 Miss. 404, 33 So. 171 (1903).

2. Possession of firearm by convicted felon.

Section 97-37-5 does not violate the rights of citizens to keep and bear arms, as provided in Article 3, Section 12 of the Constitution. James v. State, 731 So. 2d 1135 (Miss. 1999).

RESEARCH REFERENCES

ALR. Validity of state gun control legislation under state constitutional provisions securing the right to bear arms. 86 A.L.R.4th 931.

Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

Validity of state statutes restricting right of aliens to bear arms. 28 A.L.R.4th 1096.

Am Jur. 16A Am. Jur. 2d, Constitutional Law § 329.

CJS. C.J.S. Weapons §§ 3-8.

Law Reviews. Collins, Reliance on State Constitutions: Some Random Thoughts. 54 Miss L. J. 371, Sept.-Dec., 1984.

Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond. 56 Miss L. J. 73, April, 1986.

§ 13. Freedom of speech and press; libel

The freedom of speech and of the press shall be held sacred; and in all prosecutions for libel the truth may be given in evidence, and the jury shall determine the law and the facts under the direction of the court; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted.

SOURCES: 1817 art I §§ 6, 7 and 8; 1832 art I §§ 6, 7 and 8; 1869 art I § 4.

JUDICIAL DECISIONS

1. In general.
2. Access to judicial proceedings.
3. Attorneys.
4. Constitutionality.
5. Criticism of judicial acts.
6. Judicial comments.
7. Defamation—In general.
8. Parody, defamation.
9. Disloyalty to the flag or government.
10. Education and students.
11. Employment and labor relations.
12. Immunity of government officers.
13. Licenses and permits.
14. Obscene literature.
15. Sexual devices.

1. In general.

Judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) & (B), 3(B)(5), constituting willful misconduct in the judicial office which brought the judicial office into disrepute, thus causing the judge's conduct to be actionable pursuant to Miss. Const. Art. 6, § 177A; the judge's comments were disparaging results and not matters of legitimate public concern and went beyond the realm of protected campaign speech. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

The mere fact that the discretion granted to the Secretary of State in the Public Trust Tidelands Act could be interpreted in different lights, does not automatically render it vague; the procedure established by the tidelands legislation has a reasonable relation to the governmental purpose of establishing the boundary of public trust lands and as such is not vague. Columbia Land Dev., LLC v. Sec'y of State, 868 So. 2d 1006 (Miss. 2004).

City ordinance making it a misdemeanor to place on public or private property symbol, object, appellation, characterization, or graffiti which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on basis of race, color, creed, religion or gender was, even as narrowly construed by state Supreme Court, facially violative of First Amendment when applied to prosecute person who allegedly burned cross inside fenced yard of family; ordinance did not fall within any exception to prohibition against content discrimination, and although ordinance could be said to promote compelling state interest its content discrimination was not reasonably necessary to achieve such interest. R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

The breach of the peace statute, Section 97-35-13, is not unconstitutionally vague. Although the statute may have been constructed with broad language and could arguably be construed in a manner which would reach constitutionally protected speech or conduct, a statute may not be construed "so as to infringe upon the state or federally protected constitutional rights" of any individual. Jones v. City of Meridian, 552 So. 2d 820 (Miss. 1989).

Statute (Code 1942 § 2402), which, as construed by the state courts, makes it a criminal offense to communicate to others views and opinions respecting governmental policies, and prophecies concerning the states of this and other nations, irrespective of whether the communication was with an evil or sinister purpose or advocated or incited subversive action against the nation or state, or threatened any clear and present danger to American institutions or government, denies the liberty guaranteed by the Fourteenth Amendment to the United States Constitution. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d 663 (1943); Cummings v. State, 194 Miss. 59, 11 So. 2d 683 (1943), rev'd, Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943); Benoit v. State, 194 Miss. 74, 11 So. 2d 689 (1943), rev'd sub nom. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943).

Freedom of speech includes the freedom to speak unwisdom or even heresy. Tisdale v. State, 4 So. 2d 356 (Miss. 1941).

2. Access to judicial proceedings.

An accused's right to a fair trial and the press and public's right of access to criminal proceedings must be balanced when determining whether access to legal proceedings should be restricted. The press and public are entitled to notice and a hearing before a closure order is entered, and any submission in a trial court for closure, either by a party or by the court's own motion, and be it a letter, written motion, or oral motion, either in chambers or open court, must be docketed, as notice to the press and public, in the court clerk's office for at least 24 hours before any hearing on such submission, with the usual notice to all parties. The requirement should not be taken to mean that a greater notice period may not be afforded where feasible. Preferably, the submission should be a written motion if time and circumstances allow. A hearing must be held in which the press is allowed to intervene on behalf of the public and present argument, if any, against closure. The movant must be required to advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceedings, and it must make findings adequate to support the closure. In considering the less restrictive alternatives to closure, the court must articulate the alternatives considered and why they were rejected. The court must then make written findings of fact and conclusions of law specific enough that a reviewing court can determine whether the closure order was properly entered. A transcript of the closure hearing should be made public and if a petition for extraordinary relief concerning a closure order is filed in the Supreme Court, it should be accompanied by the transcript, the court's findings of fact and conclusions of law, and the evidence adduced at the hearing upon which the judge based the findings and conclusions. These requirements cannot be avoided by an agreement between the defendant and the State that proceedings and files should be closed. Gannett River States Pub. Co. v. Hand, 571 So. 2d 941 (Miss. 1990).

Civil and criminal sanctions imposed by Georgia upon publication of name of rape victim obtained from official court records open to public inspection violated constitutional protection of freedom of press. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), on remand, 234 Ga. 67, 214 S.E.2d 530 (1975).

Ordinarily a court has no right generally to deny to the press opportunity to learn, and the right to publish, the legitimate facts of trials during the public progress thereof. Brannon v. State, 202 Miss. 571, 29 So. 2d 916 (1947).

3. Attorneys.

The appellate court would deny a writ of prohibition seeking to enjoin an attorney's representation of a particular client, on the asserted basis that the representation would violate the Mississippi State Bar's Canons of Ethics, since prior restraints on speech are not tolerated absent the clearest imminent danger, and the lawyer's right and responsibility of zealous advocacy on behalf of his client is among the most precious forms of speech. Thornton v. Breland, 441 So. 2d 1348 (Miss. 1983).

An attorney in arguing a case has no right under this section to read law books to the jury. Oakes v. State, 98 Miss. 80, 54 So. 79 (1910).

4. Constitutionality.

Where, pursuant to its authority under Miss. Const. Art. VI, § 177A, the Mississippi Commission on Judicial Performance recommended that a judge be sanctioned for extra-judicial public statements of his views on the rights of gays and lesbians, the Supreme Court of Mississippi determined that gay rights was a political/public issue, and the judge's statements were religious speech protected by U.S. Const. Amend. I and Miss. Const. Art. III, § 13. Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006 (Miss. 2004).

5. Criticism of judicial acts.

The right of free speech is not exceeded by publishing a criticism of completed judicial action. Evers v. State, 241 Miss. 560, 131 So. 2d 653 (1961).

A newspaper editorial published after the court had adjourned, commenting on the circuit judge's crusade against liquor selling and gambling, that the results thereof were exceedingly small, that any belief that crime was rampant in the community was unfounded, and expressing confidence in the local law enforcement officers, and the like, did not constitute constructive contempt. Tisdale v. State, 4 So. 2d 356 (Miss. 1941).

6. Judicial comments.

Order that the judge be suspended from office for a period of one year was appropriate because his commentary on Caucasian officials and their African-American appointees in his jurisdiction was not worthy of being deemed a matter of legitimate political concern in his reelection campaign, but merely an expression of his personal animosity. The comments were not made within the content, form, or context of a matter of legitimate public concern. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

7. Defamation—In general.

Where author, after tape recording interviews with psychoanalyst, wrote magazine article which was later published as book and which contained lengthy passages in quotation marks attributed to psychoanalyst, some of which had no identical statement appearing in author's taped interviews, author was not entitled to summary judgment in suit by psychoanalyst for libel, because deliberate alteration of words uttered by public figure does not equate with knowledge of falsity for purpose of New York Times standard, unless alteration results in material change in meaning conveyed by statement; and (2), with respect to some of the quotations, evidence presented question for jury whether author acted with knowledge of falsity or with reckless disregard as to truth or falsity. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991), on remand, 960 F.2d 896 (9th Cir. Cal. 1992).

Private figure seeking damages in defamation action against newspaper bears burden of proving that defamatory statements of public concern are false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986).

Truth is a defense to defamation action. Fulton v. Mississippi Publishers Corp., 498 So. 2d 1215 (Miss. 1986).

Three doctors who worked in the emergency room of a hospital whose administrator was the center of controversy within the hospital and county government generally for his institution of efficiency programs that rankled the medical staff, including the three doctors, became vortex public figures when they issued an ultimatum to the board of trustees of the hospital even if they had not theretofore been public figures; accordingly, the three doctors had no right of recovery for libel absent proof by clear and convincing evidence of actual malice on the part of a newspaper writer who criticized them sharply in an editorial. Ferguson v. Watkins, 448 So. 2d 271 (Miss. 1984).

In action against newspaper for invasion of privacy, failure to allege that publication was made with knowledge of its falsity, with reckless disregard for truth, or maliciously was not adequate to support demurrer since plaintiffs were not public figures and since jurisdiction recognized common law right to privacy, and the allegations, though possibly subject to technical criticism, sufficiently charged a tort to warrant a trial on the merits. Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471 (Miss. 1976).

Proof of the substantial truth of a publication, made with good motives and for justifiable ends, is a complete defense to an action for libel. Smith v. Byrd, 225 Miss. 331, 83 So. 2d 172 (1955).

8. Parody, defamation.

First Amendment prohibits public figure from recovering damages for intentional infliction of emotional distress as result of parody, absent showing of false statement of fact which was made with actual malice; therefore, minister who was public figure and whose picture was used in advertisement parody labeled "ad parody- not to be taken seriously" could not recover damages for intentional infliction of emotional distress. Hustler Magazine v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988).

9. Disloyalty to the flag or government.

A statute making it a criminal offense to indoctrinate any creed, theory, or any set of principles which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag of the United States or of the state, denies the liberty guaranteed by the Fourteenth Amendment. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d 663 (1943).

10. Education and students.

Public schools have authority to promulgate and enforce a reasonable dress code for faculty, staff and students, provided only that it does not infringe rights otherwise protected, and even then the schools may enforce such a code when undergirded by some compelling governmental interest reasonably related to their educational mission, so long as the least restrictive means reasonably available are employed. Mississippi Emp. Sec. Comm'n v. McGlothin, 556 So. 2d 324 (Miss. 1990), cert. denied, 498 U.S. 879, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990).

11. Employment and labor relations.

Because plaintiff fireman's letter to a newspaper addressed a matter of public concern, how candidates would treat city employees and their raises, and defendant city submitted no evidence the letter interfered with work relationships or the fireman's job, the city had to show cause why summary judgment should not enter on the fireman's Miss. Const. Art. 3, § 13 demotion/retaliation claim. Montgomery v. Mississippi, 498 F. Supp. 2d 892 (S.D. Miss. 2007).

Employee speech is entitled to judicial protection only if it pertains to matters of public concern, and this protection does not extend to comments of personal interest. Even employee speech on matters of public interest must be balanced against the government's interest in promoting efficiency, integrity and proper discipline in the discharge of public service. Thus, a police chief's request that an officer maintain a "low profile" did not wrongfully suppress the officer's constitutional right to free speech since the request was "well within the legitimate and necessary means inherent to the efficient operation of a police department which is deeply involved in combating narcotics activity in the community." Bulloch v. City of Pascagoula, 574 So. 2d 637 (Miss. 1990).

A public school teacher's wearing of a head-wrap as an expression of her religious and cultural heritage as a member of the African Hebrew Israelites in violation of the school's dress code was constitutionally protected religious and cultural expression, such that the Mississippi Employment Security Commission had no authority to deny her claim for unemployment compensation benefits after she was discharged for insubordination when she refused to discontinue wearing the head-wrap, even though there is no specific tenet of the African Hebrew Israelites mandating that women wear headdress, the teacher was not a regular participant in the organized activities of a particular church, synagogue or other religious body, she might have been "selective in wearing the traditional head-wrap" in that at times she did not wear it, and even though her conduct may have been misconduct had it not been constitutionally protected expression. Mississippi Emp. Sec. Comm'n v. McGlothin, 556 So. 2d 324 (Miss. 1990), cert. denied, 498 U.S. 879, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990).

Where the decision not to reemploy an elementary school teacher was made, not because of her activities in speaking out against the school board and participating in teacher's organizations, but, rather, because of her disregard of school policy in taking leave without permission, such reasons supported the proposition that the protected activities under the First Amendment were not a "substantial factor" in the non-reemployment decision. Board of Trustees v. Gates, 461 So. 2d 730 (Miss. 1984), opinion clarified, 467 So. 2d 216 (Miss. 1985).

12. Immunity of government officers.

Federal Bureau of Investigation agents were absolutely immune from claims that they violated §§ 11 and 13 of Article 3 of of Mississippi Constitution where they acted within outer perimeter of their duties, and there were no implied damage remedies under such constitutional provisions. Kenyatta v. Moore, 623 F. Supp. 220 (S.D. Miss. 1985).

13. Licenses and permits.

County ordinance requiring permits for parades, demonstrations, assemblies, and other private uses of public property and requiring permit fee of up to $1,000 per day, and empowering county administrator to adjust fee amount to meet expense incidental to administering ordinance and maintaining public order in connection with licensed activity, as implemented and construed by county, violated free speech guarantee as there were no narrowly drawn, reasonable, and definite standards guiding hand of county administrator to prevent him from encouraging some views and discouraging others through arbitrary imposition of fees, and fee would depend on administrator's measure of amount of hostility likely to be created by speech, based on speech's content. Forsyth County v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992), cert. denied, 519 U.S. 1058, 117 S. Ct. 688, 136 L. Ed. 2d 612 (1997).

14. Obscene literature.

A statute prohibiting the sale of obscene literature does not violate this section. Williams v. State, 130 Miss. 827, 94 So. 882 (1923).

15. Sexual devices.

Sale of sexual devices, or the right of access to such devices by users, is not encompassed by the constitutionally protected right of privacy; advertising of the devices, or their sale is not constitutionally protected speech. PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004).

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ALR. Constitutionality of statute regulating or imposing tax or license fee upon newspapers or magazines. 35 A.L.R. 7, 110 A.L.R. 327.

Validity of statute or ordinance against picketing. 35 A.L.R. 1200; 108 A.L.R. 1119; 122 A.L.R. 1043; 125 A.L.R. 963; 130 A.L.R. 1303.

Constitutionality of statutes forbidding or regulating dissemination of betting odds or other gambling information. 47 A.L.R. 1135.

Public speaking in street. 62 A.L.R. 404.

Constitutionality of corrupt practices acts. 69 A.L.R. 377.

Validity or legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency. 73 A.L.R. 1494.

Constitutionality and construction of statutes relating to charges and attacks on candidates for nomination or election to public office. 96 A.L.R. 582.

Validity and construction of statute or ordinance relating to distribution of advertising matter. 114 A.L.R. 1446.

Constitutional guaranties of freedom of speech and of the press as applied to statutes and ordinances providing for licensing or otherwise regulating distribution of printed matter or solicitation or subscriptions therefor. 127 A.L.R. 962.

Duty of secrecy on part of members of, or witnesses or other persons present before, grand jury. 127 A.L.R. 272.

Validity of statutory or municipal regulation of soliciting of alms or contributions for charitable, religious, or individual purposes. 128 A.L.R. 1361, 130 A.L.R. 1504.

Right of labor union to publicize that commodity is nonunion-made, or that competing commodity is union-made. 131 A.L.R. 1068.

Use of streets or parks for religious purposes. 133 A.L.R. 1402.

Freedom of speech and press as limitation on power to punish for contempt. 159 A.L.R. 1379.

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Validity of criminal defamation statutes. 68 A.L.R.4th 1014.

Intrusion by news-gathering entity as invasion of right of privacy. 69 A.L.R.4th 1059.

Exclusion of public and media from voir dire examination of prospective jurors in state criminal case. 16 A.L.R.5th 152.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Propriety of prophylactic availability programs. 52 A.L.R.5th 477.

Validity, under state constitutions, of private shopping center's prohibition or regulation of political, social, or religious expression or activity. 52 A.L.R.5th 195.

Defamation: Publication of letter to editor in newspaper as actionable. 54 A.L.R.5th 443.

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First amendment challenges to display of religious symbols on public property. 107 A.L.R.5th 1.

First Amendment protection afforded to comic books, comic strips, and cartoons. 118 A.L.R.5th 213.

Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions. 24 A.L.R.6th 255.

First Amendment Protection Afforded to Web Site Operators. 30 A.L.R. 6th 299.

Validity of Restrictions Imposed during National Political Conventions Impinging upon Rights to Freedom of Speech and Assembly under First Amendment. 46 A.L.R.6th 465.

When Does Use of Pepper Spray, Mace, or Other Similar Chemical Irritants Constitute Violation of Constitutional Rights. 65 A.L.R.6th 93.

Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum — Characteristics of Forum. 70 A.L.R.6th 513.

Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum — Manner of Restriction. 71 A.L.R.6th 471.

Constitutional Challenges to Compelled Speech — General Principles. 72 A.L.R.6th 513.

Constitutional Challenges to Compelled Speech — Particular Situations or Circumstances. 73 A.L.R.6th 281.

Prohibition of federal agency's keeping of records on methods of individual exercise of First Amendment rights, under Privacy Act of 1974 (5 USCS § 552a(e)(7)). 63 A.L.R. Fed. 674.

Propriety, under First Amendment, of school board's censorship of public school libraries or coursebooks. 64 A.L.R. Fed. 771.

What oral statement of student is sufficiently disruptive so as to fall beyond protection of First Amendment. 76 A.L.R. Fed. 599.

First Amendment guaranty of freedom of speech or press as defense to liability stemming from speech allegedly causing bodily injury. 94 A.L.R. Fed. 26.

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Validity and construction of public school regulation of student distribution of religious documents at school. 136 A.L.R. Fed. 551.

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§ 14. Due process

No person shall be deprived of life, liberty, or property except by due process of law.

SOURCES: 1817 art I § 10; 1832 art I § 10; 1869 art I § 2.

JUDICIAL DECISIONS

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1. In general.

Supposed "notice" to a special assistant attorney general is not sufficient under Miss. R. Civ. P. 24(d) or Miss. R. App. P. 44; therefore, a hospital was procedurally barred from bringing constitutional challenges to Miss. Code Ann. § 41-7-191(16) under Miss. Const. Art. 4, § 87, Miss. Const. Art. 3, § 14, and the Fourteenth Amendment where there was no notice to the Mississippi Attorney General. Oktibbeha County Hosp. v. Miss. State Dep't of Health, 956 So. 2d 207 (Miss. 2007).

In a negligence action by property owners in Mississippi regarding flooding, Mississippi had a strong interest in adjudicating the dispute because Mississippi residents were injured, Mississippi property was destroyed, and the City of Mobile, Alabama, and the Board of Water & Sewer Commissioners of the City of Mobile continued to release water from the subject reservoir. Also, the interest of the hundreds of other Mississippi property owners in obtaining convenient and effective relief was furthered by keeping the suit in Mississippi because their property was located in the county where the suit was filed; maintenance of the suit did not offend "traditional notions of fair play and substantial justice," and application of the "long-arm" statute in the case did not violate the United States Constitution. Horne v. Mobile Area Water & Sewer Sys., 897 So. 2d 972 (Miss. 2004), writ of certiorari denied by 544 U.S. 922, 125 S. Ct. 1652, 161 L. Ed. 2d 479, 2005 U.S. LEXIS 2480, 73 U.S.L.W. 3555 (2005), writ of certiorari denied by 544 U.S. 922, 125 S. Ct. 1662, 161 L. Ed. 2d 480, 2005 U.S. LEXIS 2484, 73 U.S.L.W. 3555 (2005).

The Mississippi statute forbidding nuisances, §§ 95-3-1 et seq., is not unconstitutionally vague; adequate notice was clearly provided by the terms of the statute, which were clearly understandable words that left no room for misinterpretation. Collins v. City of Hazlehurst, 151 F. Supp. 2d 749 (S.D. Miss. 2001).

When legislature extinguishes "right" via legislation that affects general class of people, legislative process provides all process that is due. City of Oxford v. Northeast Miss. Elec. Power Ass'n, 704 So. 2d 59 (Miss. 1997).

State Constitution's guarantee of due process of law includes fair and impartial trial. Brown ex rel Webb v. Blackwood, 697 So. 2d 763 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997).

The trial court erred in enjoining the National Collegiate Athletic Association from interfering with the right of a Mississippi State University football player to engage in intercollegiate athletics, on the asserted basis of the Association's violation of procedural due process in suspending the player, since the privilege of engaging in interscholastic athletics is not a "property" right. National Collegiate Athletic Ass'n v. Gillard, 352 So. 2d 1072 (Miss. 1977).

Due process when applied to substantive rights is now interpreted to mean that the government is without the right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be in arbitrary exercise of governmental power. Craig v. North Miss. Community Hosp., 206 Miss. 11, 39 So. 2d 523 (1949).

Where the end is legitimate the means is for the legislature to choose, the only limitation thereon under due process being that the means chosen must not be so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. Craig v. North Miss. Community Hosp., 206 Miss. 11, 39 So. 2d 523 (1949).

"Liberty" within constitutional provisions against depriving any person thereof except by due process of law includes "liberty of contract," which, in turn, means freedom from arbitrary or unreasonable restraint. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

By what procedure private property may be taken for public use rests with the legislature subject to the requirements of due process of law and that section of the state constitution which provides that private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof. McAllister v. Graham, 6 So. 2d 300 (Miss. 1942).

In order for a statute to survive when confronted with due process of law, it must not appear to be arbitrary or capricious, but must have a reasonable relation to a legitimate end. Saucier v. Life & Cas. Ins. Co., 189 Miss. 693, 198 So. 625 (1940).

The phrase "due process of law" has been expanded beyond its literal meaning of due procedure and is now interpreted to mean that the government is without right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

Due-process clause does not prevent State from adapting life to the continuous change in social and economic conditions. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

Each case involving due process must be decided on the social and economic conditions that exist when the statute was enacted or at time case is decided. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

If statute has reasonable relation to governmental purpose and is calculated to carry out some governmental design, courts cannot strike it down as being "arbitrary." Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

The word "liberty" defined. Wilby v. State, 93 Miss. 767, 47 So. 465 (1908).

The legislature, under this section, is without power to deprive a plaintiff of a sum of money admitted to be due him. East v. King, 77 Miss. 738, 27 So. 608 (1900).

2. Notice and hearing.

Procedure the Mississippi Oil and Gas Board utilized in amending a rule did not violate contestants' constitutional rights because the contestants were given full and fair notice of the petition to amend the rule and were allowed to lodge their objections to said rule; the contestants were represented vigorously by competent counsel, allowed to call witnesses, and put exhibits into evidence during a public hearing on the matter. Adams v. Miss. State Oil & Gas Bd., 139 So. 3d 58 (Miss. 2014).

Insurance company's due process rights were violated by the county court's entry of sanctions against it in an action to which it was not a party and had not received formal notice. State Farm Mut. Auto. Ins. Co. v. Jones, 37 So. 3d 87 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 292 (Miss. 2010).

Rather than a denial of due process, the appellate court found that the student failed to take advantage of the process; the student was provided notice of and the opportunity to be heard at all of the hearings, including the one held on the summary judgment motion, and the student, for whatever reason, simply failed to attend the hearings. Harvey v. Stone County Sch. Dist., 982 So. 2d 463 (Miss. Ct. App. 2008).

Order finding a father in contempt for his nonpayment of child support was upheld where he had received a valid summons for the initial hearing; because the father appeared at the hearing at which he was found in contempt, any defects in the issuance of the notice by the court administrator were waived, and the father was not deprived of notice or the ability to prepare. Bailey v. Fischer, 946 So. 2d 404 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 54 (Miss. 2007).

Indictment explicitly stated that defendant was being charged with motor vehicle theft under Miss. Code Ann. § 97-17-42; there was no evidence presented that defendant was surprised or that he did not know, to his prejudice, that he was being prosecuted under § 97-17-42 for motor vehicle theft; therefore, there being no prejudice or surprise, the trial judge did not abuse his discretion in permitting an on-the-record amendment of the indictment. Mixon v. State, 921 So. 2d 275 (Miss. 2005).

Claimant, a teacher, was not denied procedural due process in her claim for disability benefits. Neither the referral by a doctor to a clinic where he was a director, nor the unavailability of the author of a medical report for cross-examination at the hearing constituted a violation of due process. Pub. Emples. Ret. Sys. v. Stamps, 898 So. 2d 664 (Miss. 2005).

Father was subject to the chancery court's continuing jurisdiction and received notice of the trial date; the document which gave the father notice of the hearing was a Miss. R. Civ. P. 81 summons and it listed the time and date for the father to appear, which he did, and he was present when the case was transferred to the other chancellor, such that the father had every opportunity to check with the chancery clerk's office and the mother's attorney regarding the case's status. Vincent v. Griffin, 852 So. 2d 620 (Miss. Ct. App. 2003), reversed by, remanded by 872 So. 2d 676, 2004 Miss. LEXIS 501 (Miss. 2004).

State employee who was under investigation for improper sexual conduct continued to receive full pay and benefits for the duration of the employee's leave, and the state agency was not required to afford the employee the opportunity for a hearing within 20 days, thus, the employee was not denied due process. Further, the employee had the opportunity to make arguments, put on witnesses, and cross-examine witnesses at the Mississippi Employee Appeals Board hearing. Davis v. Miss. State Dep't of Health, 856 So. 2d 485 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 315, 2003 Miss. LEXIS 674 (Miss. 2003).

Former employer that had consistently and arrogantly denied a former employee's right to an accounting of earnings allegedly in the employer's possession was not denied due process or its rights to a remedy when the chancery court ordered an equitable accounting without holding a hearing. Univ. Nursing Assocs., PLLC v. Phillips, 842 So. 2d 1270 (Miss. 2003).

The procedures surrounding a school principal's termination were not "tainted," and no violation of his due process rights occurred, even though it could have been inferred from a witness' reluctance to make a statement and from her affidavit that she felt compelled to testify or lose her job, since such "evidence" of coercion was insufficient to overcome the "presumption of honesty and integrity" in the school board members who served as adjudicators and conducted the dismissal hearing. Harris v. Canton Separate Pub. Sch. Bd. of Educ., 655 So. 2d 898 (Miss. 1995).

The due process clause of the Mississippi Constitution required that a plaintiff's appeal, which had been dismissed for failure to file a timely notice of appeal, be reinstated, since (1) 3 jury verdict forms which did not contain the word "judgment" did not constitute final judgments and therefore were not appealable, (2) the plaintiff was never notified of the existence of those forms, they were not in the court file, were not entered on the docket, and were presented to the judge ex parte, and (3) the plaintiff filed her notice of appeal within 30 days of the disposition of the post-trial motions and timely perfected her appeal to the Supreme Court. Roberts v. Grafe Auto Co., 653 So. 2d 250 (Miss. 1994), opinion after reinstatement of appeal, 701 So. 2d 1093 (Miss. 1997), reh'g denied, 702 So. 2d 133 (Miss. 1997).

The procedures followed at an administrative hearing before 3 members of the school board on a teacher's 6-month suspension violated the teacher's right to due process where, during a break in the formal proceedings, the 3 school board members told the teacher that they intended to reject suspension in favor of a formal reprimand, the teacher claimed to have relied on this information and rested her case prematurely, and the board ultimately reached a decision to suspend the teacher; although the teacher was afforded an opportunity to be heard, the school board, by its own actions, prevented her from taking full advantage of her right to present evidence in her favor by leading her to believe that there was no need to present additional evidence. Bowman v. Ferrell, 627 So. 2d 335 (Miss. 1993).

Where a suspended teacher's procedural due process rights had been violated at her hearing before the school board, the chancery court erred in ordering the teacher's reinstatement rather than a rehearing as required by § 37-9-113(4). Bowman v. Ferrell, 627 So. 2d 335 (Miss. 1993).

The statutory law providing for prehearing suspension of a driver's license when the driver refuses to submit to a breathalyzer test is not violative of minimum due process requirements. Lavinghouse v. Mississippi Hwy. Safety Patrol, 620 So. 2d 971 (Miss. 1993).

A county board of supervisors could not bar a chancery clerk, who had temporarily vacated his positions as clerk of the board of supervisors and county auditor, from performing his duties in those positions based upon a claim that the chancery clerk had failed to perform his duties, without affording him a hearing so as to comply with due process requirements. Barlow v. Weathersby, 597 So. 2d 1288 (Miss. 1992).

The highway patrol had no authority to deliver a stolen pickup truck, which had an altered vehicle identification number and had been seized from an innocent purchaser pursuant to a valid search warrant, to an insurance company, which had paid the owner the full value of the truck under a theft loss insurance policy and was therefore the lawful owner of the vehicle, absent court approval with no advance notice to the innocent purchaser of its intent to do so and without giving him an opportunity contest the matter in a court of competent jurisdiction; the appropriate procedure would have been for the highway patrol, once the truck served no further purpose in the criminal investigation or prosecution, to make a motion in the justice court for authority to release it to the insurance company, and to give the innocent purchaser and the insurance company reasonable notice of such application and an opportunity to be heard; however, the circuit court erred in directing return of the pickup truck to the innocent purchaser without making the insurance company a party to the hearing or giving it any notice of the proceeding, as this was a blatant violation of the insurance company's right to due process. Weaver v. State, 597 So. 2d 609 (Miss. 1992).

Notice of an employer's appeal of a referee's decision was sufficient to satisfy the claimant's minimum due process rights, where the Board of Review mailed a notice to the claimant but did not notify the claimant's attorney of the appeal. Notifying the claimant only and not the attorney satisfies minimum due process requirements so long as such notice is "reasonably calculated" to apprise the claimant of necessary information. Booth v. Mississippi Emp. Sec. Comm'n, 588 So. 2d 422 (Miss. 1991).

An award of attorney's fees in a contempt proceeding against the husband in a divorce action was improper where the only evidence presented regarding attorney's fees was an affidavit, with attached attorney time sheets, setting out the hours worked, the hourly rates, and costs, for a total fee of $4,450, and the husband was not present when the evidence was presented and was not given the opportunity to examine witnesses and to question the reasonableness of the award. Griffin v. Griffin, 579 So. 2d 1266 (Miss. 1991).

The administrator of an estate is required to provide actual notice to known or reasonably ascertainable legitimate children who are potential heirs and whose claims would be barred by the running of the 90-day period from the notice of publication to creditors under the nonclaim statute, § 91-1-15(3)(c). To hold otherwise would encourage administrators and executors to benefit as heirs at law by setting in motion the shortest filing period which, unbeknownst to the potential heir, has significantly shortened the time for the potential heir to meet with the statutory requirements to inherit as an heir. Smith ex rel. Young v. Estate of King, 579 So. 2d 1250 (Miss. 1991).

A chancellor's refusal to grant a motion to set aside judgment pursuant to MRCP 60(b)(6) was an abuse of discretion where the record was devoid of any notice to the defendant as to the date of the trial; notice, whether of the time and place of a hearing, the contents of a complaint, or of the specific nature of a criminal charge, is the essence of due process. Johnson v.

Weston Lumber & Bldg. Supply Co., 566 So. 2d 466 (Miss. 1990), but see Koerner v. Crittenden, 635 So. 2d 833 (Miss. 1994).

A circuit judge erred in deciding not to subject a creditor to liability for injurious violation of a debtor's constitutional right to due process when the creditor seized the debtor's mobile home and furnishings in compliance with § 11-37-101 simply because the creditor acted pursuant to a presumptively valid (albeit unconstitutional) statute. An evidentiary hearing should have been held, and the creditor's claim of good faith reliance on a presumptively valid statute should have been considered in light of not only the sincerity in its belief that it was acting properly, but the reasonableness of its actions under the circumstances. A fact finder conceivably could have concluded that the creditor's "surprise" seizure of the debtor's mobile home and its contents was, under the circumstances, unreasonable and compensable, where the record indicated no explanation for the necessity of an immediate seizure. Underwood v. Foremost Fin. Servs. Corp., 563 So. 2d 1387 (Miss. 1990).

In an action against a husband for contempt for failing to abide by the terms of a divorce decree, the husband was deprived of due process where, after the husband was held in contempt, the chancellor did not allow him to present evidence in support of his motion for a new trial in order to prove that he had abided by the terms of the divorce decree, and the chancellor then dispensed with the husband's motion for a new trial by denying it without hearing the additional evidence. Weeks v. Weeks, 556 So. 2d 348 (Miss. 1990).

Any violation of the county's regulations regarding notice of non-compliance with the county's subdivision ordinance did not deprive a developer and lot owners of their due process right with respect to the county's action for declaratory and injunctive relief to bring the lot into compliance with the ordinance since such a procedure was not a prerequisite to the filing and prosecution of the lawsuit. Additionally, the rights of the developer and the lot owners in the premises was reasonable advance notice of the lawsuit and the opportunity to appear and be heard. Johnson v. Hinds County, 524 So. 2d 947 (Miss. 1988).

Notice procedure set forth in Emergency School Leasing Authority Act, § 37-7-301, is adequate under both Mississippi and United States Constitutions. Cox v. Jackson Mun. Separate Sch. Dist., 503 So. 2d 265 (Miss. 1987).

In bond judgment and declaratory judgment actions by objectors against a county utility district that proposed to issue revenue bonds to finance a water and sewage treatment center, notwithstanding that the objectors may not have been afforded reasonable advance notice of the meeting in which the board of commissioners formerly adopted resolutions concerning the project, the revenue bond was valid and did not violate due process. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

The Constitutions of the United States and Mississippi require that no person may be deprived of his property except by due process of law, and an administrative body must protect such rights before depriving a person of his property. Mississippi Tel. Corp. v. Mississippi Pub. Serv. Comm'n, 427 So. 2d 963 (Miss. 1983).

Due process requirement is directed to the protection of individuals and does not apply to frustrate state agencies in their relationships with each other; county board of supervisors has the power to allocate space in the courthouse, and it would be impractical to hamper them in the exercise of this duty by granting traditional due process safeguards to those effected by their decisions in such matters. Tally v. Board of Supvrs., 307 So. 2d 553 (Miss. 1975).

Statutes providing for the seizure, forfeiture as contraband, and sale of firearms used for the illegal hunting of deer are fatally defective and unconstitutional as to an owner out of possession and innocent of knowledge of the illegal purpose for which the guns are used, in that they provide no notice, actual or constructive, to be given to such an owner. Kellogg v. Strickland, 191 So. 2d 536 (Miss. 1966).

Where the purchaser of land at a tax sale was not joined as a party to an eminent domain action, and the Highway Commission, after judgment, entered upon the property, took possession of the condemned right of way, and began construction work thereon, purchaser had been denied due process and his property had been taken without compensation. Mississippi State Hwy. Comm'n v. Casey, 253 Miss. 685, 178 So. 2d 859 (1965).

Action of chancery court in proceeding, at the appellee's request, with the hearing upon the merits of the cause at the time set therefor in the absence of appellant without justifiable excuse, did not deprive appellant of his property without due process of law, nor was he denied the equal protection of the law, where it appeared that not only had the appellant been granted repeated continuances, but had also been fully advised as to the date of the hearing. Webb v. Bonner, 232 Miss. 153, 98 So. 2d 143 (1957).

Foreign corporations, doing business in Alabama, Tennessee, and Mississippi, were persons within the meaning of attachment statutes and they themselves could sue in the state and were liable to be sued or proceeded against, by attachment or otherwise, as individual nonresident debtors may be sued or proceeded against. Snipes v. Commercial & Indus. Bank, 225 Miss. 345, 83 So. 2d 179 (1955).

The provision of the State Bar Act which provides for automatic suspension of a member who fails to pay the required dues but gives a suspended member power to reinstate himself by payment of delinquent dues, does not violate any constitutional rights because of failure to provide for a judicial hearing. Mississippi State Bar v. Collins, 214 Miss. 782, 59 So. 2d 351 (1952).

Since bonds for consolidated school districts may be issued on petition of majority of qualified electors under Code 1942, § 6370 and no provision is made for notice to those affected so that they may have an opportunity to be heard prior to issuance, the validating act, Code 1942, § 4314, must be construed so as to give to those who have had no opportunity to protest action of board the right to hearing, when they respond to notice to taxpayers in validation proceedings, otherwise state constitutional provision against deprivation of property except by due process of law is violated. In re Savannah Special Consol. Sch. Dist., 208 Miss. 460, 44 So. 2d 545 (1950).

No man can be condemned or divested of his right until he has had an opportunity of being heard and no judgment, order or decree is valid or binding upon a party who has had no notice of proceeding against him. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195 (1949).

Court must not only have jurisdiction of subject matter, but also of persons of parties to give validity to its final judgments, orders and decrees and it is not in power of legislature to dispense with this notice, actual or constructive. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195 (1949).

Judgment or decree is void against defendant unless there has been legal summons or legal appearance, although defendant has full and definite knowledge of existence of action against him and his action under that knowledge is immaterial. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195 (1949).

Code 1942, § 1852, providing method of summoning non-resident defendant in proceeding in chancery court is jurisdictional and is one method provided by law to meet requirement of due process clause of Constitution. Rice v. McMullen, 207 Miss. 706, 43 So. 2d 195 (1949).

Nonresident who engages in business in this state which is subject to state control is subject to suit for damages in this state on cause of action accruing here out of business transacted in this state and is properly brought into court by service of process upon secretary of state in manner provided by Code 1942, § 1438, and statutes so providing do not violate due process or immunities and privileges clauses of federal constitution. Condon v. Snipes, 205 Miss. 306, 38 So. 2d 752 (1949).

Nonresident engaging in business of termite eradication and control in this state under license from State Plant Board authorizing him to conduct such business is subject to action for damages in this state for breach of termite eradication and control contract entered into and to be performed in this state and may be brought into court by service of process upon secretary of state in manner provided by Code 1942, § 1438. Condon v. Snipes, 205 Miss. 306, 38 So. 2d 752 (1949).

An order by board of supervisors adjudicating sufficiency of the petition and ordering an election, after a secret session from which interested parties and their attorneys were excluded, and a final judgment of the board excluding wine and beer from the county, pursuant to such election, are without authority of law and a denial of due process. Miles v. Board of Supvrs., 33 So. 2d 810 (Miss. 1948).

A child's parents cannot, under the due process of law provisions of the state and Federal constitutions, be deprived by a judicial proceeding of their parental rights without notice thereof, and an opportunity to be heard in opposition thereto. Britt v. Allred, 199 Miss. 786, 25 So. 2d 711 (1946).

Unconstitutionality of provision permitting sheriff to seize and sell automobile for nonpayment of highway privilege tax without notice to owner held separable from, and did not affect validity of, remainder of the taxing statute. Holloway v. Jordan, 170 Miss. 99, 154 So. 340 (1934).

Statutory provision permitting sheriff to seize and sell automobile when owner has not paid highway privilege tax, without providing for inquiry thereinto or notice to owner, held void as denying due process. Holloway v. Jordan, 170 Miss. 99, 154 So. 340 (1934).

A case in which it is held §§ 6 and 8, c 195 of the drainage act of 1912 provides sufficient notice for taking of property. Jones v. Belzoni Drainage Dist., 102 Miss. 796, 59 So. 921 (1912).

Notice to complainant of acts of drainage board and opportunity to protect his rights meets requirement of the Constitution. Wilkinson v. Lee, 96 Miss. 688, 51 So. 718 (1910).

Chapter 105 of the Laws of 1900 cannot be assailed as unconstitutional because not providing for notice by one who has appeared and contested a case through all the courts. Illinois Cent. R.R. v. Denham, 82 Miss. 77, 33 So. 839 (1903).

Personal notice on resident-known defendants is essential to a valid judgment against them. Brown v. Board of Levee Comm'rs, 50 Miss. 468 (1874).

A judgment without notice is void. Jack v. Thompson, 41 Miss. 49 (1866).

A law depriving a citizen of his property without notice or trial, and without opportunity to protect his rights, is void. Donovan v. Mayor of Vicksburg, 29 Miss. 247, 64 Am. Dec. 143 (1855).

3. Taxation—In general.

Federal retirees who were state residents were entitled to refunds of state income taxes paid under the state's unconstitutional tax scheme which taxed federal retirees while exempting the state's own retired employees. Marx v. Broom, 632 So. 2d 1315 (Miss. 1994).

A legislative delegation to the tax commission of the duty to determine the portion of taxable income of a given person or corporation which should be allocated to sources within the state is a delegation of a fact-finding duty, and where the legislature provided the standard to be followed in evaluating the taxpayer's earned income in Mississippi, as distinguished from its earned income from other sources, such a delegation is not unconstitutional. Columbia Gulf Transmission Co. v. Barr, 194 So. 2d 890 (Miss. 1967).

Fact that decision of federal court declaring Mississippi poll tax law unconstitutional was handed down on day which was deadline for filing protest petitions against issuance of state aid road bonds, thereby increasing the number of electors in county from 8855 to 13510 and making total number of signatures on petitions insufficient to prevent board of supervisors from issuing bonds without calling election therefor, did not deprive petitioners of their constitutional rights, for the decision of the federal court was a fact beyond the power of the board to alter, but of which they were bound to take cognizance. Ratliff v. Board of Supvrs., 193 So. 2d 137 (Miss. 1966).

1934, c 246 held not to deny due process of law to abutting property owners in paying assessment proceedings thereunder. City of Clarksdale v. Fitzgerald, 181 Miss. 135, 179 So. 269 (1938).

Statute, which, for the avowed purpose of relieving unemployment and aiding agriculture and industry, authorized municipalities to raise funds by taxation for the acquisition of lands and the construction of factories which were to be leased to individuals and private corporations on terms which would insure their continued operation, did not violate the due process clause. Albritton v. City of Winona, 181

Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

Statute authorizing issuance of bonds, payable from taxes, enabling town, desiring to increase employment, to build and lease garment factory, violated State Constitution by lending town's credit in aid of private corporation. Carothers v. Town of Booneville, 169 Miss. 511, 153 So. 670 (1934).

Statute making tax a debt due by taxpayer for which action may be brought held not invalid as depriving taxpayer of property without due process of law. Nickey v. State, 167 Miss. 650, 145 So. 630 (1933), error overruled, 167 Miss. 684, 146 So. 859 (1933), motion overruled, 167 Miss. 689, 147 So. 324 (1933), aff'd, 292 U.S. 393, 54 S. Ct. 743, 78 L. Ed. 1323 (1934).

Statute making every tax lawfully levied a debt against taxpayers and authorizing recovery thereof by action held not invalid as denying due process of law. George County Bridge Co. v. Catlett, 161 Miss. 120, 135 So. 217 (1931).

The statute providing for assessment of lands by government surveys is lawful. Rawlings v. Anderson, 149 Miss. 632, 115 So. 714 (1928).

As to power to issue bonds of drainage district in anticipation of taxes see Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911).

An extension of city limits so as to include property and render it liable to city taxes, though the owner is not benefited thereby, is not to deprive of property without due process of law. Forbes v. Mayor of Meridian, 86 Miss. 243, 38 So. 676 (1905); Martin v. Dix, 52 Miss. 53, 24 Am. R. 661 (1876).

A statute providing for the assessment of railroads for back taxes by the state railroad commission, without appeal, does not deprive of property without due process of law, although other taxpayers may, under general laws, appeal from the tribunal fixing their taxes. Yazoo & Miss. V. Ry. v. Adams, 77 Miss. 764, 25 So. 355 (1899).

4. — — Tax sales, taxation.

A property owner's claim of ownership under color of title by virtue of his adverse possession of the property after he purchased the property at a tax sale but before the redemption period had ended and he had the right of possession, was sufficient to apply the "doctrine of relation" back to the date of the tax sale purchase for the purpose of challenging a subsequent zoning ordinance by asserting a pre-existing nonconforming use. In the balancing of public benefit against private property losses, a landowner's constitutional right under the due process clause prevails. Barrett v. Hinds County, 545 So. 2d 734 (Miss. 1989).

Unfair cigarette sales law requires proof of intent to both injure competitors and destroy or substantially lessen competition, and mere intent to injure competitors is insufficient; Mississippi unfair cigarette sales law does not violate due process since court cannot conclude that rebate provision bears no rational relation to state's legitimate interest in protecting healthy market competition and in view of fact that legislature is under no duty to pick least restrictive means for furthering its legitimate interests; protection of public from unfair business practices which tend to injure competitors and destroy or substantially lessen competition is necessarily matter affected with public interest and is legitimate goal of legislative action. Corr-Williams Whsle. Co. v. Stacy Williams Co., 622 F. Supp. 156 (S.D. Miss. 1985).

In a tax sale proceeding, due process is not afforded a landowner if his lands are assessed by a void description, nor can land be conveyed except by a writing containing a description capable of being applied to a particular tract of land. Calmes v. Weill, 243 So. 2d 408 (Miss. 1971).

The legislature may provide for a resale of tax lands held by it although the previous sale to the state was invalid. Marble v. Fife, 69 Miss. 596, 13 So. 842 (1891).

The legislature cannot retroactively make valid a void sale of land for taxes. Dingey v. Paxton, 60 Miss. 1038 (1883).

The legislature cannot declare lands forfeited to the state for nonpayment of taxes without sale. Griffin v. Mixon, 38 Miss. 424 (1860).

5. — — License and use taxes, taxation.

The chain store taxing statutes do not violate the concepts of due process and equal protection of the law embodied in the Mississippi and United States Constitution and did not, in this case, deny equal protection of the law to a corporate retailer operating a chain of stores within and without the state. Interco, Inc. v. Rhoden, 220 So. 2d 290 (Miss. 1969), appeal dismissed, 396 U.S. 7, 90 S. Ct. 26, 24 L. Ed. 2d 7 (1969).

This section is not violated by an annual privilege or premium tax levied on the gross premiums received by foreign insurance companies from contracts or insurance policies written or covering risks in this state, even though the tax is concededly unequal and discriminatory in that a lesser tax is imposed on the business of local companies. Prudential Ins. Co. of Am. v. Barnett, 200 Miss. 233, 27 So. 2d 60 (1946).

Licensed person selling beer held not entitled to restrain enforcement of ordinance adopted by board of supervisors finding the district in which such person sold beer was a residential district and prohibiting sale of beer therein. Alexander v. Graves, 178 Miss. 583, 173 So. 417 (1937).

Tobacco tax statute requiring retailers purchasing from wholesalers not having permit to present tobacco to nearest wholesaler having permit to have stamps affixed held not unconstitutional as imposing arbitrary and unreasonable restriction on lawful business and as being without legitimate basis of classification. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

Tobacco tax statute does not violate constitutional provisions prohibiting taking of property for public use without compensation. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

The legislature may impose a license tax on railroads. New Orleans, M. & C.R. Co. v. State, 110 Miss. 290, 70 So. 355 (1915).

The imposition of an additional privilege tax on railroads claiming exemption from state supervision under maximum and minimum provisions in their charters was unconstitutional as depriving such railroads of property without due process of law. Gulf & S.I.R.R. v. Adams, 90 Miss. 559, 45 So. 91 (1907).

Under the Constitution a privilege tax on manufacturers, distributors and retailers of Coca-Cola may be levied. Coca-Cola Co. v. Skillman, 91 Miss. 677, 44 So. 985 (1907).

Acts of 1904, c 176, and an ordinance by its authority as to privilege taxes on the business of loaning money on furniture, etc., is violative of this section. Rodge v. Kelly, 88 Miss. 209, 40 So. 552 (1906); Hyland v. Sharp, 88 Miss. 567, 41 So. 264 (1906).

6. — — Sales and use taxes, taxation.

Use tax statute violates due process clause of both State and Federal Constitution in requiring foreign seller, non-domesticated foreign corporation, having no place of business or any agent in this state, its only intra-state activity being sending into State of non-resident solicitors and two resident solicitors to take orders effective only when approved at home office, to become collecting agent for use tax on goods sold by corporation on orders taken as stated, when sales are completed by delivery of goods to common carrier in foreign state. Stone v. Reichman-Crosby Co., 43 So. 2d 184 (Miss. 1949), appeal dismissed, cert. denied, 339 U.S. 917, 70 S. Ct. 625, 94 L. Ed. 1342 (1950).

Decision on former appeal of same case that Use Tax Law of this state is unconstitutional in its requirement that foreign seller collect and pay use tax on goods sold to Mississippi residents when seller is non-domesticated foreign corporation having no place of business or any agent in this state, its only intrastate activity being sending into state of non-resident solicitors to take orders effective only when approved at home office and sales being completed by delivery of goods to common carrier in foreign state, will be adhered to on subsequent appeal, and case does not become new case because state of Tennessee, from which state goods are shipped, is claimed to have relevant Sales Tax Law; because coming to rest in this state feature of original law has been eliminated; or because two salesmen of seller happen to reside in Mississippi for their own personal convenience and not that of employer, since principles controlling law of case doctrine are more binding upon courts than law of precedent. Stone v. Reichman-Crosby Co., 43 So. 2d 184 (Miss. 1949), appeal dismissed, cert. denied, 339 U.S. 917, 70 S. Ct. 625, 94 L. Ed. 1342 (1950).

Question as to what constitutes doing business in this state, territorial jurisdiction and due process of law is judicial, and court is not bound by legislative declaration or definition as to what constitutes doing business, territorial jurisdiction or due process of law, unless such declaration or definition is sanctioned or authorized by constitutional limitations. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

Use Tax Law, Chapter 120, Laws of 1942 (Code 1942, §§ 10146-10167), is unconstitutional as to its requirement that a non-resident seller shall collect and pay tax on sales consummated in Tennessee by delivery of property to a common carrier for transportation to purchasers in Mississippi, when the non-resident seller is not doing business in Mississippi and property was sold on orders taken by non-resident salesmen, as it violates the commerce clause by imposing a burden on interstate commerce and denies to seller equal protection and due process of law. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

A retroactive provision in a sales tax law which changes the limitations upon the right of a taxpayer to sue to recover taxes paid is invalid in so far as it undertakes to compel a court to set aside a previous judgment in favor of the taxpayer, since the judgment conferred a vested right which could not be taken away without due process of law. Stone v. McKay Plumbing Co., 200 Miss. 792, 30 So. 2d 91 (1947).

Where assessments or returns of additional sales taxes were made by the chairman of the state tax commission from the best information available where the taxpayer's records were found to be inadequate, and notice was given to the taxpayer setting out the basis for the commissioner's findings supporting such additional assessment, which assessments were approved by the tax commission and the taxpayer was given an opportunity both by the chairman of the commission and by the tax commission itself to negative by evidence the facts on which the assessments were based, the order of the tax commission approving such assessment did not violate due process, since it was not necessary for the tax commission to set forth the facts on which the assessments were made in its order, as against the contention that orders of quasi-judicial commissions and bodies must be supported by a finding of basic fact. Viator v. State Tax Comm'n, 193 Miss. 266, 5 So. 2d 487 (1942), appeal dismissed, cert. denied, 316 U.S. 644, 62 S. Ct. 1109, 86 L. Ed. 1728 (1942), reh'g denied, 316 U.S. 711, 62 S. Ct. 1275, 86 L. Ed. 1777 (1942).

Sales tax statute making the place of business, including the permanent fixtures used in such business, liable to seizure and sale when taxes accrued upon the business conducted on the premises should become due and unpaid, even though it did not expressly provide that the tax should be a lien upon the property of the owner of such place of business, or that the tax should constitute a debt due and owing by the lessor, was not a violation of due process of law, in view of provisions therein permitting any person improperly charged with any tax and required to pay the same to recover it in any proper action or suit and entitling the lessor of the premises and fixtures to petition for a hearing if desired upon receipt by him of a demand from the commissioner to pay the delinquent taxes due by the lessee. Standard Oil Co. v. Stone, 191 Miss. 897, 2 So. 2d 155 (1941).

Sales tax statute in rendering liable and subject to seizure and sale the premises and fixtures of a lessor to satisfy the unpaid sales tax due on retail sales made in the conduct of a business when the premises are equipped with permanent fixtures so that no other commodity than that sold by the lessor of such premises can be sold and handled thereat, is not unconstitutionally discriminatory as being applicable only to gasoline filling stations, since there was a reasonable basis for the distinction in such situation and in not rendering liable and subject to seizure and sale the premises and fixtures of the average landlord, for instance, who leases his store building and fixtures to a merchant engaged in selling general commodities thereat other than those sold by the owner of such premises. Standard Oil Co. v. Stone, 191 Miss. 897, 2 So. 2d 155 (1941).

The statute imposing tax on sales of retail merchants and requiring them to collect tax from customers is not unconstitutional as violative of due-process clauses of State and Federal Constitutions. State ex rel. Rice v. Allen, 180 Miss. 659, 177 So. 763 (1938).

Statute imposing sales tax in greater amount on retail merchants than wholesalers, but requiring payment of the wholesale tax where retailer sold stock in bulk and taxing credit sales on basis of payments, held not unconstitutional as an arbitrary classification violating due process. Notgrass Drug Co. v. State ex rel. Rice, 175 Miss. 358, 165 So. 884 (1936).

Statute imposing sales tax that exempted sales of school books, agricultural products, and articles in preparing such products for market held not unconstitutional as denying due process because discriminating against those required to pay the tax. Notgrass Drug Co. v. State ex rel. Rice, 175 Miss. 358, 165 So. 884 (1936).

Statute imposing tax on sales of retail merchants held not unconstitutional as double taxation. Notgrass Drug Co. v. State ex rel. Rice, 175 Miss. 358, 165 So. 884 (1936).

Statute requiring retail dealer purchasing tobacco from wholesaler having no permit to present tobacco to wholesaler having permit to have tax stamps affixed does not discriminate against retailer in town some distance from wholesaler and who buys from wholesaler outside State. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

7. Employment and labor relations.

Circuit court erred in dismissing an employee's appeal of a city civil service commission's affirmance of his termination on the ground that pursuant to Miss. Unif. Cir. & Cty. R. 5.05 his, decision to wait forty days before he requested its assistance in compelling the commission to file the transcript exceeded the allowable thirty days because under Miss. R. App. P. 2(a)(2), the employee was entitled to notice from the circuit clerk of the deficiency in his appeal and fourteen days to correct any deficiency, and that lack of notice and opportunity to remedy the deficiency deprived the employee of due process; the circuit court may still dismiss an appeal for which an appellant has failed to timely provide a record, but the Mississippi Rules of Appellate Procedure apply to an appeal to circuit court. Fields v. City of Clarksdale, 27 So. 3d 464 (Miss. Ct. App. 2010), remanded by 133 So. 3d 373, 2014 Miss. App. LEXIS 90 (Miss. Ct. App. 2014).

Employee was not denied due process when he received notice that he was placed on leave but not informed of the type of leave he was placed on or given a formal notice of suspension where the employee was placed on administrative leave with pay pending the resolution of the investigation, and once the investigation was concluded the employee was properly noticed of the employer's intention to terminate his employment. Payne v. Miss. Dep't of Mental Health, 964 So. 2d 582 (Miss. Ct. App. 2007).

A college employee was denied due process where her application for duty-related disability benefits was denied by a medical review board that included two physicians, and her subsequent appeal was heard by an appeals board which included the same two physicians; the employee's constitutional guarantees of due process were violated by virtue of the physicians sitting in judgment of their own conclusions that she was not entitled to disability benefits. Flowers v. Public Emples. Retirement Sys., 748 So. 2d 178 (Miss. Ct. App. 1999).

A teacher was denied due process where her application for duty-related disability benefits was denied by a medical review board that included two physicians, and her subsequent appeal was heard by an appeals board which included the same two physicians; the teacher's constitutional guarantees of due process were violated by virtue of the physicians sitting in judgment of their own conclusions that she was not entitled to disability benefits. Burns v. Public Emples. Retirement Sys., 748 So. 2d 181 (Miss. Ct. App. 1999).

The claimant was deprived of due process where two physicians sat in judgment, as members of the disability appeals committee, of their own conclusions that the claimant was not entitled to disability benefits under the Public Employees' Retirement System. Flowers v. Public Emples. Retirement Sys., 1999 Miss. App. LEXIS 219 (Miss. Ct. App. Apr. 20, 1999), opinion withdrawn by, substituted opinion at, remanded by 748 So. 2d 178, 1999 Miss. App. LEXIS 431 (Miss. Ct. App. 1999); Burns v. Public Emples. Retirement Sys., 1999 Miss. App. LEXIS 210 (Miss. Ct. App. Apr. 20, 1999), opinion withdrawn by, substituted opinion at, remanded by 748 So. 2d 181, 1999 Miss. App. LEXIS 430 (Miss. Ct. App. 1999); Dean v. Public Emples. Retirement Sys., — So. 2d —, 1999 Miss. App. LEXIS 209 (Miss. Ct. App. Apr. 20, 1999), affirmed by 797 So. 2d 830, 2000 Miss. LEXIS 258 (Miss. 2000).

A 16-year veteran police officer, who had vested permanent employment rights under the civil service laws, resigned on his own volition and was not "constructively discharged" where he obtained legal counsel when he became aware that he was the object of an investigation and resigned his job on his attorney's advice. Thus, he could not thereafter pursue an untimely claim that he was denied procedural due process. In order to ensure that a civil service employee preserves his or her procedural due process guarantees, he or she should "stay the course" and remain with the job until relieved from the assignment by an official with statutory authority to fire. While the work environment could become the source of some irritation or embarrassment, such embarrassment will usually afford the civil servant nothing in the way of a procedural due process claim after a voluntary resignation. The instances will be few when a claim of constructive discharge will preserve procedural guarantees that the employee has waived by resigning. The wisdom of "staying the course" is especially crucial in light of state law which deems civil service administrative remedies as the exclusive remedy before relief can be sought in state court. Bulloch v. City of Pascagoula, 574 So. 2d 637 (Miss. 1990).

There is no legislative enactment providing teachers' aides with a valid claim of entitlement to continued employment. Thus, a teacher's aide's termination deprived her of no property interest, the taking of which would invoke the due process provisions of the constitution. Harrison County Sch. Bd. v. Morreale, 538 So. 2d 1196 (Miss. 1989).

A college professor did not have a property interest protected by due process in his grant of tenure. Section 37-101-15 empowers the Board of Trustees of Institutions of Higher Learning to terminate professors' employment contracts at any time for malfeasance, inefficiency or contumacious conduct but does not create a legitimate expectation of continued employment for a non-tenured employee. If a state regulation conditions receipt of a benefit upon a discretionary decision of an administrator, there is no legitimate claim of entitlement to the benefit. Wicks v. Mississippi Valley State Univ., 536 So. 2d 20 (Miss. 1988).

Statutes cannot be enacted under this section authorizing employees of a corporation to recover when employees of individuals, etc., similarly situated cannot. Such statutes must be based on some difference inherent in the nature of the business, which difference serves as a basis for and warrants the classification. Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 Am. St. R. 476 (1903).

8. Judicial proceedings—In general.

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art. 3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064 (Miss. 2009).

In a medical malpractice suit against two doctors, the patient was not denied a fair and impartial trial under Miss. Const. Art. III, § 14 when the trial court properly did not excuse for cause a former patient of one of the doctors who had an unspecified surgical procedure performed 15 years before the lawsuit because the former patient was not biased in favor of the doctor and he swore that his prior experience would not cause him to favor the doctor. Heaney v. Hewes, 8 So. 3d 221 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 206 (Miss. 2009).

In defendant's capital murder case, a court properly allowed an expert to testify on behalf of a coworker where the witness had been involved in the lab analysis, and the testimony did not concern an essential element of the crime. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

The right to a trial by a fair and impartial jury is guaranteed by Mississippi Constitution Article III, § 14, § 26, and § 31. Hudson v. Taleff, 546 So. 2d 359 (Miss. 1989).

A plaintiff in a medical malpractice case was denied her right to an impartial jury where there were over 40,000 persons in the county from which a jury could have been drawn and the plaintiff was limited to a jury pool of 25, 48 percent of which were connected in some way to the defendant doctor, because of the "statistical aberration" of the makeup of the venire and the strong likelihood that the opportunity for undue influence over other jurors in the case was too great. Hudson v. Taleff, 546 So. 2d 359 (Miss. 1989).

Unfair cigarette sales law requires proof of intent to both injure competitors and destroy or substantially lessen competition, and mere intent to injure competitors is insufficient; Mississippi unfair cigarette sales law does not violate due process since court cannot conclude that rebate provision bears no rational relation to state's legitimate interest in protecting healthy market competition and in view of fact that legislature is under no duty to pick least restrictive means for furthering its legitimate interests; protection of public from unfair business practices which tend to injure competitors and destroy or substantially lessen competition is necessarily matter affected with public interest and is legitimate goal of legislative action. Corr-Williams Whsle. Co. v. Stacy Williams Co., 622 F. Supp. 156 (S.D. Miss. 1985).

Section 11-11-5 [Repealed], a venue statute permitting suits against power companies in any county in which a company may have a power line, is constitutional despite its provision for discretion to try a case in one of several counties, since Art III § 14 of Miss. Const. of 1890 and the Fourteenth Amendment of the United States Constitution (both, inter alia, imposing due process requirements), though safeguarding fundamental rights, do not extend to the forum which a state may designate for protection of such rights. Evans v. State Farm Fire & Cas. Co., 336 So. 2d 753 (Miss. 1976).

In proceedings for issuance of bonds under Code 1942, § 6370 authorizing consolidated school districts to issue bonds for improvement and repair of school buildings, allegations of objectors that signers of petition did not constitute a majority, which, if true, would render bonds void, was improperly stricken by the court, which should have heard and determined the same as required by due process. In re Savannah Special Consol. Sch. Dist., 208 Miss. 460, 44 So. 2d 545 (1950).

It is not violative of this section for the Supreme Court to reverse judgment as to amount of damages only without reversing the whole case. New Orleans & N.E.R. Co. v. Snelgrove, 148 Miss. 890, 115 So. 394 (1927), cert. denied, 277 U.S. 596, 48 S. Ct. 559, 72 L. Ed. 1006 (1928).

A reversal or new trial on issue of amount of damages only does not deprive appellant of property without due process of law. Yazoo & Miss. V. Ry. v. Scott, 108 Miss. 871, 67 So. 491, Am. Ann. Cas. 1917E,880 (1915).

Section 4910, Code of 1906, which denied circuit courts power to grant new trials for excessive verdicts is contrary to this section. Yazoo & Miss. V. Ry. v. Wallace, 90 Miss. 609, 43 So. 469, 122 Am. St. R. 321 (1907).

To prevent a foreign insurance company suing in state courts where such company has never attempted to do business in the state is violative of this section. Swing v. B.E. Brister & Co., 87 Miss. 516, 40 So. 146 (1906).

Section 4370 of the Code of 1892 (Code 1906 § 4936), in so far as it provides that causes cannot be reversed for jurisdictional defects, deprives one of due process of law. Arbuckle v. State, 80 Miss. 15, 31 So. 437 (1901).

The decision or judgment remaining undisturbed, the revision of an opinion which expresses but the reasons of the decision does not involve "due process of law." Adams v. Yazoo & Miss. V.R. Co., 77 Miss. 194, 24 So. 200 (1898), motion denied, 77 Miss. 302, 24 So. 317 (1898), aff'd, 180 U.S. 1, 21 S. Ct. 240, 45 L. Ed. 395 (1901), reh'g denied, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901).

"Due process of law" does not require that a jury try the case. Fant v. Buchanan, 17 So. 371 (Miss. 1895).

The legislature cannot provide for the infliction of a penalty and its collection by summary process, without a judicial proceeding adjudicating the liability. McBride v. Adams, 70 Miss. 716, 12 So. 699 (1893).

A purchase of land by a deputy sheriff at his principal's sale cannot be set aside by motion; so to do would be to deprive of property without due process of law. Flournoy v. Smith, 4 Miss. (3 Howard) 62 (1838).

9. — — Gifts, judicial proceedings.

In an action brought by a donor to set aside gifts of land, the donee "purposefully availed herself of the privilege of conducting activities" within Mississippi for purposes of due process and personal jurisdiction where she had the donation document notarized at the Chancery Clerks' office by an official of the State. Anderson v. Sonat Exploration Co., 523 So. 2d 1024 (Miss. 1988).

10. — — Discovery, judicial proceedings.

A litigant is not shut off from all remedies for discovery merely because the rules of civil procedure do not apply to administrative proceedings or because the rules of the administrative agency do not promote it. In appropriate cases, a "pure bill for discovery" will lie and statutory remedies may be available to the end that due process be afforded. State Oil & Gas Bd. v. McGowan, 542 So. 2d 244 (Miss. 1989).

Code 1906 § 1938 providing for the filing by a litigant of interrogatories, to be answered by the adverse party residing out of the state, the answer to be used as evidence, does not deprive the adverse party of due process of law. Illinois Cent. R.R. v. Sanford, 23 So. 942 (Miss. 1898).

11. — — Divorce, alimony, maintenance, and support, judicial proceedings.

While it could not be said that the increase in child support was unreasonable, it was not requested by the father; the chancellor committed error in sua sponte granting an increase in the amount of child support the mother would be required to pay. Purviance v. Burgess, 980 So. 2d 308 (Miss. Ct. App. 2007).

In a divorce case, a former husband's right to due process under Miss. Const. Art. 3, § 14 and the U.S. Constitution were not violated since he was afforded a full, complete, and impartial hearing; the husband called witnesses, was afforded the right to cross-examine, and presented documentary evidence to the chancery court. Stuart v. Stuart, 956 So. 2d 295 (Miss. Ct. App. 2006).

The husband's right to due process was not violated when the judge limited the trial in a divorce proceeding to one day because (1) the husband could have requested a continuance, but did not; (2) the husband could have objected on the record to the time limit, but did not; (3) the record showed that the husband's counsel indicated a readiness to go forward at the end of the wife's case-in-chief after the husband's motion for a directed verdict was overruled by the trial court; and (4) there was no indication in the record from the husband that the time limits placed on the trial were problematic. Moore v. Moore, 757 So. 2d 1043 (Miss. Ct. App. 2000).

The appellant was entitled under his right to due process to a hearing on the issue of a material change of circumstances which if proven would warrant a modification of the divorce decree regarding child support. Childers v. Childers, 717 So. 2d 1279 (Miss. 1998).

The appellant was afforded a full, complete hearing at which he was given the opportunity to call witnesses and be heard by the trial court during the divorce proceedings on the issues relating to the equitable division of marital assets that he later presented on appeal; accordingly, he was not denied due process of law, as required by both the U.S. Constitution and the Mississippi Constitution on those issues, for he was given an opportunity to be heard on the same issues he sought to modify a few months after the final decree was entered. Childers v. Childers, 717 So. 2d 1279 (Miss. 1998).

A contemnor was denied due process of law where the show cause hearing for the contempt charges was conducted by the same judge who presided over the divorce proceedings and the related motion for recusal from which the alleged contempt originated, the contemnor was charged with a course of conduct that was committed, for the most part, outside the presence of the court, his conduct associated with the divorce proceedings involved the judge personally, and the judge chose to set a show cause hearing at a date subsequent to the alleged contemptuous conduct. Purvis v. Purvis, 657 So. 2d 794 (Miss. 1994), on rehearing (Miss. Apr. 27, 1995).

A husband had sufficient minimum contacts with Mississippi so that requiring him to submit to an adjudication of his rights in a divorce proceeding did not offend "traditional notions of fair play and substantial justice," where the husband was physically present in Mississippi at the time he was personally served, and he was domiciled in Mississippi for years and left the state incident to separation from his spouse and family. Chenier v. Chenier, 573 So. 2d 699 (Miss. 1990).

There can be no per se prohibition against a child witness testifying in a divorce case between the child's parents. The right of every litigant to compulsory process for witnesses and to have them testify under oath in court is so well grounded that any per se exclusion simply because he or she is a child of the divorcing parents risks offending the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Mississippi Constitution Art 3, § 14. Before excluding the testimony of a child witness of tender years in a divorce proceeding, the chancellor, at a minimum, should follow the procedure required by Crownover v. Crownover (1975) 33 Ill App 3d 327, 337 NE2d 56. Although no parent can be precluded from having a child of the marriage testify in a divorce proceeding simply because of that fact, parents in a divorce proceeding should, if at all possible, refrain from calling children of their marriage as witnesses, and counsel should advise their clients against doing so except in the most exigent cases. Jethrow v. Jethrow, 571 So. 2d 270 (Miss. 1990).

A defendant father was not subject to in personam jurisdiction in Mississippi consistent with due process in an action brought by the mother regarding his child support obligations, even though an Ohio court had transferred jurisdiction over the case to a chancery court in Mississippi in accordance with the Uniform Child Custody Jurisdiction Act and the child resided in Mississippi, where the father had no minimum contacts with Mississippi and had not purposely availed himself of the benefits of the laws of the state of Mississippi or derived personal or commercial benefit from his child's presence in Mississippi. Carpenter v. Allen, 540 So. 2d 1334 (Miss. 1989).

Award to wife of alimony and child support where such is not sought in pleadings is error, because it deprives husband of due process, although such judgments are not void; therefore, where husband paid alimony and child support for 3 years before complaining about due process violation, decree is final and due process right has been waived. Miller v. Miller, 512 So. 2d 1286 (Miss. 1987).

The fixing of a lien upon real and personal property belonging to a former husband who had failed to pay alimony and child support as required by a divorce decree did not deny the husband his constitutional right to due process where the lien had been imposed after a full hearing and where such lien had been necessary to ensure that the husband pay to the wife the support owing to her under the agreement embodied in the decree. Morgan v. Morgan, 397 So. 2d 894 (Miss. 1981).

12. — — Child custody, judicial proceedings.

Law does not allow parental rights to supercede the best interests of the child; parental rights, as is true of other fundamental rights, can be forfeited or taken away, and the law does recognize some means by which third parties can overcome the law's preference of natural parents. Davis v. Vaughn, 126 So. 3d 33 (Miss. 2013).

Chancery court did not err in granting custody to the father after finding that he had not deserted his child because there was no legally compelling reason to alter or abandon the established standards for rebuttal of the natural-parent presumption; requiring the maternal grandmother first to demonstrate that the father had relinquished his right to parent his child was not an undue burden. Davis v. Vaughn, 126 So. 3d 33 (Miss. 2013).

Although the chancellor initially granted the mother's motion to terminate the father's parental rights, the Hinds County Chancery Court did not have proper subject matter jurisdiction to do so because the Scott County Chancery Court entered the initial order of child custody; when presented with information regarding the jurisdictional problem, the chancellor immediately corrected the defect by setting aside his previous orders and instructing that any further proceedings regarding the case be brought before the Scott County Chancery Court, pursuant to Miss. Code Ann. § 93-5-23. C.M. v. R.D.H., 947 So. 2d 1023 (Miss. Ct. App. 2007).

In proceedings to determine custody of 2 children who had been adjudicated neglected and placed in foster care, the children were denied their due process right of representation where they were without the services of an attorney or guardian ad litem for approximately 3 years during the course of the custody proceedings. Copiah County Dep't of Human Servs. v. Linda D., 658 So. 2d 1378 (Miss. 1995).

A mother whose parental rights were terminated under § 93-15-103(3)(e) on the ground that there was a "substantial erosion of the relationship" between her and 2 of her children failed to show that the statute was unconstitutionally vague, since a person of common intelligence should have been aware that the result of a factual situation such as the mother's could well be the termination of one's parental rights. If the statute were more specific, then the cases in which it could be applied could be so drastically reduced as to make it ineffective in protecting the children it was meant to serve. Vance v. Lincoln County Dep't of Pub. Welfare ex rel. Weathers, 582 So. 2d 414 (Miss. 1991).

13. — — Contempt, judicial proceedings.

Defendant's due process rights were not violated by a contempt conviction because a trial court, even though not required for direct contempt, gave defendant notice and conducted a hearing where she was allowed to present evidence. In re Hampton, 919 So. 2d 949 (Miss. 2006), writ of certiorari denied by 547 U.S. 1131, 126 S. Ct. 2042, 164 L. Ed. 2d 784, 2006 U.S. LEXIS 3868, 74 U.S.L.W. 3639 (2006).

Where speaker uttered vulgar, profane and indecent language concerning the presiding judge while the judge was in his retiring room, and where the presiding judge took testimony of deputy sheriff who heard the remarks and then took testimony of the speaker who denied making those remarks and thereafter found the speaker guilty of direct contempt and sentenced him, the presiding judge exceeded his authority in punishing the speaker without filing of an information or other definite charge against the speaker and without giving him notice of the charge and reasonable opportunity to defend himself. Ex parte Wisdom, 223 Miss. 865, 79 So. 2d 523 (1955).

Where words are spoken concerning the presiding judge which were both contemptuous and insulting but they were spoken when the judge had retired to his chambers following the announcement of the decision, the court could not proceed to punish the speaker upon his full knowledge of facts but there had to be a hearing and the court had to rely upon the testimony of the witnesses and the speaker should have been given reasonable notice of the charges by attachment, citation or otherwise so that he may know the nature and the cause of accusation against him and that he may have a reasonable opportunity to be heard and also the speaker should have the right to obtain assistance of counsel and the right to make a record on which an order may be reviewed on appeal. Ex parte Wisdom, 223 Miss. 865, 79 So. 2d 523 (1955).

Where language spoken concerning the presiding judge was both contemptuous and insulting and where the language had been spoken within the actual presence and hearing of the court, it merited some punishment which the court would have had the right to inflict without notice, rule to show cause, or other process. Ex parte Wisdom, 223 Miss. 865, 79 So. 2d 523 (1955).

14. — — Real property, judicial proceedings.

Chancellor did not err in granting partial summary judgment to the county in dismissing the property owner's claims under Miss. Code Ann. § 19-5-22 and 42 U.S.C.S. § 1983 because the initial requirement for either a procedural or substantive due process claim was proving the plaintiff had been deprived by the government of a liberty or property interest; otherwise, no right to due process could accrue. The property owner failed to prove injury to himself since it was the property owner's tenant, and not the property owner, who the lien was against. LaCroix v. Marshall County Bd. of Supervisors, 28 So. 3d 650 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 90 (Miss. 2010).

Failure of a water management district to give notice of its petition to acquire an easement to the life tenants and remaindermen of a piece of property and failure to join the life tenants, before the entering upon and taking possession of the property, was a denial of due process. The life tenants' and remaindermen's due process rights were violated by the taking of their property without notice and without a pre-deprivation hearing. Webb v. Town Creek Master Water Mgmt. Dist., 903 So. 2d 701 (Miss. 2005), remanded by 93 So. 3d 20, 2012 Miss. LEXIS 355 (Miss. 2012).

Developer's federal and state due process claims against a city were unripe because the developer had not suffered a deprivation of property; the city had not made a final determination of whether, or under what circumstances, it would issue a building permit to the developer, or whether it would condemn the developer's property. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

Failure to make one, claiming title to tax forfeited land under a quitclaim deed of the record owner and by adverse possession, a party to plaintiff's action against the state to confirm the validity of the patent from the state to such land does not constitute a denial of due process of law, for the reason that the alleged fraud claimed by defendant that the patent was issued for a grossly inadequate consideration was a defense which only the state could raise, and the confirmation decree did not purport to affect defendant's claims of title. Comfort v. Landrum, 52 So. 2d 658 (Miss. 1951).

15. — — Adoption, judicial proceedings.

Where, in an adoption proceeding, the rights of the prospective adoptive child's natural parents were not involved, the admission in evidence of the welfare department report, which contained hearsay material consisting of a statement by a welfare worker of conversation and correspondence with others, did not deny the prospective adoptive parents of due process of the law. Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852 (1958).

The granting of authority to the court in adoption proceedings to make investigations limited to matters concerning whether the child is a proper subject for adoption, the petitioners are suitable parents for the child, the adoption is in the best interest of the child, and any other facts or circumstances which might be material to the proposed adoption, is not unreasonable, and such procedures do not constitute a denial of due process of law. Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852 (1958).

Any proceeding to adopt a child without making presumptive father party to proceeding is invalid under due process provision of state and federal constitutions. Davis v. Davis, 37 So. 2d 735 (Miss. 1948).

16. — — Education, judicial proceedings.

Injunction permanently barring the Mississippi High School Activities Association, Inc. from placing the Hattiesberg High School on one year probation after the high school's baseball team was required to forfeit a baseball game in the 1984 South AA Baseball Tournament was improperly granted in an action brought by the high school baseball team members and their parents, because the parties bringing the action were not third-party beneficiaries to the contract between the high school and the activities association, had no constitutional protected property interests in playing interscholastic sports, and had no standing to assert the due process rights of the high school. Mississippi High Sch. Activities Ass'n v. Farris ex rel. Farris, 501 So. 2d 393 (Miss. 1987).

A high school sophomore who, along with a schoolmate, drank 2 or 3 sips of beer at her home before leaving for school was denied procedural due process when, despite there being no school board rule prohibiting the drinking of beer by students at home, the school board took away all her school credits for the semester as punishment for drinking the beer, and, again, where procedures for a de novo hearing before the school board were ignored. Warren County Bd. of Educ. v. Wilkinson ex rel. Wilkinson, 500 So. 2d 455 (Miss. 1986).

The right of parents to control the religious education of their children is protected by the due process clause. In re Guardianship of Faust, 239 Miss. 299, 123 So. 2d 218 (1960).

17. — — Juvenile detention, judicial proceedings.

The jurisdictional provisions of the Youth Court Act in § 43-21-151 do not violate the rights to due process and equal protection under the United States Constitution and the Mississippi Constitution. Miller v. State, 740 So. 2d 858 (Miss. 1999).

Minors were entitled to some form of due process prior to being placed in a detention center that placed extensive restrictions on its residents. In re M.I., 519 So. 2d 433 (Miss. 1988).

Code 1942, § 7185-06 which permits a minor to be committed to a state institution as a delinquent child, upon the voluntary appearance of the minor, does not afford due process. Sharp v. State, 240 Miss. 629, 127 So. 2d 865, 90 A.L.R.2d 284 (1961), error overruled, 240 Miss. 646, 129 So. 2d 637, 90 A.L.R. 2d 284 (1961).

18. Crimes and criminal procedure — In general.

Defendant's due process rights were not violated where the trial judge complied with the minimum requirements of due process, applicable in a revocation hearing, which included written notice of the claimed violations of probation, disclosure to the probationer of evidence against him, an opportunity to be heard and to present witnesses and evidence, the right to confront and cross-examine adverse witnesses, a neutral and detached hearing body, and a written statement by the factfinders as to the evidence relied on and the reasons for revoking probation. Lambert v. State, 904 So. 2d 1150 (Miss. Ct. App. 2004).

Appellant was properly denied post-conviction relief, because he was not denied due process when he entered his guilty plea for murder and aggravated assault, as appellant had stated at the plea hearing that he understood that he was waiving the rights he would have during a trial, and there was dialogue between appellant and the court discussing self-defense. Jackson v. State, 872 So. 2d 708 (Miss. Ct. App. 2004).

Petition for post-conviction relief was properly denied because inmate's due process rights were not violated when a special prosecutor was appointed in a murder case; the record showed that the prosecution of the inmate remained in the control of a district attorney, and the special prosecutor did not control crucial prosecutorial decisions. Hollingsworth v. State, 852 So. 2d 612 (Miss. Ct. App. 2003), writ of certiorari denied by 852 So. 2d 577, 2003 Miss. App. LEXIS 867 (Miss. Ct. App. 2003).

In a capital murder case, the State's invocation of higher biblical law did not violate the inmate's rights under the Eighth and Fourteenth Amendments, and under Miss. Const. art. 3, § 14 because the prosecutor was responding to the biblical argument made by the inmate's attorney; also, the inmate's ineffective assistance of counsel claim for counsels' failure to object to the State's biblical references had to fail. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the unsworn statements of one juror showing that the juror was predisposed to voting for death without weighing mitigating factors was countered with an affidavit from the juror that the juror considered all of the evidence in the case and the unsworn statement of the second juror did not state that the juror was silent during voir dire, that she lied about her views on mitigating evidence, that the juror was unwilling to consider mitigating factors, or that she had a predisposition to the death penalty that she did not disclose during voir dire; thus, the inmate's claim that the two jurors were predisposed to voting for the death penalty was unsupported and the inmate was not deprived of his right to a fair and impartial jury under the Sixth and Fourteenth Amendments or Miss. Const. art. 3, §§ 14 and 26. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

The defendant's due process rights were not violated when he was tried in absentia on two traffic citations. Wheeler v. Stewart, 798 So. 2d 386 (Miss. 2001).

Non-disclosure of the prosecutor's plea agreement with a codefendant under circumstances where the terms of that agreement might reasonably touch upon the codefendant's credibility or otherwise undermine confidence in the outcome of the trial may vitiate a criminal conviction and require a new trial. Such rule emanates from Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), later proceeding, 2 Md. App. 146, 233 A.2d 378 (1967), habeas corpus proceeding, 314 F. Supp. 799 (D. Md. 1970), aff'd, 443 F.2d 1307 (4th Cir. Md. 1971), not followed, United States v. Oxman, 740 F.2d 1298, 16 Fed. R. Evid. Serv. 505 (3d Cir. Pa. 1984), disagreed, United States v. Borello, 766 F.2d 46, 18 Fed. R. Evid. Serv. 569 (2d Cir. N.Y. 1985), on remand, 624 F. Supp. 150 (E.D.N.Y. 1985), vacated, 473 U.S. 922, 105 S. Ct. 3550, 87 L. Ed. 2d 673 (1985), on remand, 774 F.2d 1224 (3d Cir. Pa. 1985), cert. denied, 475 U.S. 1046, 106 S. Ct. 1263, 89 L. Ed. 2d 572 (1986); Malone v. State, 486 So. 2d 367 (Miss. 1986).

The due process clauses of the federal and state constitutions required that a trial be conducted according to the established criminal procedures, with an adequate opportunity to be heard in defense. Butler v. State, 217 Miss. 40, 63 So. 2d 779 (1953).

Where fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had. Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

Guarantee of due process does not require that an accused have more than one full opportunity to be heard. Simmons v. State, 197 Miss. 326, 20 So. 2d 64 (1944), cert. denied, 324 U.S. 821, 65 S. Ct. 590, 89 L. Ed. 1391 (1945).

19. — — Admissibility of evidence, crimes and criminal procedure.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (2010).

Defendant was not denied his various constitutional rights where the court did not impermissibly consider the truthfulness of defendant's confession in deciding it admissible at a suppression hearing because much of the inquiry into truthfulness occurred as a result of impeaching defendant and attempting to ascertain his credibility. Carter v. State, 956 So. 2d 951 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 302 (Miss. 2007).

In a capital murder case where defendant was indicted separately for each of four murders, the State's pattern of continuously referring to the killing of the other three victims throughout the entire guilt phase denied defendant his fundamental right to a fair trial. Flowers v. State, 842 So. 2d 531 (Miss. 2003), remanded by 2006 Miss. LEXIS 356 (Miss. June 29, 2006).

Law enforcement officers' use of defendant's wife as confidential informant did not violate defendant's right to due process, where neither wife nor officer with whom she spoke testified at trial. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Testimony dealing with victim's murder, offered at resentencing in capital murder case to give second sentencing jury evidence of specific facts surrounding murder, not to prove murder was "especially atrocious, heinous or cruel," was relevant, and its admission did not violate due process by relating to aggravating factor not mentioned in motion in limine; defendant entered sentencing hearing knowing that prosecution was seeking death penalty and that State would attempt to prove 2 aggravators and proof associated with each, and was apprised that jury would be informed of facts surrounding murder, but did not object. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

In a murder prosecution involving a victim who died of smoke inhalation after receiving a blow to the head, the admission of facts concerning the murder of another victim who died from shotgun wounds did not violate the defendant's rights under the Eighth Amendment to the federal constitution or the due process clauses of the Mississippi Constitution and the federal constitution, where the revelation that a second person was missing was necessary in putting together the pieces of the case, evidence that the investigating officers discovered 2 bodies in the trunk of the victim's car was unavoidable, and the testimony of the other victim's mother was necessary in that she was the only witness who could testify to seeing the defendant near the victim's house, she was able to discuss what the victim was doing on the day he was killed, and she was able to give some important time frames. Mackbee v. State, 575 So. 2d 16 (Miss. 1990).

At trial of sexual battery charge, the exclusion from evidence of letters written by prosecutrix to defendant, predicated on defense's failure to disclose them in pretrial discovery, did not deprive defendant of his constitutional right to confront witnesses, to a fair trial, and to due process of law, even though the excluded letters, which otherwise were competent evidence, on their face reflected a relationship between defendant and his stepdaughter (prosecutrix) substantially at odds with prosecution's theory that defendant had employed threats of violence or death to force his stepdaughter to engage in sexual acts with him, contained materials which impeached testimony of prosecutrix, and contradicted other more peripheral parts of prosecution's case. Coates v. State, 495 So. 2d 464 (Miss. 1986).

Accused was not denied due process by the trial court's refusal to grant a preliminary evidentiary hearing on his motion to suppress identification where there was no showing of illegality in either the photographic identification of the defendant or in the several lineup identifications. Howard v. State, 319 So. 2d 219 (Miss. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

Questions asked by the state's attorney on cross-examination of defense witnesses in an attempt to impeach their credibility, which were directed not to impeachment by way of false swearing but rather to discrediting the witnesses by repeated questions directed either to the immorality of such witnesses or to a possible financial gain to one witness occasioned by the death of the victim, were prejudicial, requiring prejudicial answers, and being repeatedly pressed on the jury, such questions deprived the defendant of due process, necessitating a reversal of the case. Wood v. State, 257 So. 2d 193 (Miss. 1972).

20. — — Affidavits or indictments, crimes and criminal procedure.

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

There was no merit to appellant's assertions that his due process rights were violated when an indictment was amended to reflect his habitual offender status because appellant admitted that he was informed of sentencing recommendations prior to his guilty plea, and appellant was aware early in the proceedings that he was to be charged as an habitual offender. Sowell v. State, 970 So. 2d 752 (Miss. Ct. App. 2007).

Defendant's convictions for the simple assault of a peace officer were appropriate because the trial court did not err in allowing an amendment to his indictments on the morning of trial since the deleted phrase was merely a scrivener's error and had nothing to do with the charge. The provision was not substantive to the underlying charge of assaulting the officers with punches, kicks, and threats. Graham v. State, 967 So. 2d 670 (Miss. Ct. App. 2007).

Where defendant was tried and convicted by a justice of the peace upon what purported to be an affidavit charging unlawful possession of intoxicating liquor, which affidavit was neither signed nor sworn to prior to trial, but after conviction and appeal taken therefrom such affidavit was signed and sworn to by the officer who had previously procured its issuance, defendant was tried without due process, and on appeal the circuit court could not, by allowing the belated affidavit to stand, at once retroactively bestow upon and borrow from the justice of the peace its jurisdiction. Bramlette v. State, 193 Miss. 24, 8 So. 2d 234 (1942).

21. — — Assistance of counsel, crimes and criminal procedure.

In a child custody case, even though due process entitled a mother to counsel during criminal contempt proceedings, there was no violation of the right to counsel under U.S. Const. Amend. VI where the mother had failed to secure counsel, despite being given 6 months to do so. Davis v. Davis, 17 So. 3d 114 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

Defendant's murder conviction was appropriate where her due process rights were not violated because the record was devoid of any evidence or proof as to precisely how additional time by way of a continuance would have assisted counsel. Lyle v. State, 908 So. 2d 189 (Miss. Ct. App. 2005).

While the disciplinary proceedings to which attorneys were subject were quasi-criminal in nature, there was no claim for ineffective assistance of counsel; a bar disciplinary proceeding was not sufficiently criminal in nature to trigger the protection of Strickland. Goeldner v. Miss. Bar, 891 So. 2d 130 (Miss. 2004).

Undivided loyalty of defense counsel is essential to due process. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Claim of ineffective assistance of counsel is not procedurally viable where defendant waived issue when he declined to assert that point in his error coram nobis pleading; defendant had not shown sufficient cause to excuse this waiver where record reflected that trial counsel exited state court proceedings at conclusion of direct appeal and did not participate in presentation of error coram nobis pleading. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

Defendant was denied fair trial where trial judge, after admonishing defense counsel on several occasions about continuing ineffectual and repetitive cross-examination of state's witnesses called for defense and stating that defendant's counsel was providing state with inadmissible evidence to detriment of his client, had threatened defense counsel with jail in the presence of jury. Waldrop v. State, 506 So. 2d 273 (Miss. 1987).

Defendant was denied effective assistance of counsel under Strickland v. Washington (1984) 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, reh den 467 U.S. 1267, 82 L. Ed. 2d 864, 104 S. Ct. 3562 and on remand (CA11 Fla) 737 F2d 894, habeas corpus proceeding (SD Fla) 587 F Supp 525, affd (CA11 Fla) 737 F2d 922 and later proceeding (Fla) 453 So. 2d 389, because counsel's efforts were both deficient and prejudicial where defense counsel did not object to testimony that U.S. Marshals were seeking defendant on parole violation and for escape from such parole, had objected to testimony concerning NCIC report only on ground that witness had testified incorrectly as to it, introduced NCIC into evidence himself, questioned witnesses concerning other alleged crimes of defendant, and made numerous frivolous objections, repeated refusals to follow rulings and instructions from bench, and requested information on how to introduce exhibit. Waldrop v. State, 506 So. 2d 273 (Miss. 1987).

In prosecution for possession with intent to distribute marijuana, even though performance at trial by defendant's counsel may have been deficient, in view of, inter alia, failure to object to damaging hearsay testimony and allowing defendant to testify in own behalf and further incriminate himself, there was nevertheless sufficient evidence to support conviction, and therefore allegedly deficient performance did not prejudice defense under Strickland v. Washington (1984) 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, and Leatherwood v. State (Miss. 1985) 473 So. 2d 964. Alexander v. State, 503 So. 2d 235 (Miss. 1987).

In a prosecution for possession with intent to deliver a controlled substance, in violation of §§ 41-29-115, 41-29-117, and 41-29-119, the record failed affirmatively to establish denial of defendants' right to effective assistance of counsel; nevertheless, affirmance of the judgment of conviction would not preclude defendants from litigating the issue via proper post-conviction proceedings. Read v. State, 430 So. 2d 832 (Miss. 1983).

The duty of the court to assign counsel to defend one who, charged with a capital crime, is unable to employ counsel was not intended as a mere formality, and means more than the mere appointment of counsel. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

It is the duty of the court to see that one accused of a capital crime is represented by counsel, and where it became known to the court prior to the beginning of the trial that counsel had not conferred and advised with the accused, the court should have taken appropriate steps to assure to the accused the advantage guarantied by him under Code 1942, § 2505, and failure to do so was failure to follow the mandatory provisions of the statutes and constituted a denial of due process. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

Under Code 1942, § 2505, the right of the accused to have counsel, and the requirement that such counsel shall have access to the accused, includes the right on the part of the accused to be represented by counsel who have conferred with him prior to trial so that his case may be properly prepared. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

The denial to the accused indicted for murder of representation by counsel who had conferred with him prior to the trial was a denial of a fundamental and not a technical right, and prejudice is presumed. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

Where it was shown at the date of the trial that although nine court appointed defense attorneys had been appointed in ample time therefor, they had failed to confer with the accused, who was indicted for murder, either because the accused was in jail outside the county or otherwise, the accused's conviction, carrying with it the death penalty, was reversed. McKenzie v. State, 233 Miss. 216, 101 So. 2d 651 (1958).

The trial court is not authorized or required to appoint counsel for a defendant accused of grand larceny, a noncapital felony. Fogle v. State, 231 Miss. 746, 97 So. 2d 645 (1957).

In a prosecution for assault and battery with intent to kill, where defendant was put to trial within minutes after his counsel had withdrawn from the case, the defendant was unable to make an adequate and proper defense and he was therefore deprived of his constitutional rights. Eubanks v. State, 78 So. 2d 588 (Miss. 1955).

Failure to defense attorney to call as witnesses defendant's two sisters in his behalf was not a denial of due process based upon the assumption that defendant was not properly represented by counsel, where there was no showing in the record as to what the testimony of his witnesses would have been and also where defendant was permitted as a witness to detail conversation between these two sisters, which conversation defendant said he overheard and which presumably constituted the testimony the sisters would have given as witnesses. Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950).

Failure of defense attorney to object to introduction of evidence of shot gun used in committing homicide for which he was on trial and a photograph showing the scene of crime and surroundings, was not a denial of due process based upon the assumption that the defendant was not properly represented by counsel. Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950).

Failure of the defense attorney to make a motion for continuance was not a denial of due process based upon the assumption that the defendant was not properly represented by counsel where a year has elapsed since the homicide and the case had been once continued, in absence of showing that counsel needed more time for preparation of defense. Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950).

This section and Code 1942, § 2505, providing that where any person is in jail charged with capital crime, court, on being satisfied he is unable to employ counsel, shall choose counsel to defend him, do not authorize or require trial court to furnish, or offer to furnish, an attorney to represent a person in his trial on noncapital felony charge of burglary. Odom v. State, 205 Miss. 572, 37 So. 2d 300 (1948), cert. denied, 336 U.S. 932, 69 S. Ct. 747, 93 L. Ed. 1092 (1949).

22. — — Change of venue, crimes and criminal procedure.

When coverage by local media, including television, radio and newspaper, of capital murder case, which in effect tries and finds defendant guilty not only of capital murder as charged, but also of capital murder in another, uncharged case, is so extensive that at proceedings on voir dire of prospective jurors some 10½ months after defendant's arrest, everyone of prospective jurors has heard of case, there is presumption that defendant cannot obtain fair and impartial jury and venue of case should be transferred to county substantially outside area of coverage of local media. Fisher v. State, 481 So. 2d 203 (Miss. 1985).

23. — — Competency of defendant, crimes and criminal procedure.

Defendant's due process rights were not violated by a court's refusal to grant a mental evaluation because the record indicated that he was alert and understood the nature of the proceedings and the circumstances and consequences surrounding his actions. Coker v. State, 909 So. 2d 1239 (Miss. Ct. App. 2005).

Experts who rendered diagnosis of "no mental disorder" for low intelligence quotient for capital murder defendant, after being appointed to perform mental examination of him to determine his competency to stand trial, afforded defendant constitutionally adequate evaluation and furnished constitutionally adequate report. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A post-conviction relief petitioner was not entitled to de novo review on appeal from a ruling that he was competent to be executed where the trial judge stated that he relied on § 99-19-57(2)(b) and Ford v. Wainwright (1985, US) 91 L. Ed. 2d 335, 106 S. Ct. 2595 in determining the petitioner's competency, and that the petitioner failed to prove by a preponderance of the evidence that he was not competent to be executed; the petitioner was afforded due process and the trial judge's ruling could only be reversed if it were against the overwhelming weight of the evidence or an abuse of discretion. Billiot v. State, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

Federal due process clause permits state to apply presumption that criminal defendant is competent to stand trial and require defendant to bear burden of proving otherwise, by preponderance of evidence; such allocation of burden does not offend principal of justice so rooted in traditions and conscience of people as to be ranked fundamental, and there was no reasons to disturb state Supreme Court's conclusion that state's presumption of competence was simply restatement of burden of proof. Medina v. California, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), reh'g denied, 505 U.S. 1244, 113 S. Ct. 19, 120 L. Ed. 2d 946 (1992).

In a habeas corpus proceeding by one charged with murder and confined to the Mississippi State Hospital after having been found incompetent to stand trial, the petitioner was not denied due process of law where the burden of proof was placed upon him to prove that he had recovered his sanity and was no longer likely to cause harm to himself or others and where the state presented expert testimony that the petitioner was a paranoid schizophrenic then in tenuous remission, and that he would pose a danger to himself or others if released from the hospital. Bethany v. Stubbs, 393 So. 2d 1351 (Miss. 1981).

Where petitioner, who had been charged with several criminal offenses, had been confined at the state mental hospital for over nine years under a circuit court order on account of his mental incapacity to stand trial, and where the evidence showed that he was not making any progress and there was no substantial probability that he would attain the capacity to stand trial in the foreseeable future, the due process and equal protection clauses of the United States and Mississippi constitutions required that the state initiate proceedings at the next term of the circuit court to have petitioner committed to a state mental institution under the civil commitment statutes or that he be released from custody. Brown v. Jaquith, 318 So. 2d 856 (Miss. 1975).

The right to a preliminary examination into the mental capacity of accused charged with murder, is a substantial, procedural right guaranteed to him by the due process clauses of the federal and state constitutions. Butler v. State, 217 Miss. 40, 63 So. 2d 779 (1953).

Due process clause requires that no one shall be tried for the commission of a crime when he is mentally incapable of making a rational defense, that is, incapable of remembering and intelligently stating the facts on which his defense rests, irrespective of whether his mental condition is casual, temporary or permanent and regardless of the cause therefor. Carter v. State, 198 Miss. 523, 21 So. 2d 404 (1945).

Due process clause requires that when it appears in trial court in criminal case that the defendant is probably mentally incapable of making a rational defense, the trial should not proceed until that question has been investigated, and it appears that he is sufficiently rational for the purposes of his defense. Carter v. State, 198 Miss. 523, 21 So. 2d 404 (1945).

Murder trial of epileptic, who shortly before commission of homicide had escaped from insane hospital, at a time when he was so sleepy or drowsy, as result of tablets administered to him by sheriff pursuant to doctor's order, as to be incapable of remembering and intelligently stating what occurred at the homicide, where it was not clear from the state's evidence as to who was the aggressor, constituted violation of due process. Carter v. State, 198 Miss. 523, 21 So. 2d 404 (1945).

24. — — Confessions, crimes and criminal procedure.

Because defendants entered voluntary and intelligent guilty pleas to armed robbery, they waived the right to challenge the voluntariness of their confessions to such under the U.S. Constitution and Miss. Const. Art. 3, §§ 14 and 26; therefore, their motions for post-conviction relief were denied. Holland v. State, 956 So. 2d 322 (Miss. Ct. App. 2007).

State presented ample evidence that the statement made by defendant at booking, and before he was read his Miranda rights, was voluntary and was not in response to express questioning or its functional equivalent. Defendant was simply present in the booking room when two officers were having a discussion about paperwork in order to book him, and defendant voluntarily responded to a question that was posed to one officer by the other officer, of how many charges of homicide were being filed against defendant; defendant independently volunteered the information that he had only shot one person, without compulsion or coercion. Hammons v. State, 918 So. 2d 62 (Miss. 2005).

Defendant's motion to suppress his confession, contending that his rights under Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, Miss. Const. art. 3, §§ 14, 26 and 28, and Miss. Unif. Crim. R. Cir. Ct. Prac. 6.03 were violated was properly denied where a psychiatrist testified that defendant was not so impaired by mental disease or defect as to make him clearly incompetent to make a confession. Further, in defendant's original direct appeal, he challenged the admission of his confession on five separate grounds and that adverse decision constituted the law of the case. Thorson v. State, 895 So. 2d 85 (Miss. 2004), writ of certiorari denied by 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177, 74 U.S.L.W. 3203 (2005), remanded by 994 So. 2d 707, 2007 Miss. LEXIS 497 (Miss. 2007).

Trial court did not err when it failed to suppress defendant's statement where the State made out a prima facie case of voluntariness by demonstrating in the suppression hearing that contact was initiated by defendant and multiple Miranda warnings were given; the arresting officer testified as to the voluntariness of the statements and defendant made no attempt to refute the officer's testimony. Granger v. State, 853 So. 2d 830 (Miss. Ct. App. 2003).

Because (1) defendant was read defendant's rights, (2) defendant acknowledged that defendant understood those rights, (3) defendant exhibited no erratic behavior calling into question the voluntariness to confess, and (4) no evidence of police coercion was found, the court rejected defendant's claim that confessions were involuntary, and thus there was no violation of U.S. Const. amend. XIV. Martin v. State, 854 So. 2d 1004 (Miss. 2003).

A defendant's statement to police was admissible and not the product of improper inducement, even though a police officer had told the defendant that "it'd be best for him to tell us to help himself," where the defendant received Miranda warnings twice, he understood his constitutional rights, his statement was a denial rather than a confession, no specific promise was made to him by a law enforcement officer, and he maintained that he would have told the truth regardless of the officer's comments to him. Chase v. State, 645 So. 2d 829 (Miss. 1994), cert. denied, 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995), reh'g denied, 515 U.S. 1179, 116 S. Ct. 20, 132 L. Ed. 2d 903 (1995), post-conviction relief denied, 699 So. 2d 521 (Miss. 1997).

The due process clause of the Fourteenth Amendment invalidates a state court conviction grounded in whole or in part upon a confession which is the product of other than reasoned and voluntary choice. Lee v. Mississippi, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330 (1948), conformed to, 203 Miss. 264, 34 So. 2d 736 (1948).

A defendant in a state criminal proceeding does not lose the right to contend that his conviction was without due process because upon evidence including a coerced confession, by testifying at the trial that the confession was in fact never made. Lee v. Mississippi, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330 (1948), conformed to, 203 Miss. 264, 34 So. 2d 736 (1948).

Use of a confession of guilt by the accused extorted by brutality and violence to obtain a conviction of crime is a denial of due process of law even though coercion was not established until after the confession had been admitted in evidence and counsel for the accused did not thereafter move for its exclusion. Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

25. — — Contempt, crimes and criminal procedure.

In a child custody case, a mother was provided her procedural due process rights with regards to a finding of constructive criminal contempt because the charges were specific, the mother was provided with notice, and she was afforded the opportunity to be heard. Davis v. Davis, 17 So. 3d 114 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

26. — — Cross examination, crimes and criminal procedure.

In defendant's criminal prosecution for murder and attempted arson, the State did not dilute defendant's rights of confrontation and cross-examination under Miss. Const. Art. III, §§ 14, 26 by cross-examining and redirecting its witnesses.

The State was permitted to redirect a witness about her statement where defense counsel placed the statement at issue by introducing it into evidence on cross-examination; the State was permitted to ask its witness leading questions about the statement. Brown v. State, 981 So. 2d 1007 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

Defendant's due process rights were not violated by a prosecutor's question regarding the invocation of the right to remain silent because defense counsel referred to the issue during direct examination; moreover, defendant failed to invoke the right during questioning after an arrest for sexual battery. McCoy v. State, 878 So. 2d 167 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 910 (Miss. 2004).

In a forgery prosecution, dismissal of the state's witness after he had given the only evidence introduced in the case which identified the defendant as the person who cashed the check, and had indicated that the defendant had cashed bad checks on other occasions, without giving the defendant an opportunity to cross-examine the witness, was prejudicial error, since it denied the defendant his right to be confronted by witnesses against him, and deprived him of due process of law. Crapps v. State, 221 So. 2d 722 (Miss. 1969).

27. — — Disclosure of evidence, crimes and criminal procedure.

Defense counsel was given every opportunity to listen to the tapes and view the transcripts, as all evidence was made available to defense counsel, and no evidence was intentionally withheld by the State; additionally, when applying the four-part test to determine if Brady violations occurred in the inmate's case with respect to two witnesses, the trial court finding on that issue was supported by the record. Therefore, all exculpatory issues raised by the inmate regarding those two witnesses were without merit, and there was no violation of defendant's due process rights. Manning v. State, 929 So. 2d 885 (Miss. 2006).

Where defendant claimed the prosecution suppressed a statement made by a witness to the police on the night of the murder, the court found no Brady violation. Defendant made no showing that the contents of such a statement would have been exculpatory, and defendant had the opportunity at trial to call the witness and examine him thoroughly. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

A county was not denied due process when monetary sanctions were imposed against it in a criminal proceeding for discovery violations, notwithstanding that the board of supervisors did not receive notice on either the hearing on the motion for sanctions or on the hearing on the supplemental motion for sanctions; the county's board of supervisors was notified of the hearing on the District Attorney's motion to clarify and was represented by counsel at the hearing, the county made no motions in relation to being allowed to cross-examine the witnesses from the previous hearings, the county did not complain to the trial court regarding the notice that it received, and the county's attorney was given an opportunity to argue the county's position at the hearing. State v. Blenden, 748 So. 2d 77 (Miss. 1999).

Brady violation did not result from failure of defense counsel to learn that capital murder defendant had intelligence quotient (IQ) of 59 from experts at state hospital who were requested by defense to perform psychological examination of defendant, where defense counsel requested and received mental examination to determine defendant's competency to stand trial, not to determine his IQ, and defense counsel, trial judge and jury were well aware that defendant had only third-grade education and was unable to read and write. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Impeachment evidence as well as exculpatory material comes within the scope of the Brady rule; failure to produce does not depend upon the good faith or bad faith of the prosecution, nor upon the specificity of the defense request. Malone v. State, 486 So. 2d 367 (Miss. 1986).

A defendant is entitled to know of any advance plea agreement between the state and a codefendant who is to testify against him, and a general discovery request is adequate to impose upon the prosecution the duty of disclosure. Malone v. State, 486 So. 2d 367 (Miss. 1986).

In a prosecution for sale of less than one ounce of marijuana, due process required making the substance available to the defendant for inspection and analysis, where the outcome of the case was substantially dependent upon the identification of the alleged substance as contraband. Love v. State, 441 So. 2d 1353 (Miss. 1983).

Due process is not denied by refusing the request of defendant in a criminal case to require production of a written statement made by a state's witness to the district attorney, not shown to be at variance with testimony at the trial. Mattox v. State, 243 Miss. 402, 139 So. 2d 653 (1962).

28. — — Disqualification of judge, crimes and criminal procedure.

Where the judge presiding over appellant's post-conviction motion served a prosecutorial role in the underlying criminal case, these functions were inherently contradictory — zealous advocate versus neutral adjudicator. Appellant's right to due process was violated by the judge's failure to recuse himself. Ryals v. State, 914 So. 2d 285 (Miss. Ct. App. 2005).

A judge who had served as the prosecutor at the time of the defendant's indictment should have disqualified himself; the very functions involved in the performance of the positions of judge and prosecutor are contradictory and no person can be considered to be impartial while that person is also acting as a partisan. Since the judge failed to disqualify himself, the defendant was deprived of due process, which includes a fair and impartial trial. Jenkins v. State, 570 So. 2d 1191 (Miss. 1990).

29. — — Jury trial, crimes and criminal procedure.

If exercising ten of 11 peremptory challenges against African-American members of a venire did not suffice as a prima facie case of purposeful discrimination when one-third of the panel was African-American, then it was difficult to imagine what would; therefore, in a robbery case, the state should have been ordered to provide race-neutral reasons for its use of peremptory challenges because a prima facie case was shown by defendant. Scott v. State, 981 So. 2d 979 (Miss. Ct. App. 2007), reversed by 981 So. 2d 964, 2008 Miss. LEXIS 230 (Miss. 2008).

Defendant argued that the trial judge's phrase that the jury would "hear both sides" directly opposed his right to remain silent. However, there was not plain error as the judge never stated that phrase meant that defendant had to testify, and the judge explicitly told the jury that the State had the burden of proof and that defendant was not required to testify; the trial judge was also merely trying to note the differences between a grand jury and a trial jury, namely that during grand jury proceedings the defendant's side of the case is not heard, Robertson v. State, 921 So. 2d 348 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 165 (Miss. 2006).

Although defendant's rights under the Equal Protection Clause were violated by the state's striking of one male juror, a court of appeals erred by reversing armed robbery convictions under the plain error standard of review because there was no prejudice to the outcome of the trial since the jury was substantially gender-neutral. McGee v. State, — So. 2d —, 2006 Miss. LEXIS 469 (Miss. Aug. 31, 2006), opinion withdrawn by, substituted opinion at, affirmed by, remanded by 953 So. 2d 211, 2007 Miss. LEXIS 19 (Miss. 2007).

Although the trial court failed to instruct the jury of the elements of aggravated assault against police officers, it appeared beyond a reasonable doubt that the absence of the element instruction did not cause or contribute to the jury reaching the verdict that it reached. The evidence was overwhelming that defendant used his car in a manner that clearly indicated that he was attempting to cause serious bodily injury with a deadly weapon; consequently, that error was harmless and there was also no error in admitting evidence that defendant was being pursued after a robbery in a nearby state (for which defendant had not been convicted), where that evidence was necessary to tell a complete story to the jury. Conerly v. State, 879 So. 2d 1101 (Miss. Ct. App. 2004).

The defendant was not denied due process by the court's denial of 2 challenges to jurors for cause where the jurors at issue were ultimately excused by peremptory challenge. Sewell v. State, 721 So. 2d 129 (Miss. 1998).

It is a matter of fundamental fairness and due process that the defendant is entitled to be apprised of communications between the court and the jury during deliberations. The defendant is also entitled to be represented by counsel during this very important procedure. Edlin v. State, 523 So. 2d 42 (Miss. 1988).

It was basically unfair for the trial court in a prosecution for murder to force defendant to offer his testimony and that of his witnesses to the jury after a fatiguing day in court and at a time when both counsel and jury were exhausted; moreover, due process of law necessitated a forum for defendant to present his case within reasonable hours and under reasonable circumstances. Parker v. State, 454 So. 2d 910 (Miss. 1984).

Where evidence disclosed that jury after twenty-three hours of deliberations stood 11 to 1 for verdict of guilty of murder when bailiff stated to jury that judge told him he had until next convening of court to wait until they reached verdict and that as far as he was concerned they could stay there until they rotted and that shortly thereafter the jury returned a verdict of guilty, such conduct constituted a coercive inference on the jury prejudicial to the defendant, it being immaterial whether the judge actually made such statements. McCoy v. State, 207 Miss. 272, 42 So. 2d 195 (1949).

30. — — Examination and qualification of jurors, crimes and criminal procedure.

In defendant's murder case, the State's proferred reasons for striking a juror were race neutral because the State's reason for striking the juror was that the prosecutor once had a contentious civil matter involving members of the juror's family. Booker v. State, 5 So. 3d 411 (Miss. Ct. App. 2008), affirmed by 5 So. 3d 356, 2008 Miss. LEXIS 519 (Miss. 2008).

In defendant's murder case, the State's proferred reasons for striking a juror were race neutral because, although mistaken, the State believe that the juror had been convicted of four misdemeanors. The juror had actually only been charged with the crimes, not convicted. Booker v. State, 5 So. 3d 411 (Miss. Ct. App. 2008), affirmed by 5 So. 3d 356, 2008 Miss. LEXIS 519 (Miss. 2008).

Manner in which the trial court conducted the polling of the jury did not deny defendant equal protection of the law where the circuit court adhered to the dictates of case law in determining that in the course of post-trial hearings, juror testimony was only admissible as to objective facts bearing on extraneous influences on the deliberation process. James v. State, 912 So. 2d 982 (Miss. Ct. App. 2004), reversed by, remanded by 912 So. 2d 940, 2005 Miss. LEXIS 539 (Miss. 2005).

Defendant argued that a missing juror was tantamount to a silent juror and because of the absent juror, the trial court could not eliminate all doubts as to the exposure of all jurors, and the fact that one juror was not present during the polling process alone was sufficient to establish a denial of due process; however, there was ample evidence that the circuit court went out of its way to assemble the jury and to conduct the polling in strict adherence to the appellate court's instructions, so that the absence of one juror did not invalidate an otherwise sound procedure. James v. State, 912 So. 2d 982 (Miss. Ct. App. 2004), reversed by, remanded by 912 So. 2d 940, 2005 Miss. LEXIS 539 (Miss. 2005).

Where four African-Americans were struck from jury, the State's arguments that it had prosecuted many defendants in area with their last names, that one was related to a prior defendant who made accusations against the judicial system, and one was unemployed and failed to complete questionnaire, the reasons were sufficiently race neutral to survive defendant's Batson challenge. Clay v. State, 881 So. 2d 354 (Miss. Ct. App. 2004).

Defendant's capital murder convictions and death sentence were proper where the killings occurred within a few hours and were all part of the common scheme to rob his ex-father-in-law and eliminate any witnesses; further, although the State struck substantially more women than men, the fact that the selected jury incorporated a proportionally larger percentage of women than were in the venire contradicted defendant's claim of gender discrimination. Brawner v. State, 872 So. 2d 1 (Miss. 2004).

Defendant's failure to make contemporaneous objection left unpreserved her claim that trial court violated her rights to due process by moving venireman to end of list of potential jurors. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

In a criminal prosecution, having a deaf person on a jury would constitute a denial of the accused's rights to due process of law and to a trial before a fair and impartial jury. Weaver v. State, 497 So. 2d 1089 (Miss. 1986), habeas corpus denied, 896 F.2d 126 (5th Cir. 1990), reh'g denied (5th Cir. 1990), cert. denied, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990).

Normally person engaged in law enforcement, or related by blood or marriage to one engaged in law enforcement, is not per se excluded from jury service in criminal case; however, in highly unusual fact situation in which 12 of 39 veniremen considered by court and not excused for cause are either police officers or related by blood or marriage to current or former police officers, and in which uniformed officer serves as foreman, defendant is denied trial by impartial jury. Mhoon v. State, 464 So. 2d 77 (Miss. 1985).

31. — — Fair trial, crimes and criminal procedure.

Defendant's motion for change of venue was properly denied because there was no evidence in the record to indicate that the jurors were not fair and impartial; the trial judge took appropriate steps, through voir dire, jury instruction, and sequestration, to ensure that defendant's right to a fair trial was preserved. Welde v. State, 3 So. 3d 113 (Miss. 2009).

Defendant's right to a fair and impartial jury was not violated by an alleged relationship between one juror and a witness for the State because none of the facts asserted by defendant with regard to the relations between the juror and the police officer, who was the witness, could be found in or supported by the record. Hill v. State, 4 So. 3d 1063 (Miss. Ct. App. 2009).

Where no errors raised warranted granting post-conviction relief, defendant was not deprived of a fair trial due to the cumulative effect of the alleged errors. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

DNA testing of the knife used in an assault would have been of little assistance to defendant and therefore was not necessary to preserve defendant's due process guarantees as both the victim and the eyewitness testified that defendant attacked the victim, and if the blood on the knife was found to be defendant's blood, it would have added little support to his theory of self-defense; thus, defendant was not denied a fair trial nor was his request for expert assistance necessary to preserve his due process guarantees. Grubbs v. State, 956 So. 2d 932 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 313 (Miss. 2007).

Defendant's right to a fair trial was not violated where defendant could not show that a discovery violation was committed by the State or that he was prejudiced in any way when there was nothing in the record showing knowledge on the part of the State of either of the two defense witnesses, and defendant made no showing how the police could have known of them and thus failed to disclose them; even though defendant claimed prejudice because police and/or the DA's office failed to find certain witnesses who would have helped him in his defense, he put on no proof at trial of an alleged inadequate investigation. Morris v. State, 927 So. 2d 744 (Miss. 2006).

Defendant was properly denied post-conviction relief after he pled guilty to armed robbery because the trial court did not err in not disqualifying the assistant district attorney on the ground that he had served as defendant's court-appointed attorney prior to serving as assistant district attorney. Confidential information was not used in the prosecution of the case, and defendant was not denied fair trial. Vandergriff v. State, 920 So. 2d 486 (Miss. Ct. App. 2006).

There was no evidence that the prosecution's statements during its opening and closing arguments related to defendant's presence in jail, prevented defendant from receiving a fair trial or warranted reversal under the plain error doctrine; therefore, defendant's escape and assault on law enforcement officer convictions were upheld. Sims v. State, 919 So. 2d 264 (Miss. Ct. App. 2005).

Prosecutor did not overstep his bounds when he asked the jury not to let the defendant get away with the murder with which he was charged. Furthermore, the trial court instructed the jury that arguments and statements of counsel were not evidence and that if any argument, statement or remark had no basis in the evidence, then the jury was to disregard that argument, statement or remark; in any event, there was no prosecutorial misconduct and no grounds for reversal in light of said instructions. Davis v. State, 904 So. 2d 1212 (Miss. Ct. App. 2004), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 269 (Miss. 2005).

Before the appellate court was authorized to overturn a trial court's denial of a request for expert assistance at public expense, it had to find an abuse of discretion so egregious as to deny due process rendering a trial fundamentally unfair; while it was true that defendant denied signing the waiver of rights form, the overwhelming evidence was that he did, and under the circumstances, defendant did not offer concrete reasons to justify the provision of expert consultation at public expense, such that the denial of defendant's request for public assistance was not an abuse of discretion resulting in a denial of due process. Stewart v. State, 879 So. 2d 1089 (Miss. Ct. App. 2004).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder where the sexual molestation was integrally related to her murder such that one could not coherently present the facts of her demise without reference to it, and it described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

In a rape and simple assault case, admission of photographs of doors showing what were purported to be new locks already testified to by the victim did not affect the fundamental fairness of the trial to the extent that it would constitute reversible error. Williams v. State, 868 So. 2d 346 (Miss. Ct. App. 2003).

Cumulative effect of the State's repeated instances of arguing facts not in evidence was to deny defendant the right to a fair trial. Flowers v. State, 842 So. 2d 531 (Miss. 2003), remanded by 2006 Miss. LEXIS 356 (Miss. June 29, 2006).

In a prosecution for a single murder, the defendant was denied a fair trial where the prosecution engaged in a pattern of repeatedly and unnecessarily citing to the killing of three victims throughout the guilt phase proceedings. Flowers v. State, 2000 Miss. LEXIS 116 (Miss. May 11, 2000), opinion withdrawn by, substituted opinion at, remanded by 773 So. 2d 309, 2000 Miss. LEXIS 266 (Miss. 2000).

In a prosecution for murder, there was no error in the introduction into evidence of photographs of the murder victim where (1) there was nothing in the record to indicate that the admission of the photographs was simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury, (2) the photographs established that the victim was dead as a result of a criminal act, and the extent, position, and nature of the wounds the victim sustained, and (3) the photographs assisted the jury in visualizing the crime scene and corroborated the testimony of the investigators of the crime scene. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

The defendant was not denied a fair trial when the trial court refused to quash the venire on the basis that, of the entire venire of 47 jurors selected for service, 16 had been exposed to pretrial publicity, where those 16 jurors were removed from the venire. Baldwin v. State, 732 So. 2d 236 (Miss. 1999).

Defendant was not denied due process rights when he was brought into courtroom before jury in shackles, although defense counsel had been granted motion in limine prohibiting jury from viewing defendant in shackles, where, at worst, defendant was 10 feet inside courtroom for few minutes, there was no evidence this incident occurred intentionally, handcuffs were removed immediately after being noticed, and it did not appear incident deprived defendant of his right to fair trial. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Presence of 4 uniformed, armed state troopers in courtroom, as supplement to state court's security force, does not violate armed robbery defendant's constitutional right to fair trial. Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

As applied to criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice and in order to declare a denial of it court must find that absence of that fairness fatally infected the trial. Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

32. — — Freedom of speech or press, crimes and criminal procedure.

Circuit Court's closure order in capital murder case was reasonable regulation of time, place, and manner of newspaper's enjoyment of its First Amendment right; desire of press to inform public about important criminal proceedings can result in publication of matter that can deprive defendant of his right to fair trial; access of press to trial and pretrial processes may be qualified, and record amply supported Circuit Court's finding that unrestricted access to trial process would result in substantial likelihood of defendant being denied fair trial; additionally, newspaper was not being denied access to pre-trial proceeding in perpetuity, because closure order expired once jury was sequestered and trial began; once that point was be reached, newspaper would be granted access to complete transcript of all closed, pre-trial proceedings. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

33. — — Guilty pleas, crimes and criminal procedure.

Nothing in the record showed that an inmate's guilty plea was not entered knowingly and voluntarily, given that he was asked about his education, whether he had reviewed the plea petitions, and whether he understood them and that he was waiving certain rights, plus the inmate stated that he understood the charges, the consequences of pleading guilty, and that he was entering his plea voluntarily. Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 559 U.S. 1078, 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (2010).

Because appellant inmate did not raise an issue relating to an alleged due process violation based on the lack of a court reporter in a motion for post-conviction relief, the issue was procedurally barred; at any rate, there was a court reporter present at the inmate's plea colloquy hearing. Shies v. State, 19 So. 3d 770 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

Motion for post-conviction relief was properly denied because appellant inmate's guilty plea to manslaughter under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 was voluntary in nature where he testified that he was guilty, he was satisfied with his attorney, and that he understood the charges against him. Moreover, the entry of a voluntary plea waived speedy trial and confession-related issues. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Motion for post-conviction relief was denied in a case where defendant's suspended sentence for statutory rape was revoked because he waived issues relating to a speedy trial and defects in an evidence sample due to a guilty plea, there was no evidence that an indictment was manufactured, and the revocation of the suspended sentence was permitted under Miss. Code Ann. § 47-7-34 and Miss. Code Ann. § 47-7-37 where defendant had already served a portion of a five-year sentence after the guilty plea was entered. Davis v. State, 954 So. 2d 530 (Miss. Ct. App. 2007).

Because defendant was not informed of the elements of the charge as to his guilty plea, the appellate court reversed and remanded for a hearing as to whether defendant had the elements explained to him prior to pleading guilty, and whether there was a factual basis for the plea. Jones v. State, 936 So. 2d 993 (Miss. Ct. App. 2006).

Record indicated that the trial court, at sentencing, had some evidence that defendant committed the offense, and whether such evidence was substantial was difficult to ascertain; there was some question whether the plea following the second colloquy was knowing, intelligent and voluntary, and the supreme court could see additional facts which raised doubt as to the voluntariness of her plea. Hannah v. State, — So. 2d —, 2006 Miss. LEXIS 365 (Miss. July 20, 2006), opinion withdrawn by, substituted opinion at, remanded by 943 So. 2d 20, 2006 Miss. LEXIS 578 (Miss. 2006).

Post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine because his guilty plea was voluntary; defendant stated in his petition to enter a plea of guilty that he was entering the plea freely, voluntarily, and of his own accord, with full understanding of all matters set forth in the indictment. Defendant also acknowledged in the petition that he could receive a sentence of zero to 60 years if convicted for the sale of cocaine as an enhanced offender, and that by pleading guilty he could receive a sentence of zero to 30 years. Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006).

Defendant entered a valid guilty plea where he waived his right to a trial and the trial court questioned defendant to determine that the entry of the guilty plea was knowingly and voluntarily given; defendant was competent and understood the plea agreement he had signed, and defendant understood that the trial court could impose a sentence anywhere from the minimum to the maximum. Greer v. State, 920 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari dismissed by 933 So. 2d 303, 2006 Miss. LEXIS 307 (Miss. 2006).

Where a guilty plea was entered, an inmate's request for post-conviction relief based on a denial of due process under the Fourteenth Amendment and Miss. Const. Art. 3, § 14 was denied because those issues were waived by the entry of the plea. Kelley v. State, 913 So. 2d 379 (Miss. Ct. App. 2005).

Plea agreement signed by defendant expressly addressed each of defendant's constitutional rights and specifically addressed his right against self-incrimination. Defendant was asked in the plea agreement whether he understood that if he pleaded guilty, he would be waiving his constitutional right against self-incrimination and he answered, "yes"; although the better practice would have been for the trial judge to address defendant's right against self-incrimination specifically, failure to do so was not reversible error, and defendant's claim of a denial of due process was rejected. Moore v. State, 906 So. 2d 793 (Miss. Ct. App. 2004).

In a possession of marijuana case, defendant was not denied his due process rights in the revocation of his post-release supervision as there was evidence that defendant had waived his rights to a hearing and that he had admitted to violating his probation. Hughes v. State, 901 So. 2d 1274 (Miss. Ct. App. 2004).

Valid guilty plea operated as a waiver of all non-jurisdictional rights or defects which were incident to trial; defendant was fully advised of his rights and the maximum sentences he faced if he chose to go to trial, and he was provided a detailed admonishment prior to accepting his guilty plea, such that defendant's plea was made knowingly, intelligently, and voluntarily and he waived any rights regarding the allegedly coerced confession. Swindoll v. State, 859 So. 2d 1063 (Miss. Ct. App. 2003).

The State's plea bargain with a codefendant which was conditional upon his testimony at the defendant's trial did not violate due process where there was no indication that the codefendant's plea reduction was made conditional upon "false or specific testimony or a specific result," and the defendant's attorney cross-examined the codefendant extensively on the plea bargain; the practice of the State's withholding its end of a plea bargain until a codefendant has testified is permissible and does not result in tainted and inadmissible testimony, but rather the existence of a plea bargain is to be considered by the trier of fact in determining the credibility of the codefendant's testimony. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A defendant's plea of guilty to 2 counts of forgery was not involuntarily entered, even though the trial court did not personally advise the defendant of the minimum and maximum penalties provided by law for the crimes of forgery, where the defendant's attorney explained to him the maximum and minimum penalties for the charges, the defendant made no claim about the sentence he expected to receive or his belief as to the minimum sentence for the offense charged, and he did not claim that his alleged ignorance was the basis for his guilty plea. Banana v. State, 635 So. 2d 851 (Miss. 1994).

Although Rule 3.03(3)(B), Miss. Unif. Crim. R. Cir. Ct. Prac. only requires a judge to inquire and determine whether the defendant understands the maximum and minimum penalties when he or she wishes to plead guilty to the offense charged, trial judges should inform criminal defendants on the record of the minimum and maximum penalties for the charged offense in order to insure that no question ever be raised. Banana v. State, 635 So. 2d 851 (Miss. 1994).

Defendant was entitled to a hearing on his petition for leave to withdraw his guilty plea, on the asserted basis that he had received incorrect advice from counsel regarding the length of his sentence and the terms of his plea bargain. Tiller v. State, 440 So. 2d 1001 (Miss. 1983).

A plea of guilty constitutes a waiver of some of the most basic rights of free Americans, those secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Miss Const, Art 3, §§ 14 and 26. Sanders v. State, 440 So. 2d 278 (Miss. 1983).

In a prosecution upon an indictment for first degree murder, there was no constitutional error in accepting a plea of guilty to the reduced charge of second degree murder given with a protestation of innocence, where it appeared that the defendant had intelligently concluded upon the advice of competent counsel that his interests required entry of a guilty plea and the record contained strong evidence of actual guilt, the fact that the defendant would not have pleaded guilty except to avoid a possible death penalty upon a jury conviction of first degree murder not necessarily demonstrating that the plea was not the product of a free and rational choice. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

The 1968 decision of the United States Supreme Court in United States v. Jackson, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209, is not retroactive and was not applicable to a guilty plea entered in 1960 by a defendant charged with murder who, at the time of the decision of Jackson, was serving a life sentence in the penitentiary as a consequence. King v. Cook, 211 So. 2d 517 (Miss. 1968).

A defendant who in 1960 entered a plea of guilty to an indictment for murder and received a life sentence which he was currently serving, following the decision in 1968 of the United States Supreme Court in United States v. Jackson, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209, filed a petition for a writ of habeas corpus alleging that the death penalty provision of Code 1942, § 2217 violated the Fifth and Sixth Amendments of the United States Constitution and § 14 of the Mississippi Constitution. In affirming the denial of the writ, the court held that the Jackson rule was inapplicable to the Mississippi general statute on murder for the reason that an accused entering a plea of guilty to a charge of murder under § 2217 is not assured of not receiving the death penalty; for the trial court cannot be required to accept a guilty plea in a capital case and pronounce a sentence of less than death, but may require a jury trial in which the imposition of the death sentence is within the sole province of the jury. King v. Cook, 211 So. 2d 517 (Miss. 1968).

An ignorant man in his late twenties, who on day of arrest was indicted and sentenced on his plea of guilty, was held to have been denied due process where, without having the indictment explained to him, he was merely asked whether he understood it, whether he realized that he could be sent to the penitentiary on his plea of guilty, and whether he had a lawyer. Walters v. Ernest, 234 Miss. 315, 106 So. 2d 137 (1958).

34. — — Identification of defendant, crimes and criminal procedure.

Trial court did not err in admitting the victim's in-court identification of defendant because there was substantial credible evidence supporting the trial court's findings that the in-court identification testimony was not impermissibly tainted by her pre-trial identification of him and the in-court identification was sufficiently reliable to comport with the requirements of due process since, inter alia: (1) the victim had ample opportunity to view defendant at the time of the attempted crime; (2) the victim's attention was entirely directed at viewing defendant as he tried to hide behind a tree, located approximately three feet from her bedroom window in her backyard; and (3) the victim's description of defendant in her conversation with the police dispatcher was sufficiently accurate. Brown v. State, 961 So. 2d 720 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a capital murder case because the issue of whether defendant's due process rights were violated by the use of a single set of dental molds in a murder case was procedurally barred since the issue was capable of being raised at trial or on direct appeal; even if it was not, identification of defendant by an eyewitness was distinguishable from an expert's conclusion that defendant inflicted a particular injury based on scientific analysis. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Where witnesses at defendant's trial identified him in court as the person who shot the victim, he failed to preserve his due process claim. Defendant did not have other persons with him at counsel's table and he failed to request a pre-trial identification. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

Defendant's conviction for the sale of cocaine within 1,500 feet of a church was proper where his due process rights were not violated by the pre-court identification procedure because there was little likelihood of misidentification and the officer's degree of attention could have been considered to be at a high level because he did not view defendant in passing or from a great distance. Johnson v. State, 904 So. 2d 162 (Miss. 2005).

In a shoplifting case, the trial court did not err in admitting the identification testimony or in court identifications by two witnesses, as both witnesses gave an accurate description of defendant to those who assisted in the pursuit, they were certain that the man in a picture shown to them by the police was the same man who had been in the store, and they both testified that they identified defendant as the shoplifter based on their familiarity with him, rather than because his was the only photograph shown to them by the police. Johnson v. State, 882 So. 2d 786 (Miss. Ct. App. 2004).

Appellate court overruled defendant's argument that an on-the-scene identification violated his due process rights and prevented him from receiving a fair trial. The victim had the opportunity to view defendant two or three times before the armed robbery occurred, the victim testified that he was indeed paying attention before, during, and after the robbery, the record indicated that the victim gave a detailed description of defendant that was largely accurate, and the victim was, as far as the record revealed, unequivocal in his ability to identify defendant on four separate occasions. Johnson v. State, 884 So. 2d 787 (Miss. Ct. App. 2004), writ of certiorari denied by 883 So. 2d 1180, 2004 Miss. LEXIS 1302 (Miss. 2004).

Chance encounter at the police station with the victim did not amount to a unnecessarily suggestive, single person show-up identification such as to violate due process; the victim's description given to police was sufficiently accurate for them to identify defendant as a suspect based on nothing besides information obtained from her, and only the briefest of time transpired between the victim's encounter in the parking lot and her subsequent unanticipated encounter with defendant at the police station, at which time she identified him of her own volition, apparently without any prompting or inquiry from any investigating officer. Garner v. State, 856 So. 2d 729 (Miss. Ct. App. 2003).

Where a defendant is to be identified at trial, and the defendant requests that he or she be seated among other people in the courtroom, the trial judge should exercise broad discretion in determining whether the request should be granted; the factors to be considered by the trial judge include (1) any danger presented to the public by the defendant, (2) the danger of misidentification, (3) the courtroom facilities available, and (4) any other pertinent factors known to the trial judge. Scott v. State, 602 So. 2d 830 (Miss. 1992).

A trial judge did not abuse his discretion in denying a defendant's request to be seated among the general public when an in-court identification of the defendant was made where the trial judge thoroughly conducted voir dire examination of the witness before allowing his identification, and the defendant had previously been convicted for escape from an Arkansas prison. Scott v. State, 602 So. 2d 830 (Miss. 1992).

When a reasonably intelligent eyewitness has had a good opportunity to view the features of the perpetrator of a crime, the method the police use in having the witness identify the defendant recedes in importance in inverse ratio to the intelligence of the witness and opportunity to view the perpetrator. Thus, a rape defendant's argument that the victim's in-court identification resulted from an impermissibly suggestive photographic identification of the defendant, or from seeing him at the preliminary hearing, was without merit where the victim was a sensible child who had ample opportunity to view the rapist in the daylight, she gave a description of the defendant to a police officer, the accuracy of which was undisputed, and she identified the defendant's photograph without hesitation no more than 1½ hours after the crime. Powell v. State, 566 So. 2d 1228 (Miss. 1990).

A robbery victim's in-court identification of the defendant was not tainted by her extensive observation of the defendant at a pre-trial parole revocation hearing where the victim testified at the suppression hearing concerning her ample opportunity to observe the defendant at the time of the robbery. Saucier v. State, 562 So. 2d 1238 (Miss. 1990).

A pretrial voice identification of a burglary defendant was impermissibly suggestive and, therefore, denied the defendant due process of law where the witness heard only one voice after he was shown his stolen items by the police and was told by the police that the man whose voice he was hearing had those items on his person. Estes v. State, 533 So. 2d 437 (Miss. 1988).

35. — — Insanity defense, crimes and criminal procedure.

Statutes providing insanity shall be no defense to murder indictment held violative of due process clause. Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241 (1931).

36. — — Instructions, crimes and criminal procedure.

In a carjacking case, even though an indictment and a jury instruction lacked the specific language "from another person's immediate actual possession," as set forth in Miss. Code Ann. § 97-3-117(1), they were sufficient because the use of the name of the victim was the equivalent of such. Therefore, there was no due process violation, and defense counsel was not ineffective for submitting the instruction to the jury. Perryman v. State, 16 So. 3d 41 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

Defendant's convictions for the simple assault of a peace officer were appropriate because even though a jury instruction erroneously allowed the jury to find "physical menace" from words alone, it was a harmless error since it was uncontradicted that defendant attacked the officers with kicks and punches. Graham v. State, 967 So. 2d 670 (Miss. Ct. App. 2007).

The defendant in a murder prosecution was not denied due process when, after deliberating for two hours and 40 minutes, the jury sent a note to the court stating that they could reach a decision, the court instructed the jury to continue to deliberate, and the jury reached a verdict within 30 more minutes. Greenlee v. State, 725 So. 2d 816 (Miss. 1998).

In first-degree murder case, where trial court instructed on second-degree murder but did not require jury to agree on single theory of first-degree murder, defendant was not entitled as matter of due process to instruction on lesser included offense of robbery, where (a) jury had been instructed on lesser offense of second-degree murder as alternative to either finding guilt of first-degree murder or acquitting defendant, and (b) evidence would have supported second-degree murder conviction; due process concern with eliminating distortion of fact-finding process, which is created when jury is faced with all-or-nothing choice between murder and innocence, was not implicated. Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), reh'g denied, 501 U.S. 1277, 112 S. Ct. 28, 115 L. Ed. 2d 1109 (1991).

Where, in a murder prosecution, three trials of the defendant were initiated within two years of the crime, one ending in a mistrial and two resulting in convictions, but both convictions were reversed for improper instructions or improper argument by the prosecutor, and the defendant alleged harassment by the state, the defendant would not be released and the prosecution terminated, the sequence of events in the proceedings not constituting a denial of the defendant's rights to due process and a speedy trial. Smith v. State, 220 So. 2d 313 (Miss. 1969).

37. — — Loss or destruction of evidence, crimes and criminal procedure.

Defendant was not deprived of due process where a tape recording of the drug deal had been lost before trial as defendant had admitted at trial that he had sold the drugs for someone else. Irby v. State, 893 So. 2d 1042 (Miss. 2004).

In a criminal prosecution for armed robbery, a convenience store clerk identified defendant in a photographic array. Police failure to preserve a record of which pictures were in the array did not violate defendant's due process rights; there was no evidence of bad faith and having the photographs would not have changed the outcome of the trial. Scott v. State, 877 So. 2d 549 (Miss. Ct. App. 2004).

No constitutional requirement existed that certain investigative procedures be performed at each scene of a suspicious death or that the investigation rise to a certain level of expertise; the sufficiency or insufficiency of a police investigation went to the weight of the evidence, and it was for a jury to decide what evidence to believe, such that the jury believed the State's witnesses that the investigation was adequate. Cox v. State, 849 So. 2d 1257 (Miss. 2003).

Defendant was not denied constitutional right to fair trial where he alleged that small particle of skin from abrasion on his right index finger was material, exculpatory evidence that had been intentionally destroyed or lost by state, where there was nothing in testimony suggesting prosecutorial bad faith and where record contained little suggesting that skin particle would have played significant role at trial. Tolbert v. State, 511 So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988)'.

38. — — Post-conviction relief, crimes and criminal procedure.

Defendant was properly denied post-conviction relief after defendant's probation was revoked; nowhere in the revocation hearing did defendant indicate that defendant did not have proper notice of the hearing or that defendant was not aware of the specific grounds for the revocation. Mathis v. State, 882 So. 2d 798 (Miss. Ct. App. 2004).

Neither due process nor equal protection rights are violated by requiring a prisoner to demonstrate some specific need before requiring the State or county to furnish the prisoner with free copies of trial records in post-conviction relief proceedings. The State is not required to subsidize a "fishing expedition" for grounds upon which to attack a conviction and sentence, merely because the prisoner is indigent. Fleming v. State, 553 So. 2d 505 (Miss. 1989), but see De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992).

Upon a prima facie showing of the existence of an advance plea agreement between the state and a codefendant who was state's principal witness, whereby in exchange for testifying for the state the codefendant would receive a lenient sentence for armed robbery, a defendant, who had been convicted for the same robbery as accessory before the fact, may be entitled to post-conviction relief where the agreement had not been disclosed prior to his trial, although the defense had made a general discovery request for exculpatory material, and the existence of any such agreement had been denied by the codefendant while testifying at the defendant's trial. Case would be remanded to circuit court for evidentiary hearing. Malone v. State, 486 So. 2d 367 (Miss. 1986).

39. — — Production of evidence and witnesses, crimes and criminal procedure.

In a statutory rape case, a trial court did not abuse its discretion by refusing to appoint an expert where defendant did not show that it would have aided his defense that semen had been planted in the victim's vagina; defendant did not want an expert to testify at trial, but only requested assistance with cross-examination. Since he was able to conduct such without the aid of an expert, there was no due process violation. Ladd v. State, 969 So. 2d 141 (Miss. Ct. App. 2007).

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

Amount of force required to overtake another person's will to resist is directly proportional to the development of the other's will; therefore, defendant was properly convicted of kidnapping a child where he used deceit to lure him into a vehicle because the state proved all of the elements of kidnapping, as required by due process. Potts v. State, 955 So. 2d 913 (Miss. Ct. App. 2007).

In a prosecution for capital murder committed during the commission of a rape, the trial court's failure to provide funds to the defendant to retain an independent pathologist constituted reversible error where the opinion of the State's pathologist that the victim was raped was the only evidence offered to prove this critical aspect of the State's case. In re Turner, 635 So. 2d 894 (Miss. 1994).

While the due process clause requires that an indigent defendant should at times be allowed an expert in the interest of fundamental fairness, a court is not required to appoint an expert upon demand. Some of the factors to be considered in determining if the defendant was denied a fair trial when the court did not appoint a requested expert include the degree of access the defendant had to the State's experts and whether those experts were available for vigorous cross-examination. Another consideration is the lack of prejudice or incompetence on the part of the State's experts. Fisher v. City of Eupora, 587 So. 2d 878 (Miss. 1991).

In a capital murder prosecution involving an underlying felony of rape, the defendant's due process rights were not violated by a delay in providing the defendant with a "sexual assault kit" which collected samples of the victim's body fluids, even though the defendant did not receive the samples until almost one year after the State's expert conducted his testing, which allegedly resulting in the "degradation" of the samples so that the defendant was unable to perform accurate tests, where the State fully complied with a court order to preserve half the samples, and any delay in receiving the samples was due to the defendant's failure to "simply go and get the samples" from the State's expert and the defendant's mistaken belief that the expert had used up all the samples. Holland v. State, 587 So. 2d 848 (Miss. 1991).

In absence of anything in the record that suggests that a defendant, charged with uttering a forgery, was prejudiced to the point of warranting a new trial by the failure to furnish him with a handwriting expert, the trial court did not err in refusing defendant's request for the expert. Burt v. State, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

Code 1942, § 1895 does not authorize a court to procure the attendance and testimony of witnesses for an accused at public expense, and an accused is not deprived of his constitutional right to compulsory process and to due process of law and equal protection of the laws by the refusal of a court to order an allowance for the payment of witnesses sought by the defendant to be subpoenaed from another state pursuant to such section. Diddlemeyer v. State, 234 So. 2d 292 (Miss. 1970), cert. denied, 400 U.S. 917, 91 S. Ct. 177, 27 L. Ed. 2d 157 (1970).

In a criminal prosecution, where the trial court was without authority to compel the attendance of witnesses requested by the defendant under any circumstances, so long as they were outside the state, the court's denial of compulsory process for the attendance of three witnesses confined in penitentiaries in other states, and a fourth witness who resided out of the state, did not constitute a denial of due process or equal protection. Diddlemeyer v. State, 234 So. 2d 292 (Miss. 1970), cert. denied, 400 U.S. 917, 91 S. Ct. 177, 27 L. Ed. 2d 157 (1970).

40. — — Sentence and punishment, crimes and criminal procedure.

Order for restitution which stated that a bank, which was the victim of defendant's forgeries, was entitled to a judgment against defendant of execution against any of the defendant's vehicles and/or personal property seized by law enforcement authorities did not violate defendant's due process rights because defendant was aware that defendant's personal property had been seized by the authorities and that defendant was going to have to pay restitution. Smith v. State, 130 So. 3d 1187 (Miss. Ct. App. 2014).

Post-conviction relief was denied in a case where appellant inmate contended that he was denied due process when he received a 30-year sentence after pleading guilty to three counts of armed robbery. The inmate's claim of being a first-time offender was completely devoid of merit as he admitted to previous convictions of possession of stolen property and burglary of a vehicle. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Defendant's post-conviction motion was properly dismissed because while defendant retained the ability to challenge the legality of the incarceration, despite entering into an agreed sentencing order whereby defendant agreed not to file an appeal or a motion for postconviction collateral relief, nothing in the record showed that defendant was illegally confined. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

Defendant's due process rights were not violated in a drug case where he was not provided a separate recidivism hearing since he was not entitled to such, defendant acknowledged that he was indicted as a habitual offender and that the maximum punishment was life, and he also admitted that he was previously convicted of several felonies; defendant was unable to complain about the sentence since he was the beneficiary of a lenient sentence where he was given 17-years, despite being a habitual offender. Minchew v. State, 967 So. 2d 1244 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where a portion of a suspended sentence was revoked under Miss. Code Ann. § 47-7-37 because there was no due process violation since the evidence relied upon was listed, there was no double jeopardy violation since the original sentence was reinstated, and counsel was not required since the case was not complex. Pruitt v. State, 953 So. 2d 302 (Miss. Ct. App. 2007).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Defendant's motion for post-conviction relief was properly denied because his sentence was not unconstitutionally vague and subject to more than one interpretation; he was sentenced to 18 years in prison with 12 years to serve, and 18 minus 12 left six years suspended, which is what the language in the sentencing order reflected. Jones v. State, 956 So. 2d 310 (Miss. Ct. App. 2006).

Defendant's sentence of two days in jail for driving under the influence and failing to dim his headlights was upheld where there was no absolute constitutional bar to sentence enhancement at a second trial; an on-the-record explanation of an enhanced sentence was not warranted after a trial de novo in a superior court following an appeal from an inferior court. Carr v. State, 942 So. 2d 816 (Miss. Ct. App. 2006).

There was no equal protection violation when appellant received a 15-year sentence for statutory rape; appellant conceded that the statute applied equally to male and female defendants. McKenzie v. State, 946 So. 2d 392 (Miss. Ct. App. 2006).

In a sexual battery case, Miss. Code Ann. § 97-3-101(3) authorizes the maximum sentence to be life in prison, but does not require the jury to arrive at that verdict. Because the trial court acted within the limits of the statute and the statute did not require a finding by the jury, the procedure used by the trial court did not violate his due process rights because it did not fail to take into consideration certain factors in determining a proper sentence. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

Court found no merit to defendant's claim that his due process rights were violated when the trial judge failed to honor his plea agreement because the trial judge clearly informed defendant that the recommended sentence was going to be limited to the current charge. The trial judge stated that he would not take any other charges into consideration when sentencing defendant. Black v. State, 919 So. 2d 1017 (Miss. Ct. App. 2005).

Defendant's petition for post-conviction relief from his conviction of sexual battery was properly denied because defendant failed to establish by any convincing evidence that his attorney's performance was deficient where prior to entering his guilty plea, defendant stated that his trial counsel had discussed the charge against him and all possible defenses and that he was satisfied with his attorney's advice. Furthermore, defendant stated that he understood that his sentence could range between zero and thirty years and that he had entered a guilty plea because he had committed the crime charged against him. Myers v. State, 897 So. 2d 198 (Miss. Ct. App. 2004).

Defendant's due process rights were not violated by his removal from the intensive supervision program; when defendant was taken off house arrest and placed in the Mississippi Department of Corrections' custody, he merely experienced a change in his housing assignment and classification, which did not require a hearing since it did not involve a liberty interest. Brown v. Miss. Dep't of Corr., 906 So. 2d 833 (Miss. Ct. App. 2004).

While not without the authority to decide the merits of an inmate's application pursuant to Miss. Code Ann. § 99-39-27(7), the court found that due process required that it allow the inmate's motion to be filed in the trial court for consideration of mental retardation evidence as a defense to the death penalty as cruel and unusual punishment under U.S. Const. amend. VIII. Chase v. State, 873 So. 2d 1013 (Miss. 2004), remanded by 112 So. 3d 421, 2013 Miss. LEXIS 5 (Miss. 2013).

Contention that it was error for harsher sentence to be imposed after defendant invoked his constitutional right to fair trial would be considered on appeal, though it was not preserved at trial, as right to due process was implicated. Pierce v. Delchamps, Inc., 667 So. 2d 26 (Miss. 1996).

There was no violation of due process in imposing 25-year sentence for armed robbery following trial, after prior conviction and 15-year sentence pursuant to plea bargain had been set aside; there was no evidence of vindictiveness, particularly since there were two different sentencers and the second sentencer had benefit of hearing evidence at trial, and was the same judge who had granted motion to vacate first sentence on ground that defendant was not properly advised of his rights. Pierce v. Delchamps, Inc., 667 So. 2d 26 (Miss. 1996).

It is not violation of due process to have appellate court perform reweighing or harmless error analysis when invalid aggravating circumstance is found to exist in capital case. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Submission to a capital sentencing jury of the mitigating factor that the defendant had no "significant" history of criminal activity was not improper, in spite of the defendant's argument that the factor was unconstitutionally applied in his particular case because it implied that he had at least some criminal history when in fact he had none, where the mitigating factor was taken verbatim from the list provided by the legislature to be considered in imposing sentence, and the defendant had the opportunity during closing argument to dispel any notion the jury might have had that he had a history of criminal activity. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Although criminal defendants in Mississippi generally have no right to be sentenced by the jury, where a specific statute provides such a guarantee, such as § 99-19-101, which requires that the jury perform the weighing of aggravating and mitigating factors, Article 3, §§ 14 and 26 of the Mississippi Constitution operate together to elevate the statutory right to one of constitutional significance which the Supreme Court of Mississippi cannot abridge by applying harmless error analysis, whether by disregarding entirely the invalid circumstance or by applying a limiting construction; thus, a murder defendant's motion for leave to file a post-conviction petition would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, and the case would be remanded to the circuit court for new sentencing hearings. Wilcher v. State, 635 So. 2d 789 (Miss. 1993).

A defendant was properly sentenced as a habitual offender pursuant to § 99-19-81, even though the habitual offender language of the indictment failed to state the dates of his prior convictions, where all of the information contained in the indictment, and specifically the cause number, afforded the defendant access to the date of judgment. Therefore, the information pertaining to the dates of the judgments was substantially set forth in the indictment and sufficient information was afforded the defendant to inform him of the specific prior convictions upon which the State relied for enhanced punishment to comply with due process. Benson v. State, 551 So. 2d 188 (Miss. 1989).

Submission of aggravating circumstances of heinous, atrocious, and cruel crime did not deny defendant his rights under Constitution of Mississippi and United States; although defendant contended there was no evidence supporting this aggravating circumstance and that evidence was uncontroverted that victim was shot dead as soon as he opened door to his house, state argued that there was no evidence that victim was dead or even unconscious when later shots were fired. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Revocation of a suspended sentence without notice and an opportunity to be heard at public hearing to defendant violates the requirements of due process, even though the statute providing for such revocation does not specifically provide for notice and public hearing. Mason v. Cochran, 209 Miss. 163, 46 So. 2d 106 (1950).

Revocation of suspended sentence in hospital where circuit judge was confined as patient, upon ex parte application of sheriff and county attorney, which was concurred in by the district attorney, at a time when defendant was confined in jail on pending charges for violations of law, and without notice or hearing to defendant, constituted violation of the requirements of due process. Mason v. Cochran, 209 Miss. 163, 46 So. 2d 106 (1950).

Where prior to the date of execution set for the defendant, the method thereof was changed from hanging to electrocution by means of an electric chair but no chair had as yet been obtained when such date arrived, resentencing and fixing another date for the execution was not a taking of defendant's life without due process of law. Childress v. State, 1 So. 2d 494 (Miss. 1941).

41. — — Time for review, crimes and criminal procedure.

The time limitations provisions of the Mississippi Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) do not work an unconstitutional suspension of the writ of habeas corpus. Cole v. State, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

42. — — Vague or indefinite statutes, crimes and criminal procedure.

Business owner did not meet his burden of showing that he was being deprived of his property without due process of law because the criminal statutes, Miss. Code Ann. § 97-33-7 and Miss. Code Ann. § 97-33-17, were not too broad in their description of what caused a video game to be an illegal slot machine, and a person with ordinary intelligence would have little difficulty determining what exactly was prohibited; Mississippi did not extend a property right to illegal gambling machines, such that there were no due process rights violations, and Miss. Code Ann. § 97-33-7(2) was not unconstitutionally vague. Trainer v. State, 930 So. 2d 373 (Miss. 2006).

Kidnapping statute, Miss. Code Ann. § 97-3-53, is not unconstitutionally vague because the use of other descriptive words in § 97-3-53, such as e.g. and inveigle, leave defendants well informed of the crimes of which they are accused. Perkins v. State, 863 So. 2d 47 (Miss. 2003).

Miss. Code Ann. § 97-3-95 was held not to be unconstitutionally vague in a sexual battery case where the inmate admitted that he knew that raping an 11-year-old girl was wrong, but he did it anyway. Calhoun v. State, 849 So. 2d 892 (Miss. 2003).

Criminal statute prohibiting disorderly conduct by failing or refusing to promptly reply with or obey request or order of law enforcement officer was not unconstitutionally vague under due process clause as applied to arcade owner who carried baseball bat toward small crowd in his parking lot; regardless of whether owner was cursing or threatening officer, presence of baseball bat greatly enhanced possibility of grievous injury to police officers or others if disturbance escalated, case concerned officer's right to control conduct greatly increasing potential for sudden violence, and statute provided adequate notice that failure to obey order under the circumstances could result in arrest. Smith v. City of Picayune, 701 So. 2d 1101 (Miss. 1997).

Section 97-3-7(2) is not unconstitutionally vague on the ground that it does not define the term "serious bodily harm," particularly when applied in a case involving brutal injuries; in more ambiguous cases, prosecutors and trial courts should refer to the definition of "serious bodily injury" set out in § 210.0 of the Model Penal Code. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

The sexual battery statute, § 97-3-95, is not void for vagueness and in violation of due process of law since, the statute as it applies to a male adult who allegedly stuck his finger into the vagina of a 10-year-old girl, gives prior notice to a person of ordinary intelligence that the defendant's alleged conduct is forbidden, and there are no indications that the statute encourages erratic arrest and convictions. Roberson v. State, 501 So. 2d 398 (Miss. 1987).

43. Prisons and prisoners—In general.

A prison inmate does not have a protected liberty interest in a particular job assignment under the due process clause. However, a liberty interest may be created by state law or prison regulation. McFadden v. State, 580 So. 2d 1210 (Miss. 1991).

44. — — Administrative segregation, prisons and prisoners.

Inmates who are placed in administrative segregation have no constitutional basis for demanding the same privileges as those inmates in the general prison population since prison officials have the discretion to determine whether and when to provide prisoners with privileges such as showers, exercise, visitation, and access to personal property. Thus, the 5 hours a week of exercise plus nightly showers of 15 minutes which were provided to an inmate confined to administrative segregation did not constitute cruel and unusual punishment. Additionally, the procedures provided when the inmate was placed in administrative segregation satisfied the due process clause where the inmate received notice of detention and a hearing on the matter. Terrell v. State, 573 So. 2d 730 (Miss. 1990).

45. — — Earned time, prisons and prisoners.

The unexplained failure to award an inmate meritorious earned time did not amount to a violation of his federal and state constitutional rights to due process and equal protection, since an inmate's earning of "time" is a matter of grace or privilege under § 47-5-142, which provides that "meritorious earned time may be awarded." Since correctional officials are vested with discretionary power to award time under certain conditions, inmates are not entitled to it. Ross v. State, 584 So. 2d 777 (Miss. 1991).

46. — — Parole, prisons and prisoners.

Inmate's due-process rights were not violated when his parole was revoked because upon receiving a certified copy of the order of the court of appeals, the parole board had authority pursuant to Miss. Code Ann. 47-7-27 [Repealed] to immediately revoke the inmate's parole on his earlier conviction; a preliminary revocation hearing and a parole-revocation hearing were held, and the parole board then sent the inmate a letter, which provided notice of its decision to revoke his parole and afforded an opportunity to present evidence on his behalf. Walker v. State, 35 So. 3d 555 (Miss. Ct. App. 2010).

A trial court properly denied a parolee's petition for writ of habeas corpus, in which the parolee claimed that he was not afforded a timely parole revocation hearing, where the admitted evidence showed that the parolee had violated the conditions of his parole by 2 Tennessee felony convictions and failure to waive extradition back to Mississippi; these were reasonable grounds for revoking his parole, and therefore all procedural due process guarantees were met. Godsey v. Houston, 584 So. 2d 389 (Miss. 1991).

The Mississippi parole statutes do not create a constitutionally protected liberty interest in the form of an expectation of parole because of the use of the permissive "may" in § 47-7-3, which provides that a prisoner "may be released on parole as hereinafter provided," read in the context of the other provisions of that section and, as well, those of § 47-7-17. Thus, Mississippi law did not vest a convicted and incarcerated felon with a liberty interest in parole entitling him to due process of law incident to his application for parole. Harden v. State, 547 So. 2d 1150 (Miss. 1989).

47. — — Probation, prisons and prisoners.

Denial of the inmate's motion for postconviction relief was appropriate because his due process rights were not violated by the failure to appoint counsel for him at his probation revocation hearing. The issues relevant to his probation revocation were not complex nor were they difficult to present; thus, the inmate had no right to counsel. Staten v. State, 967 So. 2d 678 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 294 (Miss. 2008).

Denial of the inmate's petition for post-conviction relief was proper where his due process rights were not violated by the reference to a probation violation with which he was not charged because the revocation of his probation was clearly based upon a finding that he had failed to avoid persons or places of disreputable or harmful character by remaining in a place where marijuana was being used. Hubbard v. State, 919 So. 2d 1022 (Miss. Ct. App. 2005).

A defendant's probation revocation violated her due process rights where there was no record of the defendant receiving notice of a probation violation, and the disparity between the court's statements when probation was revoked, the written and signed order of revocation, and the court's after-the-fact explanation at the defendant's post-conviction relief hearing demonstrated a lack of actual notice. Berdin v. State, 648 So. 2d 73 (Miss. 1994). But see Smith v. State, 742 So. 2d 1146 (Miss. 1999).

A defendant was deprived of due process by a trial court's failure to conduct an inquiry as to the reason she was delinquent in paying her probation fines before revoking her probation because of her failure to pay those fines. Berdin v. State, 648 So. 2d 73 (Miss. 1994). But see Smith v. State, 742 So. 2d 1146 (Miss. 1999).

A defendant who allegedly violated the terms of his probation by committing the crime of sale of cocaine was denied due process of law by having his probation revoked immediately after a mistrial was declared in his trial on the charge of sale of cocaine where the revocation was based upon the trial which had just resulted in a mistrial, the defendant never agreed that the court could summarily revoke his probation in the event the trial resulted in anything other than a conviction, and he was not given advance notice of a revocation hearing. Grayson v. State, 648 So. 2d 1129 (Miss. 1994).

Neither the due process clause nor Mississippi law gives rise to a protected liberty interest in the form of an expectation of release on probation. There is no liberty interest in release pursuant to the provisions of § 47-7-47, which creates a procedure whereby the courts may place a prisoner on probation, since the language of the statute is permissive rather than mandatory in nature; the statute vests absolute discretion in both the Department of Corrections and the court in determining whether probation should be recommended and granted, and this discretion affords a prisoner no constitutionally recognized liberty interest. Smith v. State, 580 So. 2d 1221 (Miss. 1991).

A probationer was not denied due process due to the lack of a preliminary hearing in his probation revocation proceedings, even though a hearing expressly designated as "preliminary" was not held, where 3 hearings were held in the circuit courts and the first and second hearings were, for all practical purposes, equivalent to a preliminary hearing. Additionally, the probationer was not wrongfully denied the opportunity to call his own witnesses where he made a last-minute request during the third hearing to call witnesses who allegedly would have testified in his behalf, the court concluded that the witnesses would have offered no new evidence, the probationer had already admitted that he committed probation violations, and at most the witnesses would have testified in regard to the probationer's character and would have had no effect on the outcome of the case. Riely v. State, 562 So. 2d 1206 (Miss. 1990).

The probation-revocation procedure delineated in § 47-7-37 is constitutional; the statute includes the minimum due process requirements applicable to parole and probation revocation procedures. Riely v. State, 562 So. 2d 1206 (Miss. 1990); Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

A guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial, and the right that the prosecution prove each element of the offense beyond a reasonable doubt. Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

48. — — Transfer, prisons and prisoners.

A prisoner did not have a protected liberty interest in being transferred from a county correctional facility to a state prison, absent a state law or regulation or prison policy or procedure conditioning such a transfer on proof of misbehavior or some other event. McFadden v. State, 580 So. 2d 1210 (Miss. 1991).

49. — — Visitation rights, prisons and prisoners.

Although prisoners do not enjoy an absolute constitutional right to unrestricted visitation, and their visitation privileges are subject to the discretion of prison officials, restrictions on an inmate's visitation privileges should not be imposed arbitrarily or discriminatorily. Puckett v. Stuckey, 633 So. 2d 978 (Miss. 1993).

50. Penalties and forfeitures—In general.

Read literally, §§ 49-7-251 to 49-7-257 violate the Mississippi Constitution's due process guarantee, and therefore the statutes would be construed to include an exception for "innocent owners." Threlkeld v. State ex rel. Miss. Dep't of Wildlife, Fisheries & Parks, 586 So. 2d 756 (Miss. 1991).

51. — — Attorney fees, penalties and forfeitures.

A statute imposing a penalty of an attorney's fee on certain class and not on all for failure to pay employee, violates this section. Sorenson v. Webb, 111 Miss. 87, 71 So. 273 (1916).

As to the right to impose penalties and counsel fees on depositories for failure to pay on demand see Fidelity & Deposit Co. v. Wilkinson County, 109 Miss. 879, 69 So. 865 (1915).

52. — — Prisons and prisoners, penalties and forfeitures.

The actions of corrections officials in designating a prisoner eligible for earned time, due to an administrative or clerical error, and then in withdrawing that designation, did not amount to a forfeiture of earned time without due process since no earned time was accumulated by the prisoner. Doctor v. State, 522 So. 2d 229 (Miss. 1988).

53. — — Liquor offenses, penalties and forfeitures.

In an action to condemn and sell an automobile which had been seized while in possession of a third person, who had allegedly used it for transporting intoxicating liquor, the owner, in interposing his claim, was entitled to give a forthcoming bond and gain possession thereof pending a hearing, both in the circuit court and on appeal, as to his ownership thereof, and as to whether he had knowingly permitted it to be used for unlawful purposes in violation of Code 1942, §§ 2618 and 2619. Stringer v. State, 229 Miss. 412, 91 So. 2d 263 (1956).

It is constitutional to give the chancery courts jurisdiction of suits for penalties for violations of liquor laws. State ex rel. Att'y Gen. v. Marshall, 100 Miss. 626, 56 So. 792, Am. Ann. Cas. 1914A,434 (1911).

54. Racial discrimination.

Peremptory strike was not race-neutral because, in requesting the strike, counsel argued that he wished to strike the juror because she was Baptist; however, counsel did not strike another juror who was also Baptist and white, and the juror was not questioned about her religion and whether that would impair her ability to be an impartial juror. Wilson v. Strickland, 953 So. 2d 306 (Miss. Ct. App. 2007).

The statutes of the state authorizing consolidated schools do not discriminate between the white and colored races. Barrett v. Cedar Hill Consol. Sch. Dist., 123 Miss. 370, 85 So. 125 (1920).

It was held that the statute requiring railroads to provide equal separate Pullman accommodations for the white and colored races is not violative of this section. Southern Ry. v. Norton, 112 Miss. 302, 73 So. 1 (1916).

The board of supervisors by intentionally leaving names of qualified negroes off the jury list violates this section. Farrow v. State, 91 Miss. 509, 45 So. 619 (1908).

55. Public improvements and highways.

Individual citizen has no due process right under Mississippi Constitution to reasonable advance notice and opportunity to be heard before legislative action is taken establishing policy to undertake substantial public improvements and to finance same via bond issue. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

Subsequent to bond validation decree becoming final, taxpayer may not be heard to complain of legality or constitutionality of facet of bond issue or project to be funded which could have been presented and fully heard at bond validation hearing; however, that which could not have been presented (because of limited scope of hearing or whatever) may not be precluded from subsequent litigation consistent with due process. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

Chapter 176, Laws of 1914, providing for elections to issue highway bonds does not deprive of property without due process of law. Prather v. Googe, 108 Miss. 670, 67 So. 156 (1915).

56. Use of property—In general.

The discretion granted the Secretary of State by § 29-15-7 was not unconstitutionally vague in violation of the Fourteenth Amendment to the United States Constitution and Article 3, § 14 of the Mississippi Constitution, since the procedure established by the tidelands legislation had a reasonable relation to the governmental purpose of establishing the boundary of public trust lands; the mere fact that the discretion granted the Secretary of State could be interpreted in different lights did not automatically render it vague. Secretary of State v. Wiesenberg, 633 So. 2d 983 (Miss. 1994).

A statute authorizing public utilities to enter on lands to make a preliminary examination and survey with a view to condemnation, subject to liability for any damage done, does not violate this provision. Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546 (1962).

57. — — Zoning laws, use of property.

Where the building inspector granted the ice company permits for an ice dispenser, the city's action in applying for a variance and overturning the decision to grant the permit were arbitrary and capricious and violated the company's due process rights under the United States Constitution and the Mississippi Constitution. No notice of the hearing was given to the company. City of Petal v. Dixie Peanut Co., 994 So. 2d 835 (Miss. Ct. App. 2008), writ of certiorari dismissed by 998 So. 2d 1010, 2008 Miss. LEXIS 683 (Miss. 2008).

Absent proof of a significant impact on the values of the neighbors' property, no property interest existed for which some process was due as a matter of constitutional right; the property owner's first request to the city to split her lot was made in 1999, and notice was given on April 6, 2001 that the matter would be considered on April 9, so constitutional process was not due, as no property deprivation existed and there was no defect in notice. Hinds v. City of Ocean Springs, 883 So. 2d 111 (Miss. Ct. App. 2004), writ of certiorari denied by 883 So. 2d 1180, 2004 Miss. LEXIS 1251 (Miss. 2004).

Decision of city fathers in drawing and maintaining line past which commercial development would not be allowed was not arbitrary, capricious, or unreasonable, where there was substantial evidence supporting both sides of rezoning application, thus making ultimate decision fairly debatable; same reasoning applied to denial of assertion that zoning restriction amounted to confiscatory taking in violation of due process of law under constitution because that issue is intertwined with review of whether zoning decision is arbitrary, capricious, or unreasonable. Saunders v. City of Jackson, 511 So. 2d 902 (Miss. 1987).

The due process rights, if any, guaranteed to objectors of a rezoning proposal is reasonable advance notice of the substance of the rezoning proposal together with the opportunity to be heard at all critical stages of the process. Thrash v. Mayor & Comm'rs of Jackson, 498 So. 2d 801 (Miss. 1986).

The construction and maintenance of a warehouse for the reception of freight on railroad right-of-way, which had existed as such for more than 50 years prior to the adoption of an ordinance making most of such right-of-way a residential district, held to be a reasonable use of such right-of-way in facilitating the the company's principal business and no more objectionable than the operation of trains, and to be authorized by provision of ordinance excepting existing nonconforming uses; and, accordingly, action of city authorities in denying such use of the property was an unreasonable and arbitrary interpretation of the ordinance which tended to deprive the company of its property and use thereof in violation of both Federal and State Constitutions. Jones v. City of Hattiesburg, 207 Miss. 491, 42 So. 2d 717 (1949).

Although a zoning ordinance enacted under ch 198, Laws 1944, amending ch 448, Laws 1938, a rural zoning statute, may be valid in its general aspects, when applied to a particular area or piece of property and a particular set of facts, the ordinance is so arbitrary and unreasonable as to result in confiscation, the ordinance is void as applied to the particular property or area. Frederic v. Board of Supvrs., 197 Miss. 293, 20 So. 2d 92 (1944), error overruled, 197 Miss. 300, 20 So. 2d 671 (1944).

A rural zoning ordinance enacted under Laws 1944, chapter 198, amending Laws 1938, chapter 448, to be valid, must comply with constitutional requirements that private property shall not be taken or damaged for public use without compensation, and that no person shall be deprived of property except by due process of law. Frederic v. Board of Supvrs., 197 Miss. 293, 20 So. 2d 92 (1944), error overruled, 197 Miss. 300, 20 So. 2d 671 (1944).

Rural zoning ordinance, enacted under Laws 1944, ch 198, amending Laws 1938, ch 448, acquires no facility to avoid constitutional guaranties (that private property shall not be taken or damaged for public use without compensation and that no person shall be deprived of property except by due process of law) by the mere device of giving it a name, or by coupling it with a commendatory preamble. Frederic v. Board of Supvrs., 197 Miss. 293, 20 So. 2d 92 (1944), error overruled, 197 Miss. 300, 20 So. 2d 671 (1944).

The effect of an ordinance forbidding the erection of any house, etc., between the road or street of a municipality and the sea without obtaining a special permit therefor, and declaring any such house, etc., a nuisance, was to deprive owners of property of its lawful use without just compensation being first made. Quintini v. Mayor of Bay St. Louis, 64 Miss. 483, 1 So. 625, 60 Am. R. 62 (1887).

58. Eminent domain.

Because contestants never raised their takings argument before the Mississippi Oil and Gas Board or on appeal, the claim was procedurally barred. Adams v. Miss. State Oil & Gas Bd., 139 So. 3d 58 (Miss. 2014).

Regardless of the adequacy of the post-deprivation remedies in § 65-1-301, the statute must provide a predeprivation hearing before taking property; because it does not provide for such a pre-deprivation hearing, §§ 65-1-301 to 65-1-347 are unconstitutional as violative of procedural due process. Lemon v. State Transp. Comm'n, 735 So. 2d 1013 (Miss. 1999).

Owner/developer of a rundown apartment complex did not suffer violations of its right to due process because the owner/developer did not have property interests via contractual rights in the Moderate Rehabilitation Contract or the Annual Contribution Contract at issue and therefore could not have been deprived of the contracts without due process. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

59. Negligence and contributory negligence.

The legislature is not prohibited from changing the common law rule with reference to contributory negligence being a defense. Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920).

The legislature may by statute provide that injuries caused by the running of trains is prima facie evidence of negligence on part of railroad company. New Orleans, M. & C.R. Co. v. Cole, 101 Miss. 173, 57 So. 556 (1912).

The contributory negligence statute is not violative of this section. Natchez & S.R. Co. v. Crawford, 99 Miss. 697, 55 So. 596 (1911).

60. Animal legislation.

Neither livestock sanitary board nor its officers have right to seize cattle without process of law and charge owner with costs of dipping them for eradication of ticks; officers of livestock sanitary board seizing cattle without legal process are liable to owner for damages. D'Aquilla v. Anderson, 153 Miss. 549, 120 So. 434 (1929).

Chapter 38, Ex Session Laws of 1917, requiring counties to pay owners of cattle injured in dipping is not violative of this section. Hancock County v. Shaw, 120 Miss. 48, 81 So. 647 (1919).

It is lawful for the state board of health to provide for examination of cows used in dairy business. Hawkins v. Hoye, 108 Miss. 282, 66 So. 741 (1914), error overruled, 66 So. 1015 (Miss. 1915).

The statute regulating and restricting the capture of creatures ferae naturae not reduced to actual possession is not violative of this section. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. R. 700 (1905).

A municipal ordinance authorizing the killing of unmuzzled dogs running at large is not invalid. Illinois Cent. R.R. v. Peterson, 68 Miss. 454, 10 So. 43 (1891).

61. Political parties and elections.

Primary claim advanced by plaintiff in state court action, that voting malapportionment which allegedly violated one-person, one-vote guaranteed by Article 3, Section 14, was sufficient to stand as independent ground for challenging election procedure, and federal issue under Voting Rights Act could collaterally attach to such claim. Republican Party v. Adams County Election Comm'n, 775 F. Supp. 978 (S.D. Miss. 1991).

Section 23-15-217 is not unconstitutionally void for vagueness because ordinary person of common intelligence upon reading it could understand what was allowed and what was not; statute provides two disqualifications upon county election commissioner offering himself as candidate for office: the first, no person holding office of elections commissioner may be candidate for election to any other office at any election held or to be held during 4 year term for which that person has been elected to serve as elections commissioner; second, commissioner may not be candidate for any other office in any election with respect to which he has taken any action in his official capacity; exception to both disqualifications is that incumbent election commissioner may be candidate for re-election. Meeks v. Tallahatchie County, 513 So. 2d 563 (Miss. 1987).

Access to candidacy is not fundamental right and § 23-15-217 places no special burdens on minority parties or independent candidates; state has legitimate interest in preventing election commissioner from seeking another office while he has control of electors that shall vote for all candidates, where there would be potential for mischief were elections commissioner allowed effective control over registration and poll books, for 2 years, for example, then allowed to resign and seek another elective office. Meeks v. Tallahatchie County, 513 So. 2d 563 (Miss. 1987).

When individual files proper qualifying papers and pays requisite filing fee to become candidate for public office, neither state nor, in case of primary election, political party, may arbitrarily or capriciously deprive him or her of place on ballot; process afforded to individual by party executive committee exceeded his minimum due, where individual informally learned that committee was meeting, had acted negatively upon his candidacy, went uninvited to meeting, and there appeared before committee and fully presented his views and case. Meeks v. Tallahatchie County, 513 So. 2d 563 (Miss. 1987).

A statute which provides for the creation of a second judicial district in a certain county and the holding of an election to determine whether such district shall be created is not unconstitutional as denying equal protection of the laws. Carter v. Harrison County Election Comm'n, 183 So. 2d 630 (Miss. 1966).

62. Regulation of business and professions — In general.

In a case involving a certificate of need, procedural due process rights were not violated where all of the steps under Miss. Code Ann. § 41-7-197 were followed; no parties to the proceeding, no health care facilities in the same health care service area, and no others originally noticed, appeared to request a new hearing. The issue of import to satisfy the requirements of the Mississippi State Health Plan was not the specific route, but rather the number of procedures, and notice of a new route was given. Miss. State Dep't of Health v. Baptist Mem. Hospital-DeSoto, Inc., 984 So. 2d 967 (Miss. 2008).

Massage therapist's due process rights were not violated when a Mississippi State Board of Massage Therapy member investigated the client's complaint against the therapist and later participated in the administrative hearing because the Board member's dual capacity as investigator and hearing participant was procedurally correct. Dawson v. Miss. State Bd. of Massage Therapy, 949 So. 2d 829 (Miss. Ct. App. 2006).

Trial court erred in overturning a board's denial of an application for a funeral service license where the applicant stated that he planned to do his training in Mississippi, but actually worked in Tennessee; at the board's hearing, the applicant was allowed to present witnesses and other forms of evidence, and his due process concerns were adequately addressed. Miss. State Bd. of Funeral Servs. v. Coleman, 944 So. 2d 92 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 730 (Miss. 2006).

One is entitled to due process of law before an administrative agency. McFadden v. Mississippi State Bd. of Medical Licensure, 735 So. 2d 145 (Miss. 1999).

Due process does not require allocation of permissible production on the basis of the productivity of each well instead of upon a surface acreage basis. Barnwell, Inc. v. Sun Oil Co., 249 Miss. 398, 162 So. 2d 635 (1964).

Code 1942, § 1108, known as "Fair Trade Act," permitting producer, manufacturer or owner to contract with retailer as to resale price of his own product which is in fair and open competition with commodities of same general class produced by others, does not violate this section. W.A. Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950).

State cannot, under guise of protecting public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

Ordinance and statute prohibiting auction sales by jewelers between certain hours held not to violate due-process clause and equality clause. Matheny v. Simmons, 165 Miss. 429, 139 So. 172 (1932).

Statute forbidding unlawful combinations of cotton ginners does not contravene due process clause. State ex rel. Jordan v. Gilmer Grocery Co., 156 Miss. 99, 125 So. 710 (1930).

The "bulk sales statute" is constitutional. Moore Dry Goods Co. v. Rowe, 97 Miss. 775, 53 So. 626 (1910), error overruled 99 Miss. 30, 54 So. 659.; Phillipps & Buttorff Mfg. Co. v. Perkins & Elmore, 53 So. 628 (Miss. 1910).

Pool rooms legalized by statute cannot be prohibited by municipal ordinance. Crittenden v. Town of Booneville, 92 Miss. 277, 45 So. 723, 131 Am. St. R. 518 (1908).

63. — — Accountants and tax preparers, regulation of business and professions.

Code 1942, §§ 8905-8911, establishing a class of certified public accountants, providing for their regulation and prohibiting others from holding themselves out as such, is a valid exercise of the police power of the State. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

Code 1942, § 8912, prohibiting any person other than a certified public accountant or an attorney from receiving compensation for making or preparing any tax return is not a reasonable exercise of the police power, is not in promotion of the public welfare, and is without reasonable relation to the advancement of public convenience, health, morals, or safety, is arbitrarily discriminatory, and is an infringement of the right to pursue an occupation gainfully, and hence is in violation of the Constitution. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

64. — — Attorneys, regulation of business and professions.

The complaint procedure established by the Supreme Court for attorney disciplinary proceedings does not violate due process on the ground that it does not provide for an appeal to any other state court. Asher v. Mississippi Bar, 661 So. 2d 722 (Miss. 1995).

The complaint procedure established by the Supreme Court for attorney disciplinary proceedings does not violate due process on the ground that members of the complaint tribunal are also members of the Mississippi Bar. Asher v. Mississippi Bar, 661 So. 2d 722 (Miss. 1995).

The Rules of Discipline for the Mississippi State Bar do not violate due process or § 33 of the Mississippi Constitution; attorney disciplinary proceedings are an integral part of the functioning of the judicial branch and thus are not subject to the "legislative power" vested in § 33. Hall v. Mississippi Bar, 631 So. 2d 120 (Miss. 1993).

An attorney who was suspended from the practice of law following a felony conviction in the federal courts and who was disbarred 3 years later at the conclusion of his appeal of the federal conviction, was not denied equal protection or due process rights on the ground that he would be required to wait 3 years longer before reinstatement than an attorney who chose not to appeal a conviction. All disbarred attorneys are treated equally; the disparity of time arises when an attorney resists the disbarment pending his or her appellate procedures. Had the attorney accepted the disbarment following his conviction, no delay in entering a final order of disbarment would have resulted, and therefore there was no unequal treatment or denial of due process. Additionally, the attorney's disbarment was not retroactive to the date of his suspension since the attorney's initiative delayed the entry of the final order; retroactivity cannot be applied when the attorney seeks a stay of the final order. Mississippi State Bar v. Nixon, 562 So. 2d 1288 (Miss. 1990), reinstatement granted, 618 So. 2d 1283 (Miss. 1993).

The fact that an attorney for a school's board of trustees participates in a dismissal hearing, advises the board and generally runs the hearing affords the employee no grounds for complaint unless it can be shown that in fact the attorney corrupted or otherwise destroyed the impartiality of the process. Hoffman v. Board of Trustees, E. Miss. Junior College, 567 So. 2d 838 (Miss. 1990).

Since Bar disciplinary proceedings are inherently adversarial proceedings of a quasi-criminal nature, in the course of those proceedings there is secured to the accused attorney the right to due process of law, and within such secured due process right is the right of the accused attorney to have access to compulsory process for obtaining attendance of witnesses at critical stages of the proceedings. Attorney K. v. Mississippi State Bar Ass'n, 491 So. 2d 220 (Miss. 1986).

65. — — Banks and banking, regulation of business and professions.

State bank guaranty statute authorizing issuance of noninterest-bearing certificates held not invalid as depriving holder of certificate of deposit, to interest-bearing guaranty certificate under earlier statute, of vested right. Love v. Mangum, 160 Miss. 590, 135 So. 223 (1931).

66. — — Education, regulation of business and professions.

Only those persons who, out of personal animosity, or personal or financial stake in the decision, are shown of such bias that the presumption of honesty and integrity of school board members is overcome, shall be disqualified from service on a hearing board based on due process considerations. Hoffman v. Board of Trustees, E. Miss. Junior College, 567 So. 2d 838 (Miss. 1990).

Section 9, Chapter 10, Laws of 1953 (§ 6271-09) prescribing additional qualification for county superintendents of public education, but also providing that no person who was serving as county superintendent of education at the effective date of the Act should be ineligible for the office because of lack of the qualifications prescribed therein, was not invalid as containing an unreasonable discrimination in favor of incumbents, and did not violate the equal protection and due process clauses of the Federal and State Constitutions. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

67. — — Insurance, regulation of business and professions.

If it be said that the legislature by reenacting a statute making persons carrying on certain activities for an insurance company agents of the company adopted the construction put on it by previous judicial decisions, which had the effect to raise an insurance company's special agent with limited powers, into its general agent when acting for it in the particulars specified herein, with authority to then make material changes in a policy of insurance issued by the company, in violation of its provisions, such statute, so construed, would violate due process of law. Saucier v. Life & Cas. Ins. Co., 189 Miss. 693, 198 So. 625 (1940).

Statute imposing personal liability on policy on agent of insurance company unauthorized to do business in State held not unconstitutional as abridging privilege of contract and depriving agent of defense of agency. Wilkinson v. Goza, 165 Miss. 38, 145 So. 91 (1932).

68. — — Physicians, regulation of business and professions.

Physician, who was licensed and occasionally practiced medicine in Mississippi, and a medical clinic, which had an office and rented timeshare office space in Mississippi, subjected themselves to suit under the clear terms of the long-arm statute, Miss. Code Ann. § 13-3-57, by doing business in the state. Considering the interests of Mississippi in providing a forum for legal redress for residents who were negligently injured by out-of-state physicians, the court found that the circuit court's assumption of personal jurisdiction over the physician comported with traditional notions of fair play and substantial justice and did not offend U.S. Const. Amend. XIV. Estate of Jones v. Phillips, 992 So. 2d 1131 (Miss. 2008).

Pediatrician was afforded due process upon the suspension of her hospital privileges in the area of neonatal resuscitation. The pediatrician was given the opportunity to appear at the review hearing, to submit evidence, and to review documents supporting the hospital's decision. Warnick v. Natchez Cmty. Hosp., Inc., 904 So. 2d 1019 (Miss. 2004).

The waiver of opening statements in a proceeding before the Board of Medical Licensure did not violate due process. McFadden v. Mississippi State Bd. of Medical Licensure, 735 So. 2d 145 (Miss. 1999).

The fact that the Board of Medical Licensure performed both investigative and adjudicative functions did not violate due process. McFadden v. Mississippi State Bd. of Medical Licensure, 735 So. 2d 145 (Miss. 1999).

Physician was collaterally estopped from relitigating issue of whether hospital's termination of his surgical privileges was state action for purposes of due process clause of State Constitution, where federal court had previously determined that hospital's actions were not state action for purpose of Federal Constitution. Wong v. Stripling, 700 So. 2d 296 (Miss. 1997).

Physician's procedural due process rights were satisfied in proceedings that resulted in denial of reinstatement of medical license when physician was provided with opportunity to be heard, to present witnesses, to cross-examine adverse witnesses, to be represented by attorney of physician's choice, and physician was given ample notice of hearings and detailed explanation of why license was not reinstated. Montalvo v. Mississippi State Bd. of Medical Licensure, 671 So. 2d 53 (Miss. 1996).

A physician may be required to be examined and secure license before he practices medicine. State v. Tucker, 102 Miss. 517, 59 So. 826 (1912).

69. — — Utilities, regulation of business and professions.

A bill that created a sewer district and an ordinance that established a gray-water collection system and that regulated the use of public and private sewers and drains were not unconstitutional. Croke v. Lowndes County Bd. of Supvrs., 733 So. 2d 837 (Miss. 1999).

No impairment of contract rights results from denying to a utility having an exclusive municipal franchise and street lighting contract the right to extend its service into annexed territory which is part of the certificated area of another utility. Capital Elec. Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 514, 150 So. 2d 534 (1963), appeal dismissed, cert. denied, 375 U.S. 77, 84 S. Ct. 196, 11 L. Ed. 2d 142 (1963), reh'g denied, 375 U.S. 981, 84 S. Ct. 478, 11 L. Ed. 2d 428 (1964).

No impairment of contract obligation is involved in holding that a utility may continue to serve a portion of its certificated area after its annexation to a city, as against a utility having an exclusive franchise. Delta Elec. Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 482, 149 So. 2d 504 (1963), appeal dismissed, cert. denied, 375 U.S. 77, 84 S. Ct. 196, 11 L. Ed. 2d 142 (1963), reh'g denied, 375 U.S. 981, 84 S. Ct. 478, 11 L. Ed. 2d 428 (1964).

70. — — Price control, regulation of business and professions.

The provision for the fixing of prices by the Milk Control Act of 1960, being a valid exercise of the police power, does not violate this provision. Mississippi Milk Comm'n v. Vance, 240 Miss. 814, 129 So. 2d 642 (1961).

71. — — Taxis, regulation of business and professions.

Permit to operate taxicabs in city constitutes a permit to do that which would otherwise be unlawful; and, being a mere personal privilege, it is revocable for due cause and is not a vested, or property right in a constitutional sense. Allen v. City of Kosciusko, 207 Miss. 343, 42 So. 2d 388 (1949).

Operator of fleet of taxicabs could not challenge constitutionality of ordinance revoking all taxicab permits and establishing new permit requirements, passed subsequent to revocation of his license without notice and hearing, where he did not apply for a permit under the new ordinance and, therefore, was unaffected thereby. Allen v. City of Kosciusko, 207 Miss. 343, 42 So. 2d 388 (1949).

72. — — Railroads, regulation of business and professions.

An ordinance requiring railroads to light their crossings is not confiscatory and unreasonable where it applies only to main lines, and not to spurs, side tracks and switch tracks. Illinois Cent. R.R. v. Williams, 242 Miss. 586, 135 So. 2d 831 (1961).

State may lawfully require interstate railroad to abolish at own expense highway grade crossings, without regard to financial ability, if reasonably required by public safety. New Orleans & N.E.R. Co. v. State Hwy. Comm'n, 164 Miss. 343, 144 So. 558 (1932).

Chapter 88 Laws of 1908 authorizing railroad commission to require spur tracks violates this section. McInnis v. New Orleans & N.E.R., 109 Miss. 482, 68 So. 481 (1915).

The railroad commission cannot require physical connection of two railroads. Mississippi R.R. Comm'n v. Yazoo & Miss. V.R. Co., 100 Miss. 595, 56 So. 668 (1911).

As to legislative power to require railroads to maintain depot in every incorporated village through which road passes see Southern Ry. v. State, 95 Miss. 657, 48 So. 236, Am. Ann. Cas. 1912A,225 (1909).

As to vested rights of the railroad company by charter see Alabama & V. Ry. Co. v. King, 93 Miss. 379, 47 So. 857 (1908).

It is lawful by statute to make bills of lading conclusive evidence of receipt of property. Yazoo & Miss. V. Ry. v. G.W. Bent & Co., 94 Miss. 681, 47 So. 805 (1908).

Section 3555 of the Code of 1892 (Code 1906 § 4053), though applying to railroads constructed before its passage, does not infringe this section. Illinois Cent.

R.R. v. Copiah County, 81 Miss. 685, 33 So. 502 (1903).

As to right to require railroad companies to maintain cattle guards see Kansas City, M. & B.R. Co. v. Spencer, 72 Miss. 491, 17 So. 168 (1894); Illinois Cent. R.R. v. Copiah County, 81 Miss. 685, 33 So. 502 (1902); Yazoo & Miss. V. Ry. v. Harrington, 85 Miss. 366, 37 So. 1016 (1905).

73. — — Sunday closing laws, regulation of business and professions.

Absent evidence of invidious discrimination as to a class or a person, state Sunday closing laws did not violate due process clause of state and federal constitutions. Genesco, Inc. v. J. C. Penney Co., 313 So. 2d 20 (Miss. 1975).

74. Unemployment compensation.

Statute (§ 71-5-513) which prohibits payment of unemployment benefits to wife who leaves employment in state to accompany husband to another state does not violate equal protection or due process. Warren v. Board of Review of Miss. Emp. Sec. Comm'n, 463 So. 2d 1076 (Miss. 1985).

Denial to a union member of benefits under the Unemployment Compensation Act because of his refusal to accept nonunion employment is not a denial of a property right in violation of the due process and equal protection clauses of the Constitutions of the United States and the State of Mississippi. Mills v. Mississippi Emp. Sec. Comm'n, 228 Miss. 789, 89 So. 2d 727, 56 A.L.R.2d 1010 (1956).

Determination that drug business employing six persons and dairy business employing four persons was under a common control so as to be within the application of the Mississippi Unemployment Compensation Act did not deprive the defendant of his property without due process of law or deny him the equal protection of the laws, where such determination was based upon evidence that defendant deeded the dairy to his wife to evade liability for benefits under such act that although proceeds of the dairy were used by the wife for remodeling and furnishing their home, defendant retained control over the dairy business, and both businesses were really operated for the benefit of defendant and his family. Mississippi Unemployment Comp. Comm'n v. Avent, 192 Miss. 85, 4 So. 2d 296 (1941), error overruled, 192 Miss. 94, 4 So. 2d 684 (1941), appeal dismissed, 316 U.S. 641, 62 S. Ct. 947, 86 L. Ed. 1727 (1942).

75. Workers compensation.

Award of workers' compensation benefits to an employee was overturned where, as a result of the Mississippi Workers' Compensation Commission's departure from its own procedural rules, certain medical records were entered into evidence that erroneously provided medical causation relating the employee's focal dystonia to the employee's work as a card dealer for the employer; the mandates of due process were not adhered to by the commission. Robinson Prop. Group v. Newton, 975 So. 2d 256 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 284 (Miss. 2008).

Errors occurred when the administrative law judge acted contrary to his ruling at a hearing in which he found that an employee accident report was inadmissible because of discovery violations and when the Mississippi Workers' Compensation Commission chose to disregard the administrative hearing officer's decision as to the enforcement of its own procedural rules; however, the employee could not complain that the Commission's consideration of the employee accident report caused surprise or contend that trial by ambush would have occurred if the administrative hearing officer had allowed the report to be introduced at the hearing because she knew the document existed and what it contained. Thus, although the administrative law judge erred when he reopened the record to admit the employee accident report, the error did not rise to the level of denying the employee due process. Bermond v. Casino Magic, 874 So. 2d 480 (Miss. Ct. App. 2004).

Workers' compensation claimants challenging constitutionality of workers' compensation system failed to show that they suffered inordinate delays in resolution of their benefits claims, and, thus, failed to show state-caused due process deprivation arising out of delays in system, where many of delays complained of by claimants were result of their own or their attorneys' action or inaction. Warren v. Mississippi Workers' Comp. Comm'n, 700 So. 2d 608 (Miss. 1997).

Under Mississippi and Federal Constitutions, there is no due process violation by virtue of exclusive remedy provisions of Workers' Compensation Act, § 71-3-9, precluding action by wife of injured employee for loss of consortium, even though cause of action for loss of consortium is generally recognized under § 93-3-1. West v. Plastifax, Inc., 505 So. 2d 1026 (Miss. 1987).

The Workmen's Compensation Law is not unconstitutional because it makes no discrimination between employees who have been guilty of negligence and employees who have exercised due care or because it denies to the injured employee the right to have damages assessed by a jury according to the conventional methods of the common law. Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).

The Workmen's Compensation Law is not invalid because it undertakes to put all laborers or employees in one class, or because it undertakes to compensate persons of widely differing rights, or persons of widely differing ages, or persons of widely differing responsibilities as to their families under one standard of compensation. Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).

The Workmen's Compensation Law does not violate the due process provisions of the state constitution because it abrogates rights of actions for personal injuries recognized by the common law, or rights of action for personal injury in wrongful death created by statutes; or because it subjects the employer to liability for compensation to his injured employee without regard to any neglect or default on the part of the employer or any other person for whom he is responsible; or because the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commence with the damages actually sustained, and is limited to the measure of the compensation prescribed by the act; or because both the employer and the employee are deprived of their liberty to acquire property by being prevented from making such agreement as they may choose to make respecting terms of employment. Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).

76. Retirement benefits.

There was no violation of due process where a physician examined the claimant and provided a diagnosis and recommendation, and then voted with his fellow members of the medical board in the initial administrative determination to deny the claimant's application for disability retirement benefits as such procedure was justifiable by weighing the importance of the claimant's interests against the risk of an erroneous decision and the costs of alternative procedures. Dean v. Public Emples. Retirement Sys., 797 So. 2d 830 (Miss. 2000).

77. Sovereign immunity.

There is no "property right" to sue the State, since the Mississippi Legislature has withheld that right through its statutes, and therefore the principle of sovereign immunity, as enacted by the legislature in §§ 11-46-1 et seq., does not violate the due process clause of the Mississippi Constitution or the 14th Amendment to the United States Constitution. Robinson v. Stewart, 655 So. 2d 866 (Miss. 1995).

The continuance of electrical power is a property interest worthy of due process protections. Thus, the defense of sovereign immunity was not available to a county where a homeowner alleged that he had been damaged when the county and an electrical utility discontinued his electrical power, since sovereign immunity is no defense where a violation of constitutional rights is concerned. Tucker v. Hinds County, 558 So. 2d 869 (Miss. 1990).

78. Damages.

In a contract dispute over the installation of a swimming pool, a trial court violated a contractor's procedural due process rights in basing its judgment on testimony that was neither taken under oath nor subject to cross-examination where the contractor consulted with a concrete finisher, and relied on the finisher's unsworn opinion. Pulliam v. Chandler, 872 So. 2d 752 (Miss. Ct. App. 2004).

Mississippi's system for awarding punitive damages is not unconstitutional, and therefore the imposition of punitive damages did not violate a defendant's constitutional right to due process. Ciba-Geigy Corp. v. Murphree, 653 So. 2d 857 (Miss. 1994).

The legislature may authorize the guardian of an infant, or person of unsound mind, to agree upon damages to be paid for the property of the ward taken for public use. Louisville, N.O. & T. Ry. v. Blythe, 69 Miss. 939, 11 So. 111, 30 Am. St. R. 599 (1892).

79. Education, schools and students.

Student's due process rights were not violated where he was not afforded notice and an opportunity to be heard at a school board meeting regarding his alleged violation of the school district's weapons policy because the student was afforded notice and an opportunity to be heard before the Appeals Committee. Due process did not require that defendant be afforded with an opportunity to be heard at every step of the student disciplinary process. Hinds County Sch. Dist. Bd. v. R.B., 10 So. 3d 387 (Miss. 2008).

Student was denied his due process rights during disciplinary proceedings against him where not only was the student not allowed to pose questions to the other students involved in the incident, who were not present at the hearing, he had no right to even know the names of the students who accused him; the student received absolutely no notice of the hearing in which the school district was to review the Appeals Committee's recommendation of expulsion for one year and render a final decision on the disciplinary proceeding, and a one-year expulsion required more than the minimal due process protections of notice and right to be heard. Hinds County Sch. Dist. Bd. of Trs. v. R.B., 10 So. 3d 495 (Miss. Ct. App. 2007), reversed by 10 So. 3d 387, 2008 Miss. LEXIS 606 (Miss. 2008).

Superintendent's due process argument was rejected in a case arising from his dismissal because he was not required to get the notice set forth in Miss. Code Ann. § 37-9-109, which covered nonrenewals, and a school district board complied with the procedures set forth in Miss. Code Ann. § 37-9-59 and Miss. Code Ann. § 37-9-111; moreover, even if § 37-9-109 did apply to the case, the superintendent failed to avail himself of the requirements of such. Wilder v. Bd. of Trs. of the Hazlehurst City Sch. Dist., 969 So. 2d 83 (Miss. Ct. App. 2007), writ of certiorari denied by 968 So. 2d 948, 2007 Miss. LEXIS 657 (Miss. 2007).

Right to minimally adequate public education created and entailed by laws of Mississippi is fundamental; as such, young citizens of state enjoy full substantive and procedural protections of due process clause of constitution of state of Mississippi. Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237 (Miss. 1985).

As matter of state substantive due process, school board's disciplinary rule or scheme is constitutionally enforceable where, fairly viewed, it furthers substantial legitimate interest of school district; authority vested in school boards consistent with constitutional limitation includes substantial discretion with respect to administration of punishment to student who violates school rule. Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237 (Miss. 1985).

School bonds may be issued upon petition of a majority of qualified voters, without an election and without a notice. In re Magee Consol. Sch. Bonds, 212 Miss. 454, 54 So. 2d 664 (1951).

80. Landlord-tenant disputes.

A landlord's actions in locking up a tenant's possessions pursuant to § 89-7-51(2) did not violate due process requirements where the landlord failed to use the attachment for rent statutes; since § 89-7-51 did not authorize the landlord to use self-help to seize the tenant's property, there was no state action. Bender v. North Meridian Mobile Home Park, 636 So. 2d 385 (Miss. 1994), rehearing denied.

81. Municipal ordinances.

Clinton, Miss., Zoning Ordinance § 401.05 was unconstitutionally vague as it allegedly applied to property owners when a city attempted to enforce by having the owners remove a treehouse from their front yard because the city provided no notice to the public that it utilized the definition of "accessory structure or use" to define "accessory building or use;" according to the ordinance, an "accessory structure" could be either a "detached structure" or a "use;" there was no definition of "detached structure," but there was a definition of "structure." Further, the definition of use" was vague as well. Mayor of Clinton v. Welch, 888 So. 2d 416 (Miss. 2004).

A city's noise control ordinance, which prohibited "unnecessary or unusual noises...which either annoys, injures or endangers the comfort, repose, health or safety of others...," violated the due process clauses of the federal and state constitutions because it failed to provide clear notice and sufficiently definite warning of the conduct that was prohibited. A statute is unconstitutionally vague when the standard of conduct it specifies is dependent upon the individualized sensitivity of each complainant, and whether a noise is "unnecessary," "unusual" or "annoying" depends upon the ear of the listener. Nichols v. City of Gulfport, 589 So. 2d 1280 (Miss. 1991).

82. Miscellaneous.

There was no due process violation with respect to doctors on the Mississippi Public Employees' Retirement System Medical Board examining claimants, making a diagnosis and recommendation, and then voting as members of the Medical Board on the disability claims; therefore, the denial of a disability claim was upheld. Flowers v. Public Emples. Ret. Sys., — So. 2d —, 2006 Miss. App. LEXIS 247 (Miss. Ct. App. Apr. 4, 2006), opinion withdrawn by, substituted opinion at 952 So. 2d 972, 2006 Miss. App. LEXIS 778 (Miss. Ct. App. 2006).

Arrestee's due process rights were not violated by an assistant district attorney's act of providing incorrect identifying information to police that led to a wrongful arrest in a false pretenses case because the overall actions were objectively reasonable, even though a picture of the correct perpetrator and a discrepancy regarding birth dates was contained in a file; as such, the assistant district attorney was entitled to qualified immunity. Stewart v. DA, 923 So. 2d 1017 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 161 (Miss. 2006).

Where the Mississippi Commission on Environmental Quality found that the tire company had committed numerous violations under a National Pollutant Discharge Elimination System (NPDES) permit, the tire company failed to demonstrate that it had been singled out, or that it was selected for prosecution based upon protected classifications. Further, the appellate court deferred to the Mississippi Department of Environmental Quality's decision regarding the methodology limits the agency implemented, these being based on concentration limits rather than mass limits; in the latter context, the Commission acted within its power in determining that the permit was not "fatally flawed" under the methodology implemented. Titan Tire of Natchez, Inc. v. Miss. Comm'n on Envtl. Quality, 891 So. 2d 195 (Miss. 2004).

In a products liability case arising from use of a prescription drug, the trial court abused its discretion in improperly changing venue to Claiborne County because the record was replete with evidence that defendant drug company had sufficiently proved bias in the community of Claiborne County. Therefore, although the trial court correctly found that it was proper to change venue from Jefferson County, Claiborne County was not a proper venue in which a fair trial could be conducted. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004), modified and rehearing denied by 2004 Miss. LEXIS 1002 (Miss. Aug. 5, 2004).

Sale of sexual devices, or the right of access to such devices by users, is not encompassed by the constitutionally protected right of privacy; advertising of the devices, or their sale is not constitutionally protected speech. PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004).

Section 51-1-4's 100 cubic feet per second standard for determining what constitutes a public waterway suffers no constitutional or other infirmity when scrutinized under §§ 14, 17 or 81 of the Mississippi Constitution or otherwise, or under federal law, including but not limited to the Equal Footings Doctrine and the congressional enactment of 1817 creating the State of Mississippi. Ryals v. Pigott, 580 So. 2d 1140 (Miss. 1990), cert. denied, 502 U.S. 940, 112 S. Ct. 377, 116 L. Ed. 2d 328 (1991).

There is no suggestion of partiality or impropriety in the use of an assistant attorney general as a hearing officer in a hearing before the Department of Natural Resources Permit Board; the attorney general's office affords counsel to state agencies and there is no conflict or suggestion of unfairness in this arrangement. Thus, an environmental organization, which objected to a modified air emissions permit and was afforded an administrative hearing before the Natural Resources Permit Board, was not denied due process of law on the ground that the hearing officer who sat with the Board was a special assistant attorney general. Furthermore, the environmental organization waived any objections it might have had where it made no objection before the Board and proceeded through the hearing without objection, and the organization admitted having knowledge of the identity of the hearing officer as an assistant attorney general well before the hearing and in time to object if any legitimate objection existed. United Cement Co. v. Safe Air for The Env't, Inc., 558 So. 2d 840 (Miss. 1990).

A person may not be involuntarily committed to a state mental institution unless (1) there is clear and convincing evidence that the person is in substantial need of mental treatment, and (2) the state renders to him a minimally adequate course of care and treatment; accordingly, a deceased had a substantive right not to be "warehoused," and if he was substantially mentally ill, the state's right to commit him involuntarily was conditioned on its affording him minimally adequate care and treatment. Chill v. Mississippi Hosp. Reimbursement Comm'n, 429 So. 2d 574 (Miss. 1983).

Absent proof of malice or ill will, the question of due process violations by the judiciary should be remedied, if necessary, by appeal or otherwise and not through disciplinary proceedings. In re Anderson, 412 So. 2d 743 (Miss. 1982).

A provision of the Milk Products Sales Act for recovery by the state of the cost of investigation and of attorney's fees from violators of the Act is not unconstitutional in failing to provide for the recovery of such costs by a person who is charged with a violation of the Act but is the successful party in a suit. McCaffrey v. State ex rel. Patterson, 220 So. 2d 826 (Miss. 1969).

A statute providing for incorporation of a municipality by the proclamation of the Governor, does not violate due process. Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 62 So. 2d 772 (1953).

Laws 1948, ch 430, § 1 amending Laws 1946, ch 363, § 6 (Code 1942, § 7146-06), providing for state aid to nonprofit hospitals under supervision by a state agency in connection with a statewide hospital plan does not violate due process requirement, since it bears a reasonable relation to a governmental purpose as expressed in § 86 of the constitution, imposing upon the legislature the duty to provide for the care of the indigent sick in the hospitals in the state. Craig v. North Miss. Community Hosp., 206 Miss. 11, 39 So. 2d 523 (1949).

Shareholder of capital stock in an incorporated agricultural association, upon becoming ineligible to hold stock by reason of fact that he is no longer a producer of agricultural products and who is unable to sell or transfer his stock to another eligible producer or organization, is entitled under Code 1942, § 4485 to be paid by the association only the par value of his stock which may be paid by association's certificate of indebtedness payable out of future earnings, and not the amount representing the proportion that his shares bear to the present assets of the association even though such amount may be greater than the par value of the shares, and such does not deprive the shareholder of property without due process of law in violation of the constitution. Avon Gin Co. v. Bond, 198 Miss. 197, 22 So. 2d 362 (1945).

Chapter 97, Acts of 1908, regulating procedure of levee board does not violate this section. Bobo v. Board of Levee Comm'rs, 92 Miss. 792, 46 So. 819 (1908).

The section is not violated by the statute requiring a conveyance of a homestead to be made by husband and wife jointly. Lady Ensley Furnace Co. v. Rogan, 95 Ala. 594, 11 So. 188 (1892).

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ALR. Compulsory examination for venereal disease. 2 A.L.R. 1332, 22 A.L.R. 1189.

Constitutionality of statute or ordinance providing for destruction of animals. 8 A.L.R. 67.

Constitutionality of statute regulating the time of payment of wages. 12 A.L.R. 612, 26 A.L.R. 1396.

Income tax on nonresident or foreign corporation. 15 A.L.R. 1326; 90 A.L.R. 484, 156 A.L.R. 1370.

Constitutionality of statute regulating or imposing tax or license fee upon newspapers or magazines. 35 A.L.R. 7, 110 A.L.R. 327.

Constitutionality of statute making unlawful possession of intoxicating liquor legally obtained, or providing for its confiscation. 37 A.L.R. 1386.

Asexualization or sterilization of criminals or defectives. 40 A.L.R. 535; 51 A.L.R. 862; 87 A.L.R. 242.

Constitutionality of "civil rights" legislation by state. 49 A.L.R. 505.

Constitutionality of statute relating to injunctions against crime or abatement of nuisance arising from violation of liquor law. 49 A.L.R. 635.

Constitutionality of statute against solicitation of business by or for attorney. 53 A.L.R. 279.

Constitutionality of statute or ordinance prohibiting or regulating advertising by physician, surgeon, or other person professing healing arts. 54 A.L.R. 400.

Constitutionality of statute affecting riparian rights. 56 A.L.R. 277.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 A.L.R. 20; 82 A.L.R. 345; 116 A.L.R. 209; 132 A.L.R. 91; 139 A.L.R. 673.

Validity of special statute authorizing exemption of industrial concern from taxation. 64 A.L.R. 1217.

Power to extend boundaries of municipal corporations. 64 A.L.R. 1335.

Schools: free textbooks and other school supplies for individual use of pupils. 67 A.L.R. 1196.

Constitutionality of levee and flood control acts. 70 A.L.R. 1274.

Constitutionality of chain store tax. 73 A.L.R. 1481; 85 A.L.R. 736; 112 A.L.R. 305.

Validity of legislation directed against political, social, or industrial propaganda deemed to be of a dangerous tendency. 73 A.L.R. 1494.

Constitutionality of statutes or ordinances for taxation of common carriers by automobile. 75 A.L.R. 13.

State income tax on resident in respect of income earned outside the state. 87 A.L.R. 380.

Validity of so-called "sales tax." 89 A.L.R. 1432, 110 A.L.R. 1485, 117 A.L.R. 846, 128 A.L.R. 893.

Constitutionality of statute permitting state to take or use in evidence depositions in criminal case. 90 A.L.R. 377.

Constitutionality of statutes in relation to registration before voting at election or primary. 91 A.L.R. 349.

Constitutionality and construction of state farm aid laws. 92 A.L.R. 768.

Power of municipal or school authorities to prescribe vaccination or other health measure as a condition of school attendance. 93 A.L.R. 1413.

Constitutionality of statutes providing for refund of taxes illegally or erroneously exacted. 98 A.L.R. 284.

Judicial questions regarding Federal Social Security Act or state legislation adopted in anticipation of, or after the passage of, that act, to set up "state plan" contemplated by it. 100 A.L.R. 697; 106 A.L.R. 243; 108 A.L.R. 613; 109 A.L.R. 1346; 118 A.L.R. 1220; 121 A.L.R. 1002.

Failure of advertisement in judicial proceeding for sale of land for delinquent taxes or foreclosure of tax lien, to describe lands affected, as contrary to due process of law or other constitutional objection. 107 A.L.R. 285.

Regulation of use of highway by private motor vehicles for hire. 109 A.L.R. 550.

Power to detach land from municipal corporations, towns, or villages. 117 A.L.R. 267.

Constitutionality of regulations as to milk. 119 A.L.R. 243, 155 A.L.R. 1383.

Validity of statutory or municipal regulation of soliciting of alms or contributions for charitable, religious, or individual purposes. 128 A.L.R. 1361, 130 A.L.R. 1504.

Constitutionality, construction, and application of general use tax or other compensating tax designed to complement state sales tax. 129 A.L.R. 222, 153 A.L.R. 609.

Restrictive covenants, conditions, or agreements in respect of real property discriminating against persons on account of race, color, or religion. 3 A.L.R.2d 466.

Garage as part of house with which it is physically connected within zoning regulations or restrictive covenant. 7 A.L.R.2d 593.

Zoning based on size of commercial or industrial enterprises or units. 7 A.L.R.2d 1007.

Validity of statute, ordinance, or regulation forbidding granting of exclusive rights or franchises to, or abolishing existing exclusive rights secured pursuant to outstanding permits for, taxicabs or hack stands. 8 A.L.R.2d 574.

Validity of building height regulations. 8 A.L.R.2d 963.

Exclusion from municipality of industrial activities inconsistent with residential character. 9 A.L.R.2d 683.

Zoning: change in ownership of nonconforming business or use as affecting right to continuance thereof. 9 A.L.R.2d 1039.

Constitutionality, construction, and application of statutory provisions respecting persons who may prepare tax returns for others. 10 A.L.R.2d 1443.

Validity and construction of regulations as to subdivision maps or plats. 11 A.L.R.2d 524.

Constitutionality, construction, and application of statute relating to dental hygienists. 11 A.L.R.2d 724.

Validity of minimum wage statutes relating to private employment. 39 A.L.R.2d 740.

Validity of statutes, ordinances, or regulations for protection of vegetation against disease or infection. 70 A.L.R.2d 852.

Validity and construction of "right-to-work" laws. 92 A.L.R.2d 598.

Validity of statutory classifications based on population—government employee salary or pension statutes. 96 A.L.R.3d 538.

Validity of statutory classifications based on population—jury selection statutes. 97 A.L.R.3d 434.

Validity of statutory classifications based on population—zoning, building, and land use statutes. 98 A.L.R.3d 679.

Validity of statutory classifications based on population—tax statutes. 98 A.L.R.3d 1083.

Right of jailed or imprisoned parent to visit from minor child. 15 A.L.R.4th 1234.

What constitutes illegal discrimination under state statutory prohibition against discrimination in housing accommodations on account of marital status. 33 A.L.R.4th 964.

Admissibility, in criminal case, of physical evidence obtained without consent by surgical removal from person's body. 41 A.L.R.4th 60.

Exclusion of public and media from voir dire examination of prospective jurors in state criminal case. 16 A.L.R.5th 152.

Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief. 45 A.L.R.5th 531.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions—post-Connelly cases. 48 A.L.R.5th 555.

Duty of prosecutor to present exculpatory evidence to state grand jury. 49 A.L.R.5th 639.

Disqualification of judge for bias against counsel for litigant. 54 A.L.R.5th 575.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process. 93 A.L.R.5th 527.

Failure of state prosecutor to disclose fingerprint evidence as violating due process. 94 A.L.R.5th 393.

Failure of state prosecutor to disclose exculpatory ballistic evidence as violating due process. 95 A.L.R.5th 611.

Failure of state prosecutor to disclose exculpatory medical reports and tests as violating due process. 101 A.L.R.5th 187.

Failure of state prosecutor to disclose pretrial statement made by crime victim as violating due process. 102 A.L.R.5th 327.

Application of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) to state death penalty proceedings. 110 A.L.R.5th 1.

Failure of state prosecutor to disclose existence of plea bargain or other deals with witness as violating due process. 12 A.L.R.6th 267.

Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas - Coercion or Duress. 19 A.L.R.6th 411.

Failure of State Prosecutor to Disclose Exculpatory Tape Recorded Evidence as Violating Due Process. 24 A.L.R.6th 1.

What Constitutes "Custodial Interrogation" at Hospital by Police Officer Within Rule of *Miranda v. Arizona* Requiring That Suspect Be Informed of His or Her Federal Constitutional Rights Before Custodial Interrogation - Suspect Injured or Taken Ill. 25 A.L.R.6th 379.

What Constitutes 'Custodial Interrogation' of Juvenile by Police Officer Within Rule of *Miranda v. Arizona* Requiring that Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation - At Police Station or Sheriff's Office. 26 A.L.R.6th 451.

When Does Use of Taser Constitute Violation of Constitutional Rights. 45 A.L.R.6th 1.

Class-of-One Equal Protection Claims Based Upon Real Estate Development, Zoning, and Planning. 68 A.L.R.6th 389.

Right of action under Title IX of Education Amendments Act of 1972 (20 USCS §§ 1681 et seq.) against school or school district for sexual harassment of student by student's peer. 141 A.L.R. Fed. 407.

Equal protection and due process clause challenges based on racial discrimination — Supreme Court cases. 172 A.L.R. Fed. 1.

Equal protection and due process clause challenges based on sex discrimination — Supreme Court cases. 178 A.L.R. Fed. 25.

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§ 15. Slavery and involuntary servitude prohibited; punishment for crime

There shall be neither slavery nor involuntary servitude in this state, otherwise than in the punishment of crime, whereof the party shall have been duly convicted.

SOURCES: 1869 art I § 19.

JUDICIAL DECISIONS

1. In general.

Mother's assertions were without merit that by attempting to force her into the foster care system with her newborn, and by threatening to withhold contact with the child, the Department of Human Services subjected her to unconstitutional involuntary servitude in violation Miss. Const. Art. III, § 15 and U.S. Const. Amend. XIII; in every case in which the supreme court found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction. In the Interest of C.B.Y., 936 So. 2d 974 (Miss. Ct. App. 2006).

In a sale of marijuana case, defendant was not entitled to be set free based on the State's alleged improper conduct in threatening imprisonment if defendant did not work as an undercover informant, as the evidence showed that defendant had voluntarily agreed to become an informant and never actually performed any act as an informant. Poole v. State, 862 So. 2d 1285 (Miss. Ct. App. 2004).

Law relating to hiring renter or laborer having contracted with another must be construed consistently with this section. Hill v. Duckworth, 155 Miss. 484, 124 So. 641 (1929).

Statute punishing any laborer, renter or share cropper who should leave his employer or leased premises before the expiration of his contract, without the consent of the employer or landlord, and who should enter into a second contract without giving notice of the first contract, was unconstitutional under this section. State v. Armstead, 103 Miss. 790, 60 So. 778, Am. Ann. Cas. 1915B,495 (1913).

RESEARCH REFERENCES

ALR. Constitutionality of statute requiring persons, regardless of financial condition, to engage in some business, profession, occupation, or employment. 9 A.L.R. 1366.

Injunction against strike as violating constitutional provision against involuntary servitude. 46 A.L.R. 1541.

Selective Training and Service Act. 129 A.L.R. 1171; 147 A.L.R. 1313; 148 A.L.R. 1388; 149 A.L.R. 1457; 150 A.L.R. 1420; 151 A.L.R. 1456; 152 A.L.R. 1452; 153 A.L.R. 1422; 154 A.L.R. 1448; 155 A.L.R. 1452; 156 A.L.R. 1450; 157 A.L.R. 1450; 158 A.L.R. 1450.

Statute providing for apportionment between lessor and lessee of a tax imposed upon the producer of oil, gas, or other natural production as violation of the constitutional provision against impairment of the obligation of contracts. 160 A.L.R. 980.

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§ 16. Ex post facto laws; impairment of contract

Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed.

SOURCES: 1817 art I § 19; 1832 art I § 19; 1869 art I § 9.

JUDICIAL DECISIONS

1. In general.
2. Construction with other constitutional provisions.
3. Construction with Federal Constitution.
4. Ex post facto laws—In general.
5. — — Death penalty cases, ex post facto laws.
6. — — Drugs and alcohol, ex post facto laws.
7. — — Filiation or paternity, ex post facto laws.
8. — — Robbery, ex post facto laws.
9. — Aggravated assault, ex post facto laws.
10. — — Probation or parole, ex post facto laws.
11. — — Usury, ex post facto laws.
12. — — Taxes and monetary penalties, ex post facto laws.
13. Contracts within constitutional protection — In general.
14. — — Marriage and marital property, contracts within constitutional protection.
15. — — Transportation, contracts within constitutional protection.
16. — — Wages and salaries, contracts within constitutional protection.
17. Impairment of obligation of contract—In general.
18. — — Banks and banking, impairment of obligation of contract.
19. — — Game and fish laws, impairment of obligation of contract.
20. — — Jury trial, impairment of obligation of contract.
21. — — Mortgage and foreclosure sales, impairment of obligation of contract.
22. — — Retirement benefits, impairment or obligation of contract.
23. — — Taxes, impairment of obligation of contract.
24. — — Workers compensation laws, impairment of obligation of contract.
25. — — Utilities, impairment of obligation of contract.
26. Impairment of obligation of contract.

1. In general.

Where the attorneys in fact entered into a contract of employment with an attorney to pursue a personal injury claim on the ward's behalf, and the attorney, primarily out of caution, later submitted a proposed settlement to the chancery court for approval, the chancery court abused its discretion in reducing the lawyer's fee from a 40 percent contingency fee as provided in the contract to a 33 1/3 percent contingency fee. The contract was not one entered into pursuant to a traditional probate matter and it was not a contract within the parameters of Miss. Unif. Ch. Ct. R. 6.12; the practical effect of the chancellor's decision, upheld by the court of appeals, was a judicial abrogation of the provisions of the Uniform Durable Power of Attorney Act found in Miss. Code Ann. §§ 87-3-101 through 87-3-113 and it also constituted a failure to uphold Miss. Const. art. 3, § 16 and U.S. Const. Art. 1, § 10, cl. 1, which prohibited the impairment of obligations of contracts. In re Savell v. Renfroe, 876 So. 2d 308 (Miss. 2004).

Vested rights cannot be destroyed by the legislature creating a new cause of action nor can it destroy a valid defense to an existing cause of action. Richards v. City Lumber Co., 101 Miss. 678, 57 So. 977 (1912).

2. Construction with other constitutional provisions.

The contract clause is of equal dignity and must be read along with Const. § 179. Southern Bell Tel. & Tel. Co. v. City of Meridian, 241 Miss. 678, 131 So. 2d 666 (1961).

3. Construction with Federal Constitution.

When there is state constitutional entitlement to some due process right, state may not enact legislation to impede that right under ex post facto analysis. Christmas v. State, 700 So. 2d 262 (Miss. 1997).

Supreme Court will not declare that Act, which does not contravene contract clause of Federal Constitution, does violate identical provision of State Constitution unless compelled to do so by reason of prior decisions of State court construing such provision. Wilson Banking Co. Liquidating Corp. v. Colvard, 172 Miss. 804, 161 So. 123 (1935).

The Fourteenth Amendment to the Federal Constitution and the law of the land guarantees the right to make contracts pertaining to business. Jones v. Mississippi Farms Co., 116 Miss. 295, 76 So. 880 (1917).

4. Ex post facto laws—In general.

The retroactive application of the 1995 amendment to the statute, which substantively changed the elements of the crime by deleting the requirement of proving that the children were left in destitute and necessitous circumstances and raising the age of the children protected, violated the constitutional prohibition against ex post facto laws. Knowles v. State, 708 So. 2d 549 (Miss. 1998).

§ 97-3-95(c) was not applied retroactively to defendant where subsection (c) was added to statute in 1983 to be effective from and after March 29, 1983, and incident giving rise to prosecution occurred in August, 1983. Cantrell v. State, 507 So. 2d 325 (Miss. 1987).

This provision relates exclusively to criminal or penal statutes. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766 (1963).

A constitutional amendment authorizing a recovery for property damaged applies to railroad companies in operation before the adoption of the amendment. Alabama & V. Ry. Co. v. King, 93 Miss. 379, 47 So. 857 (1908).

An indictment cannot be predicated on an offense committed prior to its enactment. Barton v. State, 94 Miss. 375, 47 So. 521 (1908).

A law is not ex post facto which modifies the rigor of the criminal law. McGuire v. State, 76 Miss. 504, 25 So. 495 (1899).

If two things conjointly constitute a crime and the legislature makes each an offense the later act can, under this section, operate only prospectively. State v. Gillis, 75 Miss. 331, 24 So. 25 (1898).

A statute amending a criminal law which precludes a defense available under the former law is, as to crimes committed before the amendment, ex post facto; and so is one changing, but not mitigating, the punishment previously prescribed. Lindsey v. State, 65 Miss. 542, 5 So. 99, 7 Am. St. R. 674 (1888).

A statute, passed after suit brought but before verdict denying costs, not applied. Gayden v. Bates, 1 Miss. (1 Walker) 209 (1825).

5. — — Death penalty cases, ex post facto laws.

Circuit court did not err in resentencing defendant to serve a sentence of life without the possibility of parole pursuant to Miss. Code Ann. § 99-19-107 after vacating his death sentence because it correctly applied § 99-19-107 in resentencing defendant, and since defendant's death penalty was found unconstitutional by the United States Supreme Court's ruling in Atkins, the application of § 99-19-107 was appropriate; the statute clearly states that no one whose death penalty was ruled unconstitutional can receive life with parole, and the application of the statute in no way constitutes an ex post facto punishment in violation of Miss. Const. art. 3, § 16 and U.S. Const. art. I, § 10. Neal v. State, 27 So. 3d 460 (Miss. Ct. App. 2009).

Appellant's motion for post-conviction relief was properly denied as untimely filed because appellant's sentence of life without parole, under Miss. Code Ann. § 97-3-21, following his plea of guilty to capital murder, did not violate his constitutional right against ex post facto application of the law because (1) the Supreme Court of Mississippi previously held that the imposition of the new sentencing option of life without parole did not violate the prohibition against ex post facto laws, and (2) sentencing under Miss. Code Ann. § 97-3-21 clearly and lawfully directed capital defendants whose pretrial, trial, or resentencing proceedings took place after July 1, 1994, to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death. Randall v. State, 987 So. 2d 453 (Miss. Ct. App. 2008).

After the supreme court remanded defendant's matter for resentencing and the circuit court resentenced defendant to life imprisonment without the possibility of parole, defendant challenged the applicability of Miss. Code Ann. § 99-19-107; however, defendant's challenge was procedurally barred because defendant failed to raise the issue before the matter was remanded, and further, application of that statute as opposed to Miss. Code Ann. § 97-3-21, which was in effect at the time of the commission of the offense, did not violate ex post facto provisions. Foster v. State, 961 So. 2d 670 (Miss. 2007).

Retroactive application of statute granting Supreme Court authority in its review of death penalty cases to reweigh aggravating and mitigating circumstances and to conduct harmless error analysis is violation of state constitutional provisions against ex post facto law. Cole v. State, 666 So. 2d 767 (Miss. 1995).

In a capital murder prosecution arising from a murder committed in 1976, the application of § 99-19-81 in sentencing the defendant constituted an ex post facto law in violation of Art I, § X of the United States Constitution and Art 3, § 16 of the Mississippi Constitution because § 99-19-81 was not yet in effect at the time the murder was committed; the defendant should have been sentenced pursuant to § 97-3-21, which governed the penalty for capital murder in 1976. Johnston v. State, 618 So. 2d 90 (Miss. 1993).

Where a new statute gave condemned a choice as to the method of infliction of death penalty, the law was not an ex post facto law as to persons who were sentenced to death before enactment. Wetzel v. Wiggins, 226 Miss. 671, 85 So. 2d 469 (1956), appeal dismissed, cert. denied, 352 U.S. 807, 77 S. Ct. 80, 1 L. Ed. 2d 39 (1956), reh'g denied, 352 U.S. 919, 77 S. Ct. 217, 1 L. Ed. 2d 125 (1956).

A statute providing that juries in capital cases may fix the punishment at imprisonment for life in the penitentiary is not ex post facto, even in its application to offenses committed before its passage and when the death penalty was fixed by law. McGuire v. State, 76 Miss. 504, 25 So. 495 (1899).

6. — — Drugs and alcohol, ex post facto laws.

Trial court erred in summarily dismissing an inmate's petition seeking trusty status; since the record lacked sufficient factual findings to determine whether the application of Miss. Code Ann. § 47-5-138.1 to the inmate constituted an ex post facto violation, resolution of this issue required an evidentiary hearing. Horton v. Epps, 20 So. 3d 24 (Miss. Ct. App. 2009).

The amendment to Miss. Code Ann. § 47-5-138.1 was not an ex post facto law; even though the amended statute held that an offender was not eligible for trusty status if the offender was convicted of trafficking in controlled substances, defendant continued to receive the 10 days for 30 days time benefit under the prior statute. Ross v. Epps, 922 So. 2d 847 (Miss. Ct. App. 2006).

Where the sale of marijuana for which appellant was convicted occurred when the maximum penalty for such sale was four years imprisonment or a fine of two thousand dollars, or both, the trial court erred in sentencing appellant to a term of ten years and fining him five thousand dollars under the provisions of Code 1972, § 41-29-139, which did not become effective until after the sale in question had occurred; punishment for a crime may not be increased after the crime has been committed under the provisions of Miss Const § 16 and U.S. Const Art 1 § 10 Cl 1. King v. State, 304 So. 2d 650 (Miss. 1974).

Indictment for possession of still in December, 1923, held defective for failure to negative statutory exceptions. State v. Clark, 145 Miss. 207, 110 So. 447 (1926).

7. — — Filiation or paternity, ex post facto laws.

The prohibition of ex post facto laws does not preclude the application of a statute providing for filiation proceedings in the case of a child born before its effective date. Dunn v. Grisham, 250 Miss. 74, 157 So. 2d 766 (1963).

8. — — Robbery, ex post facto laws.

A 7-year sentence for armed robbery committed with a knife in 1980 in violation of § 97-3-79 was not an unconstitutional application of an ex post facto law, even though § 47-7-3 denied eligibility for parole prior to 1982 only when a robbery was committed with the display of a firearm, where the sentencing order merely established that the defendant serve 7 years and made no mention of "mandatory" or "without parole." Additionally, the sentencing chapter and the parole chapter are separate and distinct; the granting of parole or denial of parole under § 47-7-3 is the exclusive responsibility of the state parole board, which is independent of the circuit court's sentencing authority. Thus, sentencing authority was provided for under § 97-3-79, rather than § 47-7-3, and the defendant was not "sentenced" under the parole statute, which was later amended. Mitchell v. State, 561 So. 2d 1037 (Miss. 1990).

A petitioner who enters a guilty plea to armed robbery pursuant to plea bargain agreement upon erroneous advice of counsel that petitioner will be eligible for earned good time and will be subject to release after serving 7 years of sentence is not subjected to ex post facto law when Mississippi Department of Corrections changes administrative policy to comply with §§ 47-5-139 and 47-7-3, causing petitioner to serve minimum of 10 years. Coleman v. State, 483 So. 2d 680 (Miss. 1986).

A defendant convicted of armed robbery after 1977 and sentenced to serve less than 10 years in the penitentiary, and who was therefore not eligible for parole pursuant to § 47-7-3, was not subjected to enforcement of an ex post facto law by a policy of the Department of Corrections administratively barring him from earning good time after January, 1981, although good time earned prior to that date was not taken away, notwithstanding the provisions of § 47-5-139(7), since the statutory provisions regarding good time remained unchanged, and since administrative interpretation of a clearly worded statute is not a "law" within the scope and contemplation of the ex post facto clauses of the federal and state Constitutions. Tiller v. State, 440 So. 2d 1001 (Miss. 1983).

9. — Aggravated assault, ex post facto laws.

Defendant's enhanced sentences for his convictions of aggravated assault on law enforcement officers were inappropriate because he should have been sentenced under Miss. Code Ann. § 97-37-37(1), which became effective on July 1, 2004, and which was in effect at the time his crime was committed. Instead, he was sentenced under Miss. Code Ann. § 97-37-37(2), which was not in effect at the time his crime was committed. Mayers v. State, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

10. — — Probation or parole, ex post facto laws.

Trial court did not err in upholding the decision of the Mississippi Department of Corrections (MDOC) to deny an inmate trusty status because the MDOC, pursuant to Miss. Code Ann. § 47-7-3(2), stopped applying trusty time to reduce an offender's parole eligibility date, and the MDOC's decision to change its application of the trusty-time policy was not an ex post facto application of the law as to defendant; therefore, the inmate's placement into trusty status would not reduce the amount of time that he had to serve before becoming eligible for parole on his kidnaping conviction. Rice v. State, 28 So. 3d 683 (Miss. Ct. App. 2010).

No constitutional prohibition existed on the Mississippi Department of Corrections' new interpretation of Miss. Code Ann. § 99-19-21 where administrative correction of a prior misinterpretation of parole laws did not violate the ex post facto clause; because the Mississippi parole statutes used the word "may" rather than "shall," prisoners had no constitutionally recognized liberty interest in parole. Snow v. Johnson, 913 So. 2d 334 (Miss. Ct. App. 2005).

An administrative correction of a prior misinterpretation of parole laws is not a change in the law so as to violate the ex post facto clause of the United States or Mississippi Constitutions; even if the correction of a former mistaken interpretation of parole law did reach the level of a change in law, administrative decisions with regard to parole law eligibility are not "laws annexed to the crime when committed." Taylor v. Mississippi State Probation & Parole Bd., 365 So. 2d 621 (Miss. 1978).

11. — — Usury, ex post facto laws.

Laws regulating interest should not have retroactive operation. Eastin v. Vandorn, 1 Miss. (1 Walker) 214 (1826).

12. — — Taxes and monetary penalties, ex post facto laws.

Where the Laws of 1910, c 148, imposed a tax on a dog and the Laws of February 5, 1914, imposed a penalty for failure to pay such tax, the latter statute is not ex post facto. State v. Widman, 112 Miss. 1, 72 So. 782 (1916).

13. Contracts within constitutional protection — In general.

Miss. Const. Art. 3, § 16 and U.S. Const. Art. 1, § 10, cl. 1 were violated when a decision was retroactively applied to releases executed in a personal injury case; the law in effect at the time the releases were executed stated that the release of an agent had no effect on a principal's vicarious liability. The validity and obligation of a contract could not have been impaired by a court decision altering the construction of the law. Whitaker v. T & M Foods, Ltd., 7 So. 3d 893 (Miss. 2009).

Contracts clause of the Mississippi Constitution, Miss. Const. Art. III, § 16, prohibited the retroactive application of precedent that limited an employer's vicarious liability for the negligence of its employee because the rights of an injured party could not be impaired by a subsequent judicial decision altering the construction of the law. Dimple v. T & M Foods, Ltd., — So. 2d —, 2008 Miss. LEXIS 486 (Miss. Oct. 2, 2008), substituted opinion at 7 So. 3d 893, 2009 Miss. LEXIS 166 (Miss. 2009).

Financial adviser found that elimination of personnel and positions was required as part of the remedy for the school district's deficit. The school district had the authority to alter the offer of renewed employment that had already been made to the assistant principal even after the deadline that would usually apply to school employee contract renewal; the school district's actions were not unconstitutional. McKnight v. Mound Bayou Pub. Sch. Dist., 879 So. 2d 493 (Miss. Ct. App. 2004).

A tort action does not come within the constitutional provision prohibiting impairment of existing contracts, and a statute increasing the homestead exemption could properly be applied to judgment which was rendered after the passage of the act, even though the cause of action arose before the statute was passed. Odom v. Luehr, 226 Miss. 661, 85 So. 2d 218 (1956).

"Obligation of contract" within constitutional provisions prohibiting State from passing laws impairing obligation of contract depends on law in existence when contract was made, and means law under which contract was made as well as all remedies for its enforcement or after provided remedies equally adequate. Tucker Printing Co. v. Board of Supvrs., 171 Miss. 608, 158 So. 336 (1934).

Generally, no vested rights exist in prevailing laws which will preclude their amendment or repeal. Love v. Mangum, 160 Miss. 590, 135 So. 223 (1931).

Duty arising by operation of law is not a contract in the constitutional sense. Love v. Mangum, 160 Miss. 590, 135 So. 223 (1931).

A contract with levee board cannot be impaired by legislature. Franklin v. Ellis, 130 Miss. 164, 93 So. 738 (1922).

The right to acquire and enjoy realty without limit as to value and quantity guaranteed in the charter of a corporation cannot be impaired by subsequent legislation under the police power of the state. Southern Realty Co. v. Tchula Co-operative Stores, 114 Miss. 309, 75 So. 121 (1917).

Taxes are not due by virtue of contract. Crow v. Cartledge, 99 Miss. 281, 54 So. 947, Am. Ann. Cas. 1913E,470 (1911).

A contract valid when made under decisions of the courts of the state cannot be impaired by any subsequent action of the legislature or decision of its courts altering its construction of the laws under which it was made. Wisconsin Lumber Co. v. State, 97 Miss. 571, 54 So. 247 (1911).

When the state parts with its property, even by donation, the transaction constitutes a contract, and the property is thereby placed beyond legislative control. Commercial Bank v. Chambers, 16 Miss. (8 S. & M.) 9 (1847).

14. — — Marriage and marital property, contracts within constitutional protection.

Marriage is not a contract within the meaning of the Constitution. Carson v. Carson, 40 Miss. 349 (1866).

Dower interest, before death of husband, not within the protection of the provision. Magee v. Young, 40 Miss. 164, 90 Am. Dec. 322 (1866).

15. — — Transportation, contracts within constitutional protection.

A right by charter granted to a railroad company to fix rates within maximum limits is a contract which cannot be impaired by subsequent legislation. Gulf & S.I.R.R. v. Adams, 90 Miss. 559, 45 So. 91 (1907).

The provisions of the charter of a railroad company enacted before the adoption of the Constitution of 1890 authorizing it to establish and charge for the transportation of person and property within maximum limits prescribed constitute a contract between the state and the company, the obligations of which cannot be impaired. Stone v. Yazoo & Miss. V. Ry., 62 Miss. 607 (1885); Stone v. Natchez, J. & C.R.R., 62 Miss. 646' (1885), writ of error dismissed, 131 U.S. 442, 9 S. Ct. 801, 33 L. Ed. 216 (1888); Mississippi R.R. Comm'n v. Gulf & S.I.R.R., 78 Miss. 750, 29 So. 789 (1901).

The right granted by a charter to a railroad to fix its tariff of freights below a maximum is a contract. Stone v. Yazoo & Miss. V. Ry., 62 Miss. 607, 52 Am. R. 193 (1885).

The grant of a right to keep a ferry is not a contract. Sullivan v. Lafayette County Bd. of Supvrs., 58 Miss. 790 (1881); Seal v. Donnelly, 60 Miss. 658 (1882); Montjoy v. Pillow, 64 Miss. 705, 2 So. 108 (1887).

The grant of an exclusive privilege to keep a public wharf is a contract. Martin v. O'Brien, 34 Miss. 21 (1857), construing former Art. 2, § 3.

16. — — Wages and salaries, contracts within constitutional protection.

The salary of an officer is not within the constitutional protection. State v. Smedes, 26 Miss. 47 (1853); Hyde v. State, 52 Miss. 665 (1876).

17. Impairment of obligation of contract—In general.

Couple did not rely on any statutory authority when they entered into the contract with the driver's insurer but instead they entered into the contract based upon prior judicial decisions regarding the release of a tortfeasor in a vicarious liability situation; thus, the contracts clause of Miss. Const. art. 3, § 16 was not applicable. Whitaker v. T & M Foods, Ltd., 7 So. 3d 946 (Miss. Ct. App. 2007), reversed by, remanded by 2008 Miss. LEXIS 486 (Miss. Oct. 2, 2008), reversed by, remanded by 7 So. 3d 893, 2009 Miss. LEXIS 166 (Miss. 2009)supra.

The constitutional provision that "laws impairing the obligation of contract shall not be passed" is qualified by proper exercise of the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d 85, 37 A.L.R.2d 415 (1952), error overruled 214 Miss. 857, 59 So. 2d 844.

Where the circuit court reversed an order of the state oil and gas board integrating all interest in gas under lands in two drilling units as authorized by statute, and where on appeal it was argued that the statute and order violated due process and the impairment of contract clause of the state and federal constitutions, the supreme court must decide the question of constitutionality of statute although the judgment was not based on any constitutional grounds. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d 85, 37 A.L.R.2d 415 (1952), error overruled 214 Miss. 857, 59 So. 2d 844.

Code 1942, § 1108, known as "Fair Trade Act," permitting producer, manufacturer or owner to contract with retailer as to resale price of his own product which is in fair and open competition with commodities of same general class produced by others, does not violate this section. W.A. Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950).

Where a former statute did not expressly declare a usurious contract void, a modified statute under which the contract as made by the parties would be valid does not impair the obligations of the contract, but simply withdraws previous impediments and renders it enforceable as made. Deposit Guar. Bank & Trust Co. v. Williams, 193 Miss. 432, 9 So. 2d 638 (1942).

Where the applicable statutes, at the time the state highway commission took over a county road under an agreement to maintain it without expense to the county, contained no provision authorizing the commission to obligate itself by any such contract, subsequent abandonment and surrender to the county of a portion of such road so taken over did not constitute an impairment of the obligation of a contract. Wilkinson County v. State Hwy. Comm'n, 191 Miss. 750, 4 So. 2d 298 (1941).

Statute (Laws 1932, c 278) providing for scaling down of indebtedness of a drainage district when assessed benefits received are less than its bonded or other indebtedness, and providing for issuance of liquidation certificates, which may be made payable at dates different from original obligations, and providing that payment of such certificates would prevent further levy on lands for the benefits received, held unconstitutional as impairing obligation of contracts evidenced by bonds issued before enactment of the statute. Pryor v. Goza, 172 Miss. 46, 159 So. 99 (1935).

Legislation of State impairing obligation of contract made under its authority is void, and courts in enforcing contract will pursue same course and apply same remedies as though such void legislation had never existed. Tucker Printing Co. v. Board of Supvrs., 171 Miss. 608, 158 So. 336 (1934).

A statute within the police power of the state and beneficial does not impair the freedom of contract. State v. J.J. Newman Lumber Co., 102 Miss. 802, 59 So. 923 (1912), error overruled, 103 Miss. 263, 60 So. 215 (1912).

Allowance of recovery against railroad for damages incurred in construction and operation of the railroad would not constitute an impairment of the obligation of a contract because its charter, and the acts amendatory to it, authorized construction of the railroad and the taking of property therefor at a time when the constitutional provisions pertaining to eminent domain required payment of compensation only for property "taken," but did not contain the subsequently added words "or damaged." Alabama & V. Ry. Co. v. King, 93 Miss. 379, 47 So. 857 (1908).

It is not in the power of the legislature to pass a statute of limitations against bonds not due; and where such bonds are payable to bearer it cannot require an affidavit of the holder showing a chain of title. Priestly v. Watkins, 62 Miss. 798 (1885).

See as to statutes affecting remedies. Musgrove v. Vicksburg & N.R.R., 50 Miss. 677 (1874), overruled on other grounds, State ex rel. Pittman v. Ladner, 512 So. 2d 1271 (Miss. 1987).

The legislature cannot enlarge the exemptions of property from liability to existing creditors; so to do would be to impair the obligations of contracts. Lessley v. Phipps, 49 Miss. 790 (1874); Johnson v. Fletcher, 54 Miss. 628 (1877); Rice v. Smith, 72 Miss. 42, 16 So. 417 (1894).

A statute which prohibits a corporation from assigning promissory notes, the charter not expressly conferring the right, is valid. McIntyre v. Ingraham, 35 Miss. 25 (1858).

18. — — Banks and banking, impairment of obligation of contract.

State bank guaranty statute providing for issuance of noninterest-bearing guaranty certificates held not invalid as impairing obligation of contract of holder for interest-bearing certificate of deposit. Love v. Mangum, 160 Miss. 590, 135 So. 223 (1931).

Where a bank's charter empowered it "to receive money on deposit and pay away the same free of expense, discount bills of exchange and notes, and to make loans," and in the course of its business the bank discounted and held promissory notes, a subsequent statute, declaring it to be unlawful for any state bank to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt, and providing for the abatement of such debts when sued upon, was unconstitutional as impairing the obligation of contract. Planters' Bank v. Sharp, 47 U.S. 301, 6 How. 301, 12 L. Ed. 447 (1848).

A statute requiring banks to pay specie on their obligations after a fixed time is valid. Commercial Bank v. State, 14 Miss. (6 S. & M.) 599 (1846).

Act of 1843, prescribing mode of procedure against banks for violations of charters, does not impair the obligation of contracts. Commercial Bank v. State, 12 Miss. (4 S. & M.) 439 (1845); Nevitt v.

Bank of Port Gibson, 14 Miss. (6 S. & M.) 513 (1846).

19. — — Game and fish laws, impairment of obligation of contract.

Where statute repealing game and fish laws did not expressly repudiate indebtedness incurred by county in enforcing repealed laws, and interpretation of statute to repudiate such debt would make statute unconstitutional as impairing obligation of contract, legislature would be presumed not to have intended to repudiate debt. Tucker Printing Co. v. Board of Supvrs., 171 Miss. 608, 158 So. 336 (1934).

Interpretation of statute repealing game and fish laws as abrogating obligation incurred by county for printing licenses and copies of game and fish law used in carrying out repealed law would impair obligation of contract and make repealing Act void to extent it impaired obligation of contract. Tucker Printing Co. v. Board of Supvrs., 171 Miss. 608, 158 So. 336 (1934).

20. — — Jury trial, impairment of obligation of contract.

The jury statutes are not violative of the Constitution. Lewis v. State, 91 Miss. 505, 45 So. 360 (1908).

21. — — Mortgage and foreclosure sales, impairment of obligation of contract.

In a proceeding to distribute the surplus fund remaining after a foreclosure sale of real property, the trial court erred in concluding that the defaulting landowners were entitled to a $15,000 homestead exemption where all but one of their creditors had obtained and enrolled judgments against them prior to the effective date of the law increasing the homestead exemption from $5,000 to $15,000; nor did the increased exemption apply to the remaining creditor where its claim was pending on the effective date of the new law. Thus, the $15,000 exemption was applicable to all of the creditors' claim. Builders Supply Co. v. Pine Belt Sav. & Loan Ass'n, 369 So. 2d 743 (Miss. 1979).

Act authorizing postponement of mortgage foreclosure sales and extension of time for redemption from such sales with certain limitations safeguarding rights of mortgagees was not violative of constitutional provision against impairment of obligations of contracts. Wilson Banking Co. Liquidating Corp. v. Colvard, 172 Miss. 804, 161 So. 123 (1935).

Holders of deed of trust could not complain of delay in fixing benefits to be paid by mortgagor under Act providing for postponement of mortgage foreclosure sales, where holders move for dissolution of injunction restraining foreclosure sale on ground that Act was unconstitutional without claiming benefits under Act which are properly determinable on final hearing. Wilson Banking Co. Liquidating Corp. v. Colvard, 172 Miss. 804, 161 So. 123 (1935).

22. — — Retirement benefits, impairment or obligation of contract.

Section 25-11-114(2)(a), which mandates that the pre-retirement death benefits of a Mississippi Public Employees' Retirement System member must go to the member's surviving spouse, regardless of whom the member has duly designated as his or her beneficiary, was unconstitutional as applied because it impaired a contractual right that the deceased employee acquired when he became a member of the public retirement system. Public Emples. Retirement Sys. v. Porter, 763 So. 2d 845 (Miss. 2000).

Section 25-11-103(f), which provides that the spouse of a member of the Public Employees' Retirement System shall be the member's beneficiary unless the member has designated another beneficiary subsequent to the date of marriage, does not constitute an unreasonable impairment of an employee's contractual right contrary to the United States and Mississippi Constitutions because it provides protection to those whose spouse fails to redesignate due to "inadvertence" while allowing an employee to make a "conscious decision" to redesignate if he or she does not want his or her spouse to receive the death benefits. Dillon v. Beal, 632 So. 2d 1298 (Miss. 1994).

23. — — Taxes, impairment of obligation of contract.

Where an amendment to the 1944 Act entitled the town of Heidelberg to one-third of oil severance taxes returned to

Jasper County by reducing the amount payable by one-third of tax which was produced in the municipality, the amendment was not unconstitutional and it did not impair the town's obligation in contracts which it held with holders of water and sewer system bonds issued under resolution of mayor and board of aldermen, pledging 75 per cent of all revenue collected by the town under 1944 Act or any amendments or substitutes therefor to retire the bonds. Town of Heidelberg v. Jasper County, 218 Miss. 147, 65 So. 2d 463 (1953).

The unconstitutional impairment of a contract results from the enactment of a statute (Laws 1924, c 170) permitting the successor of a revenue agent to report on the merits of pending suits for collection of delinquent taxes and share in the commission allowed on the amounts collected by such suits, where the prior statute under which the suits were brought permitted the agent to continue suits brought by him in the name of his successor, and enjoy the resulting commission. Mississippi ex rel. Robertson v. Miller, 276 U.S. 174, 48 S. Ct. 266, 72 L. Ed. 517 (1928).

It was constitutional for the legislature by the repeal of the statutes rendering contracts unenforceable for failure to pay privilege tax to revive the remedy for rendering such contracts enforceable. Sullivan v. Ammons, 95 Miss. 196, 48 So. 244 (1909).

If the legislature create a board of public improvements and levy a tax on land irrevocably devoting the taxes to the satisfaction of the debts which the board was authorized to contract, the state cannot by subsequent act, after the debts are contracted, abate the tax or release the land from liability therefor. Forsdick v. Board of Levee Comm'rs, 76 Miss. 859, 26 So. 637 (1899).

Certain statutes (Laws 1875, p. 11, undertaking to abate taxes due a levee board; Laws 1876, p. 350, in so far as it sought to avoid taxes due such levee board; and Laws 1884, p. 182, relating to levee lands held by purchasers and providing for quitclaims by the state) held void, in whole or in part, as violating the obligations of contracts of bondholders. Woodruff v. State, 77 Miss. 68, 25 So. 483 (1898).

Where, by its charter, a municipality is authorized to raise money and appropriate it to city purposes, the legislature can divert the money to a different purpose. State Bd. of Educ. v. City of Aberdeen, 56 Miss. 518 (1879).

24. — — Workers compensation laws, impairment of obligation of contract.

The Workmen's Compensation Law does not impair right of employer and employee to contract. Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).

25. — — Utilities, impairment of obligation of contract.

H.B. 997, clarifying Miss. Code Ann. §§ 77-3-13, 77-3-17, and 17-3-21 did not violate the Contracts Clause of the federal and state constitutions because the regulation of the state's public utilities fell within the legislature's authority, and where a city failed to secure Mississippi Public Service Commission approval for an acquisition from a power company, its contractual rights had not vested. City of Starkville v. 4-County Elec. Power Ass'n, 909 So. 2d 1094 (Miss. 2005).

A college, consumer of electricity, was not denied due process when it was given an opportunity to be heard (which it utilized fully) in a proceeding in which the public service commission issued a cease and desist order against one utility company which was furnishing service to the college within the certificated area of another utility; nor did the issuance of the order impair the contract between the college and the first utility company, for the contract was not paramount to the legislative authority vested in the commission at the time the contract was made. Ford v. State, 218 So. 2d 707 (Miss. 1969).

No taking without due process results from denying to a utility having an exclusive municipal franchise and street lighting contract the right to extend its service into annexed territory which is part of the certificated area of another utility. Capital Elec. Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 514, 150 So. 2d 534 (1963), appeal dismissed, cert. denied, 375 U.S. 77, 84 S. Ct. 196, 11 L. Ed. 2d 142

(1963), reh'g denied, 375 U.S. 981, 84 S. Ct. 478, 11 L. Ed. 2d 428 (1964).

No taking without due process is involved in holding that a utility may continue to serve a portion of its certificated area after its annexation to a city, as against a utility having an exclusive municipal franchise. Delta Elec. Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 482, 149 So. 2d 504 (1963), appeal dismissed, cert. denied, 375 U.S. 77, 84 S. Ct. 196, 11 L. Ed. 2d 142 (1963), reh'g denied, 375 U.S. 981, 84 S. Ct. 478, 11 L. Ed. 2d 428 (1964).

This provision precludes a municipality from charging rent to a telephone company previously granted the free use of its streets. Southern Bell Tel. & Tel. Co. v. City of Meridian, 241 Miss. 678, 131 So. 2d 666 (1961).

26. Impairment of obligation of contract.

Where a purchase order stated "TERMS: Net 30 Days from Invoice Date," defendant prime contractor and plaintiff subcontractor had by contract altered the 15-day payment arrangement under Miss. Code Ann. § 31-5-27 on a public construction project and thus, the subcontractor was not entitled to interest for payments made outside the 15 day limit of § 31-5-27; the agreement under the purchase order was not a violation of public policy as such a contract was not prohibited by the Mississippi Constitution or the United States Constitution, a statute, or condemned by court decisions. APAC-Mississippi, Inc. v. James Constr. Group, L.L.C., 370 F. Supp. 2d 528 (S.D. Miss. 2005), opinion withdrawn by 386 F. Supp. 2d 725, 2005 U.S. Dist. LEXIS 20575 (S.D. Miss. 2005).

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ALR. Constitutionality of statute extending period for redemption from judicial or tax sale, or sale upon mortgage foreclosure. 1 A.L.R. 143; 38 A.L.R. 229; 89 A.L.R. 966.

Impairment of obligation of convict labor contracts. 3 A.L.R. 1671.

Power of state to change private contract rates for public utilities. 9 A.L.R. 1423.

Constitutionality of statute regulating the time of payment of wages. 12 A.L.R. 612; 26 A.L.R. 1396.

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Constitutionality of statute relating to injunctions against crime or abatement of nuisance arising from violation of liquor law. 49 A.L.R. 635.

Constitutional or statutory changes affecting grand jury or substituting information for indictment as an ex post facto law. 53 A.L.R. 716.

Validity of curative statute impairing judgment or rendering it ineffective. 53 A.L.R. 1134, 136 A.L.R. 328.

Effect of statutory change of penalty or punishment after conviction. 55 A.L.R. 443.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 A.L.R. 20; 82 A.L.R. 345; 116 A.L.R. 209; 132 A.L.R. 91; 139 A.L.R. 673.

Constitutionality of statute restoring competency of convicts as witnesses. 63 A.L.R. 982.

Constitutionality of statutes providing for consolidation or merger of public utility corporations. 66 A.L.R. 1568.

Constitutionality of levee and flood control acts. 70 A.L.R. 1274.

Applicability of constitutional or statutory provisions relating to added liability of stockholders to holders of stock issued, or stockholders of corporations organized, before their enactment. 72 A.L.R. 1252.

Constitutionality of statutes or ordinances for taxation of common carriers by automobile. 75 A.L.R. 13.

Constitutionality, construction, and effect of statutory or charter provisions relating to the sale of all or substantially all of the assets of corporation or division or distribution of proceeds. 79 A.L.R. 624.

Subsequent issue of bonds by public body as impairing obligation to prior creditors. 87 A.L.R. 397.

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Validity of so-called "sales tax." 89 A.L.R. 1432, 110 A.L.R. 1485, 117 A.L.R. 846, 128 A.L.R. 893.

Constitutionality of statute permitting state to take or use in evidence depositions in criminal case. 90 A.L.R. 377.

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Constitutionality of statutes limiting hours of labor in private industry. 90 A.L.R. 814.

Debtor's exemption statutes as impairing obligations of existing contracts. 93 A.L.R. 177.

Contract for payment in gold or silver or in gold or silver coin ("gold coin" clauses). 95 A.L.R. 1383; 101 A.L.R. 1318; 114 A.L.R. 820.

Constitutional provision against impairing obligation of contract as applicable to statutes affecting rights or remedies of holders or owners of improvement bonds or liens. 97 A.L.R. 911.

Validity of privilege tax as applied to contractor performing contract with Federal government. 97 A.L.R. 1257, 114 A.L.R. 347.

Constitutional provision against impairing obligation of contracts as applied to rights or remedies of owners of property subject to assessment for local improvements. 100 A.L.R. 164.

Constitutionality, construction and application of statute permitting release of part of property subject to tax liens or special assessments. 100 A.L.R. 418.

Validity, effect, and enforceability of provision of bonds, coupons, or other obligations of municipal or political body or of statute or ordinance under which they are issued, that they will be accepted in payment of taxes. 100 A.L.R. 1339.

Power of corporations to change obligations to stockholders. 105 A.L.R. 1452, 117 A.L.R. 1290.

Constitutionality of statute providing for proceedings supplementary to execution. 106 A.L.R. 383.

Statutes affecting mortgagee's rights and remedies in respect of deficiency as unconstitutional impairment of obligation of contract. 108 A.L.R. 891; 115 A.L.R. 435; 130 A.L.R. 1482; 133 A.L.R. 1473.

Tax exemption as unconstitutionally impairing public obligations antedating the exemption. 109 A.L.R. 817.

Constitutional prohibition of ex post facto laws as applicable to statutes relating to joinder of offenses or defendants. 110 A.L.R. 1308.

Constitutional provisions against impairment of obligations of contract as applied to sinking funds for retirement of municipal or other public bonds. 115 A.L.R. 220.

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Selective Training and Service Acts. 129 A.L.R. 1171; 147 A.L.R. 1313; 148 A.L.R. 1388; 149 A.L.R. 1457; 150 A.L.R. 1420; 151 A.L.R. 1456; 152 A.L.R. 1452; 153 A.L.R. 1422; 154 A.L.R. 1448; 155 A.L.R. 1452; 156 A.L.R. 1450; 157 A.L.R. 1450; 158 A.L.R. 1450.

Constitutionality of statute changing rights of withdrawing members of building and loan association. 133 A.L.R. 1493.

Statute regarding right of surviving spouse in estate of deceased spouse as affecting contract or waiver in that regard executed before passage of the statute. 137 A.L.R. 1099.

Validity and construction of war legislation in nature of moratory statute. 137 A.L.R. 1380, 147 A.L.R. 1311.

Comment Note: Tax exemptions and the contract clause. 173 A.L.R. 15.

Constitutionality, construction, and application of statute or ordinance providing for reduction of pension or retirement benefit of public officer or employee because of independent income. 7 A.L.R.2d 692.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period. 79 A.L.R.2d 1080.

Use of peremptory challenges to exclude persons from criminal jury based on religious affiliation — post-Batson state cases. 63 A.L.R.5th 375.

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§ 17. Taking property for public use; due compensation

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

SOURCES: 1817 art I § 13; 1832 art I § 13; 1869 art I § 10.

Cross References — Exercise of right of eminent domain, see § 11-27-1 et seq.

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1. In general.

Where the allegations by a farm against the Mississippi Transportation Commission for flooding of the farm's property had sounded in negligence, the farm could not assert Miss. Const. Art. 3, § 17 for the first time in its response to the Commission's summary judgment motion as a defense, because the MTC did not have sufficient notice of the taking claim for the farm's response to the summary judgment motion. B & W Farms v. Miss. Transp.Comm'n, 922 So. 2d 857 (Miss. Ct. App. 2006).

This section makes the question of Public use a judicial question; but the question of necessity is a legislative question. Horne v. Pearl River Valley Water Supply Dist., 249 Miss. 358, 162 So. 2d 504 (1964).

Whether there is a public necessity for a taking is essentially a legislative question. Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963), motion overruled, 248 Miss. 23, 158 So. 2d 694 (1963), cert. denied, 376 U.S. 970, 84 S. Ct. 1136, 12 L. Ed. 2d 84 (1964).

The living owner of a future interest must have his "day in court," or its equivalent, and is therefore a necessary party to a condemnation proceeding. Hemphill v. Mississippi State Hwy. Comm'n, 245 Miss. 33, 145 So. 2d 455 (1962).

Whether a taking is for a public use is a judicial question. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

This section is not applicable except where property is taken or damaged for public use by the public authorities or corporations, vested with the power of eminent domain. Burkett v. Ross, 227 Miss. 315, 86 So. 2d 33 (1956).

Since a municipality is a creature of the Legislature, it may, within the limitations of this section and § 24 of the State Constitution, impart to it some of its sovereignty by statute. Bishop v. City of Meridian, 223 Miss. 703, 79 So. 2d 221 (1955), error overruled, 223 Miss. 713, 79 So. 2d 815 (1955).

Eminent domain rights are attributes of sovereignty, and are inherent in all sovereignty, and therefore would exist without any constitutional recognition. Erwin v. Mississippi State Hwy. Comm'n, 213 Miss. 885, 58 So. 2d 52 (1952).

The construction and maintenance of a warehouse for the reception of freight on railroad right-of-way, which had existed as such for more than 50 years prior to the adoption of an ordinance making most of such right-of-way a residential district, held to be a reasonable use of such right-of-way in facilitating the company's principal business and no more objectionable than the operation of trains, and to be authorized by provision of ordinance excepting existing nonconforming uses; and, accordingly, action of city authorities in denying such use of the property was an unreasonable and arbitrary interpretation of the ordinance which tended to deprive the company of its property and use thereof in violation of both Federal and State Constitutions. Jones v. City of Hattiesburg, 207 Miss. 491, 42 So. 2d 717 (1949).

To afford a property owner relief hereunder, it is not necessary that there shall be an actual taking of any portion of his property or that there be a physical invasion thereof. Quin v. Mississippi State Hwy. Comm'n, 194 Miss. 411, 11 So. 2d 810 (1943).

By what procedure private property may be taken for public use rests with the legislature subject to the requirements of due process of law and that section of the state constitution which provides that private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof. McAllister v. Graham, 6 So. 2d 300 (Miss. 1942).

This section is self-executing. Parker v. State Hwy. Comm'n, 173 Miss. 213, 162 So. 162 (1935); State Hwy. Comm'n v. Mason, 192 Miss. 576, 4 So. 2d 345 (1941).

Liability under constitutional provision providing that private property shall not be taken or damaged for public use except on compensation being first made is not dependent on negligence but on taking or damaging. Thompson v. City of Philadelphia, 180 Miss. 190, 177 So. 39 (1937).

This section is mandatory so as to entitle owner of property damaged for public use to remedy at common law, in absence of statute providing redress. Parker v. State Hwy. Comm'n, 173 Miss. 213, 162 So. 162 (1935).

Property damaged for public use, as well as property physically invaded, must be compensated for. Kwong v. Board of Miss. Levee Comm'rs, 164 Miss. 250, 144 So. 693 (1932).

A guarantee in the Constitution cannot be overridden by the public policy of the state. Hill v. Woodward, 100 Miss. 879, 57 So. 294, Am. Ann. Cas. 1914A,390 (1911).

The term "property" includes every species of value, right or interest and any invasion of property rights entitles one to damages, although such may be nominal. Illinois Cent. R.R. v. State, 94 Miss. 759, 48 So. 561 (1909).

A statute regulating and restricting the capture of creatures ferae naturae, not reduced to actual possession, is not violative of this section. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. R. 700 (1905).

This section does not authorize the courts to determine the necessity for the taking of property in the exercise of eminent domain. Ham v. Board of Levee Comm'rs, 83 Miss. 534, 35 So. 943 (1904); Greenwood v. Gwin, 153 Miss. 517, 121 So. 160 (1929).

The section enlarges the previous rule, in that it provides that property cannot be damaged (though not taken) for public use without due compensation first made. Alabama & V. Ry. Co. v. Bloom, 71 Miss. 247, 15 So. 72 (1894).

The private property meant is property of a specific, fixed, and tangible nature, capable of possession and transmission. Commissioners of Homochitto River v. Withers, 29 Miss. 21, 64 Am. Dec. 126 (1855), aff'd, 61 U.S. (20 How.) 84, 15 L. Ed. 816 (1858).

2. Validity of statutes—In general.

District court found that the Eleventh Amendment to the U.S. Constitution did not bar an association from proceeding with an action against Mississippi's Fiscal Officer in his official capacity, alleging that powers he was given under amendments to Miss. Code Ann. § 83-21-21 violated the Fifth and Fourteenth Amendments to the U.S. Constitution because he was able to take private property without just compensation, but that it could not hear claims the association made against the State of Mississippi or a claim it made against the Fiscal Officer which alleged that the amendments violated Miss. Const. art. 3, § 17. Miss. Surplus Lines Ass'n v. Mississippi, 384 F. Supp. 2d 982 (S.D. Miss. 2005).

An ordinance requiring the removal of non-conforming signs after five years pursuant to an exercise of police power was not an unconstitutional taking of property. Red Roof Inns, Inc. v. City of Ridgeland, 797 So. 2d 898 (Miss. 2001).

Outdoor Advertising Act (Code 1972, §§ 49-23-1 through 49-23-29) does not violate Miss Const § 17 or U.S. Const Amendment 14. Mississippi State Hwy. Comm'n v. Roberts Enters., Inc., 304 So. 2d 637 (Miss. 1974).

The Legislature has granted each municipality power to amend its special charter, but when municipality undertakes to make this amendment whether as to substance or form, it must follow the statute as to manner and method by which such amendment may be made. Bishop v. City of Meridian, 223 Miss. 703, 79 So. 2d 221 (1955), error overruled, 223 Miss. 713, 79 So. 2d 815 (1955).

3. Attorney's fees, validity of statutes.

Section 99-15-17, which limits the compensation which an attorney may receive for the representation of an indigent, does not amount to an unconstitutional taking of an attorney's property, deprive indigent defendants of the effective assistance of counsel, or violate the equal protection clause. The statute allows for "reimbursement of actual expenses," which can be interpreted to include reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle the case; there is a rebuttable presumption that a court-appointed attorney's actual overhead within the statute is $25 per hour. This construction of § 99-15-17 will allow an attorney to receive $1,000 in profit plus his or her actual expenses. A rebuttal presumption arises that the actual cost contemplated by the statute is the average of $25 per hour; this figure may be subject to change when the 1988 survey conducted by the Mississippi State Bar is updated. The trial court is bound by the $25 per hour figure only when proof to the contrary is not forthcoming. The hours submitted by an attorney are subject to scrutiny under a reasonable and necessary standard. Specific expenses must be approved by the court before the attorney incurs the expenses. Court approved expenses include, but are not limited to, such items as the cost of an investigator, the cost of an expert witness, and a trip to interview witnesses. This interpretation of the statute avoids unconstitutionality on all grounds. Wilson v. State, 574 So. 2d 1338 (Miss. 1990).

4. Landowner's rights, validity of statutes.

Neither the constitution nor the laws of this state impose liability on a contractor lawfully acting in behalf of the United States in performing a lawful public function without negligence, the landowner's remedy, if any, being against the public agency having the work done. Pigott v. Boeing Co., 240 So. 2d 63 (Miss. 1970).

Land is not taken or damaged for public use by a city's surveyor's going thereon to make a survey. City of Laurel v. Bush, 238 Miss. 718, 120 So. 2d 149 (1960).

5. Waterways, validity of statutes.

Section 51-1-4's 100 cubic feet per second standard for determining what constitutes a public waterway suffers no constitutional or other infirmity when scrutinized under §§ 14, 17 or 81 of the Mississippi Constitution or otherwise, or under federal law, including but not limited to the Equal Footings Doctrine and the congressional enactment of 1817 creating the State of Mississippi. Ryals v. Pigott, 580 So. 2d 1140 (Miss. 1990), cert. denied, 502 U.S. 940, 112 S. Ct. 377, 116 L. Ed. 2d 328 (1991).

The 2 lakes artificially created by dredging for fill materials used in construction of Interstate Highway I-10 are not part of the State's tidelands public trust, and to strip these artificial tidelands from their record titleholders would constitute a taking within the Fifth and Fourteenth Amendments to the United States Constitution and within Mississippi Constitution Article 3, § 17, which taking would require just compensation from the State. Cinque Bambini Partnership v. State, 491 So. 2d 508 (Miss. 1986), certiorari granted 107 S.Ct. 1284, 479 U.S. 1084, 94 L.E.2d 142, dismissal denied, 481 U.S. 1003, 107 S. Ct. 1623, 95 L. Ed. 2d 197 (1987), aff'd, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988), reh'g denied, 486 U.S. 1018, 108 S. Ct. 1760, 100 L. Ed. 2d 221 (1988).

A statute empowering a water district to condemn lands within a quarter-mile of the shore line of its reservoir where necessary for the project and the exercise of its powers and functions does not authorize a taking for other than public purposes because it authorizes the district to lease or sell land for the purpose of operating recreational facilities for profit, to dispose of any property for the furtherance of its business, and a repurchase by leaseholders of a limited portion of the property condemned. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

Where the city used underlying waters of Mississippi Sound for the purpose of constructing a small craft commercial harbor, this did not constitute taking property for public use without compensation despite the fact that construction of the harbor would deprive the property owners of access to boating, fishing, etc. Xidis v. City of Gulfport, 221 Miss. 79, 72 So. 2d 153 (1954).

6. Price regulation, validity of statutes.

The provision for the fixing of prices by the Milk Control Act of 1960, being a valid exercise of the police power, does not violate this provision. Mississippi Milk Comm'n v. Vance, 240 Miss. 814, 129 So. 2d 642 (1961).

7. Right of eminent domain—In general.

Plaintiff landowner, whose dilapidated structure was demolished by defendant city on public safety grounds, was given sufficient notice and time to clean the property himself; due to the fact that he did not comply with the city's directives within the time given, the city was authorized to clear his property and assess the costs to him without that constituting a taking under the Mississippi Constitution. Pearson v. City of Louisville, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 89580 (N.D. Miss. Nov. 4, 2008).

Judgment for eminent domain taking under Miss. Const. Art. 3 § 17 was affirmed because the evidence was sufficient to support the verdict; there was reasonable access left to the property after the taking; the jury awarded the landowner several thousand dollars more than the original offer, indicating the jury awarded some damages for the lack of access; and there was no problem with the jury instructions as they provided a correct statement of the statutory procedure involved in eminent domain. North Biloxi Dev. Co., L.L.C. v. Miss. Transp. Comm'n, 912 So. 2d 1118 (Miss. Ct. App. 2005).

Since Article 3, Section 17 mandates that a determination of public use be made whenever private property is taken, and the condemnor has the burden of proof on the issue of public use, §§ 65-1-301 to 65-1-347, strictly construed, are unconstitutional for not providing a predeprivation opportunity for the landowner to challenge the taking and to make the condemnor satisfy its burden on the issue of public use. Lemon v. State Transp. Comm'n, 735 So. 2d 1013 (Miss. 1999).

Whether a taking by eminent domain is for a public use is a judicial question and Code 1942, § 2782 creates a specific and exclusive remedy for determining the right to eminent domain and public necessity. Texas Gas Transmission Corp. v. Council, 199 So. 2d 247 (Miss. 1967).

A condemnor has the burden of proving that the use for which property is taken is public. Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963), motion overruled, 248 Miss. 23, 158 So. 2d 694 (1963), cert. denied, 376 U.S. 970, 84 S. Ct. 1136, 12 L. Ed. 2d 84 (1964).

The uses for which property is taken are none the less public because served through the agency of lessees of the public authority. Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963), motion overruled, 248 Miss. 23, 158 So. 2d 694 (1963), cert. denied, 376 U.S. 970, 84 S. Ct. 1136, 12 L. Ed. 2d 84 (1964).

A taking for a public use is not invalid merely because of an incidental benefit to private individuals. Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963), motion overruled, 248 Miss. 23, 158 So. 2d 694 (1963), cert. denied, 376 U.S. 970, 84 S. Ct. 1136, 12 L. Ed. 2d 84 (1964).

The burden of proof is on a landowner who alleges lack of necessity for a taking authorized by the legislature. Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963), motion overruled, 248 Miss. 23, 158 So. 2d 694 (1963), cert. denied, 376 U.S. 970, 84 S. Ct. 1136, 12 L. Ed. 2d 84 (1964).

Whether a taking is necessary is within the discretion of the condemnor, with the exercise of which the courts will interfere only when abuse or fraud is shown. Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963), motion overruled, 248 Miss. 23, 158 So. 2d 694 (1963), cert. denied, 376 U.S. 970, 84 S. Ct. 1136, 12 L. Ed. 2d 84 (1964).

Where the uses for which property is taken are public, it is not necessary to show specifically what uses are to be made of particular parts. Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963), motion overruled, 248 Miss. 23, 158 So. 2d 694 (1963), cert. denied, 376 U.S. 970, 84 S. Ct. 1136, 12 L. Ed. 2d 84 (1964).

The general rule is that the power of eminent domain should be construed favorably to landowner and that no greater estate can be taken than the particular use requires. Berry v. Southern Pine Elec. Power Ass'n, 222 Miss. 260, 76 So. 2d 212 (1954).

That proceedings in eminent domain were authorized and directed by resolution rather than by ordinance by city operating under legislative charter providing that city may exercise right of eminent domain and that deeds and contracts necessary to be made in writing shall be authorized by resolution of council is immaterial as distinction between two devices when applied to specific act is one of language only and it is formal attested action of council expressive of its determination that counts. McLaurin v. State, 41 So. 2d 41 (Miss. 1949).

This section applies to all persons, natural and artificial. Eady v. State, 121 So. 295 (Miss. 1929).

Power to exercise the right of eminent domain by private or municipal corporations is limited to express terms or clear implication. Wise v. Yazoo City, 96 Miss. 507, 51 So. 453, Am. Ann. Cas. 1912B,377 (1910).

The right of eminent domain is an inherent and essential element of sovereignty; this is recognized by the Constitution and limitations placed on it; the section is not enabling but restrictive. Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389 (1857).

8. Political subdivisions and municipalities, right of eminent domain.

Constitution prohibiting taking or damaging of property for public use applies to state and political subdivisions including municipality, regardless of whether the taking or damaging is in exercise of governmental function or not. Hodges v. Town of Drew, 172 Miss. 668, 159 So. 298 (1935); Thompson v. Philadelphia, 180 Miss. 190, 177 So. 39 (1937).

A municipality may by legislative authority charge the costs of paving a sidewalk as a lien on abutting lots of different owners according to the front foot rule, and to do so is not a taking of private property for public use without compensation. Wilzinski v. City of Greenville, 85 Miss. 393, 37 So. 807 (1905).

The section embraces municipalities and prohibits them from taking or damaging private property without compensation, etc., embracing both direct and consequential damages. Mayor of Vicksburg v. Herman, 72 Miss. 211, 16 So. 434 (1894).

9. Taxing power, right of eminent domain.

Where the purchaser of land at a tax sale was not joined as a party to an eminent domain action, and the Highway Commission, after judgment, entered upon the property, took possession of the condemned right of way, and began construction work thereon, purchaser had been denied due process and his property had been taken without compensation. Mississippi State Hwy. Comm'n v. Casey, 253 Miss. 685, 178 So. 2d 859 (1965).

Section held inapplicable to taxing power, but only to taking of specific property for public use. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

This section is inapplicable to a statute which, for the avowed purpose of relieving unemployment and aiding agriculture and industry, authorized municipalities to raise funds by taxation for the acquisition of lands and the construction of factories to be leased to individuals and private corporations on terms which would insure their continued operation. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

Tobacco tax statute does not violate constitutional provisions prohibiting taking of property for public use without compensation. Edward Hines Lumber Co. v. Hall, 148 So. 373 (Miss. 1933).

Inhibition against taking property except on due compensation has no application to taxing property. Swayne v. City of Hattiesburg, 147 Miss. 244, 111 So. 818, 56 A.L.R. 926 (1927), aff'd, 276 U.S. 599, 48 S. Ct. 320, 72 L. Ed. 724 (1928).

Local assessments, beyond the limits of taxation, are, according to what is probably dicta, violative of this provision. Town of Macon v. Patty, 57 Miss. 378, 34 Am. R. 451 (1879).

The power of eminent domain and the power of taxation are distinct, and the exercise of the latter is not a taking within this provision. Griffin v. Dogan, 48 Miss. 11 (1873); Martin v. Dix, 52 Miss. 53 (1876).

A statute providing for the investiture of the state with title to land because of nonpayment of taxes, without a sale, is void. Griffin v. Mixon, 38 Miss. 424 (1860).

10. Public utilities, right of eminent domain.

The holder of a 16th section agricultural lease, which reserved to the board of supervisors the right to grant or sell a right-of-way across said land for any public utility line, had the right to prevent the construction of a pipeline across his leasehold lands under a purported pipeline easement granted by the board of supervisors, where the holder of the easement was not a public utility because its transmission of gas through the proposed pipeline was not open to the public and it had not acquired a certificate of public convenience and necessity. Holder v. Mississippi Fuel Co., 317 So. 2d 891 (Miss. 1975).

A statute authorizing public utilities to enter on lands to make a preliminary examination and survey with a view to condemnation, subject to liability for any damage done, does not violate this provision. Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546 (1962).

An easement acquired by eminent domain for telephone and telegraph lines, may be used for television transmission along with other telephone and telegraph purposes and such use was a public use and such television transmission would be done by company as common carrier. Ball v. AT & T, 227 Miss. 218, 86 So. 2d 42 (1956).

Destruction or impairment of a rural telephone system, using only one wire and the earth for the return of the current which completed the circuit, resulting by induction because of the subsequent construction of a parallel electric distribution system was not a damaging of public property within the purview of this section, where such electric distribution system was without defect and the damage to the telephone system could be avoided by installing a second wire, the owner of such telephone system acquiring no property right in the continuation of the one-wire system. Wade v. State, 196 So. 510 (Miss. 1940).

Under legislative grant a telephone company may condemn the right of way of a railroad. Western Union Tel. Co. v. Louisville & N.R.R., 107 Miss. 626, 65 So. 650 (1914), aff'd, 250 U.S. 363, 39 S. Ct. 513, 63 L. Ed. 1032 (1919); Louisville & N.R.R. v. Western Union Tel. Co., 234 U.S. 369, 34 S. Ct. 810, 58 L. Ed. 1356 (1914).

Telephone companies may condemn a railroad right of way for its poles and fixtures. Cumberland Tel. & Tel. Co. v. Yazoo & Miss. V. Ry. Co., 90 Miss. 686, 44 So. 166 (1907).

11. Sewers and drains, right of eminent domain.

Requiring a landowner to connect to the sewer system was not a taking. Croke v. Southgate Sewer Dist., 857 So. 2d 774 (Miss. 2003).

City could not be compelled to condemn complainant's whole right to construct sewerage system where public necessity only required equal easement with that of complainants. City of Greenwood v. Gwin, 153 Miss. 517, 121 So. 160 (1929).

As to right of drainage district to divert flood waters upon outside riparian owners, see Indian Creek Drainage Dist. No. 1 v. Garrott, 123 Miss. 301, 85 So. 312 (1920).

As to eminent domain under c 270, Laws of 1914. Riverside Drainage Dist. v. Buckner, 108 Miss. 427, 66 So. 784 (1914).

12. Streets and highways, right of eminent domain.

The negotiated conveyance in lieu of eminent domain of a portion of the property used as a church and cemetery by the occupying church organization to the state highway commission for highway purposes did not constitute an abandonment of the conveyed property for the purpose for which it was originally granted so as to give the holders of a mere possibility of reverter therein a cause of action against the highway department, particularly where there was no evidence that the remainder of the property would not continue to be used for the purposes for which it was conveyed. Patrick v. Mississippi State Hwy. Comm'n, 184 So. 2d 850 (Miss. 1966).

The acquisition by eminent domain of an easement or right-of-way primarily, if not exclusively, for the benefit of a landowner whose means of ingress and egress had been cut off by reason of the acquisition from him of a portion of the right-of-way for a public limited access highway was a mere byproduct of laying out the highway, and being essential for the construction of the highway, was itself a taking for a public use and not violative of this section. J. & G. Express, Inc. v. Pic-Walsh Freight Co., 175 So. 2d 606 (Miss. 1965).

Construction of a clover-leaf intersection the effect of which was to change the points at which abutting owners may enter a highway constitutes a taking. Hamilton v. Mississippi State Hwy. Comm'n, 240 Miss. 895, 128 So. 2d 742 (1961).

An abutting property owner may not enjoin a municipality from raising or lowering a street on the showing that it will injure his property, nor may he have the change eliminated or the original grade restored or have a reworking of the reconstruction in a manner to avoid the alleged damage caused by the casting of surface water on his property by an injunction. City of Water Valley v. Poteete, 203 Miss. 382, 33 So. 2d 794 (1948).

Where a property owner creates a subdivision and lays it off into lots with streets and reserves the right in the streets to operate a public utility, a city which afterwards takes in such subdivision takes the streets burdened with the rights of the original owner and must condemn rights under the power of eminent domain to secure them from the owner. Gwin v. City of Greenwood, 150 Miss. 656, 115 So. 890, 58 A.L.R. 849 (1928).

13. Railroad rights of way, right of eminent domain.

The State's acquisition of an abandoned railroad right-of-way contiguous to the boundary of a state penitentiary was clearly for a public purpose where there was no suggestion that the State had any plan to use the property in any fashion except to be a part of the state penitentiary grounds. Governor's Office of Gen. Servs. v. Carter, 573 So. 2d 736 (Miss. 1990).

14. Drainage, right of eminent domain.

Landowner may bring action for damage to real property caused by construction of drainage canal notwithstanding failure of property owner to first present claim to county board of supervisors, as required by statute (§ 65-7-61) where damage constitutes violation of Mississippi Constitution and where violation takes place in absence of prior notice. Runge v. Necaise Constr. Co., 467 So. 2d 666 (Miss. 1985).

This section is self-executing: therefore no legislation is necessary to permit a landowner to sue for damages to his property through erosion by an uncared-for county-constructed drainage ditch. Dorsey v. Adams County, 246 Miss. 369, 149 So. 2d 493 (1963).

A landowner may not be deprived without compensation of the right to a crossing over a drainage canal. Beaver Dam Drainage Dist. v. McClain, 241 Miss. 865, 133 So. 2d 615 (1961).

State Highway Commission was not liable for negligence of its engineers in so constructing ditches on sides of highway as to cause water of creek to overflow owners' farm lands. State Hwy. Comm'n v. Knight, 170 Miss. 60, 154 So. 263 (1934).

A riparian owner or drainage district may erect levees or other works to protect lands from the accidental or flood waters of the stream. Jones v. George, 126 Miss. 576, 89 So. 231 (1921).

This section does not apply as to the liability vel non of a corporation, public or private, for unauthorized acts of its officers and agents. Stephens v. Beaver Dam Drainage Dist., 123 Miss. 884, 86 So. 641 (1921).

15. Waterways, right of eminent domain.

Power to condemn land for a public water supply reservoir includes perimeter lands for the control of access and of polluting. Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963), motion overruled, 248 Miss. 23, 158 So. 2d 694 (1963), cert. denied, 376 U.S. 970, 84 S. Ct. 1136, 12 L. Ed. 2d 84 (1964).

16. — Zoning, right of eminent domain.

An amendment of a zoning ordinance that changed the zone containing the plaintiff's business from a permitted use to a conditional use zone did not constitute a taking. Walters v. City of Greenville, 751 So. 2d 1206 (Miss. Ct. App. 1999).

A bill for an injunction to require the owner of land located approximately 3500 feet from the main airport runway to top or remove trees which had been permitted to extend into a restricted area more than 50 feet above the surface established by an otherwise valid zoning order as an instrument approach zone and transition surface zone, was dismissed on the ground that the zoning restriction constituted an unlawful taking or damage of private property for public use without due compensation. Ballard v. Maraman, 191 So. 2d 126 (Miss. 1966).

A city and a municipal airport authority which, by enactment of an authorized valid zoning ordinance, had assumed, for the protection of an instrument approach zone and a transition surface zone, to prohibit the owner of property located approximately 3500 feet from the main airport runway from using or encroaching upon air space more than 50 feet above his land, had so interfered with and restricted the owner's use and enjoyment of his private property for public use as to constitute a taking or damaging thereof without due compensation. Ballard v. Maraman, 191 So. 2d 126 (Miss. 1966).

Rural zoning ordinance enacted under Laws 1944, ch 198, amending Laws 1938, ch 448, to be valid, must comply with constitutional requirements that private property shall not be taken or damaged for public use without compensation, and that no person shall be deprived of property except by due process of law. Frederic v. Board of Supvrs., 197 Miss. 293, 20 So. 2d 92 (1944), error overruled, 197 Miss. 300, 20 So. 2d 671 (1944).

Rural zoning ordinance, enacted under Laws 1944, ch 198, amending Laws 1938, ch 448, acquires no facility to avoid constitutional guaranties (that private property shall not be taken or damaged for public use without compensation and that no person shall be deprived of property except by due process of law) by the mere device of giving it a name, nor by coupling it with a commendatory preamble. Frederic v. Board of Supvrs., 197 Miss. 293, 20 So. 2d 92 (1944), error overruled, 197 Miss. 300, 20 So. 2d 671 (1944).

Although a zoning ordinance enacted under ch 198, Laws 1944, amending ch 448, Laws 1938, a rural zoning statute, may be valid in its general aspects, it is void as applied to a particular property or area, if, when applied to such particular area or piece of property and a particular set of facts, the ordinance is so arbitrary and unreasonable as to result in confiscation. Frederic v. Board of Supvrs., 197 Miss. 293, 20 So. 2d 92 (1944), error overruled, 197 Miss. 300, 20 So. 2d 671 (1944).

17. Right to due compensation—In general.

Where the State deposited the funds for eminent domain proceeding, the landowners had the right to withdraw the funds from any point thereafter; therefore, the State no longer had control of the funds and had no obligation to pay interest on those funds from the date of deposit. Gautier v. Miss. Transp. Comm'n, 839 So. 2d 588 (Miss. Ct. App. 2003).

Where jury's verdict of amount owed to landowners for property taken by the State was between the values set by all three experts, the verdict was not contrary to the weight of the credible evidence, or the result of bias, passion, or prejudice. Gautier v. Miss. Transp. Comm'n, 839 So. 2d 588 (Miss. Ct. App. 2003).

While this section gives individuals the constitutional right not to have their private property taken without just compensation, it does not extend to a constitutional right to particular jury instructions pertaining to the taking of the property of an individual. Carlton v. Mississippi Transp. Comm'n, 749 So. 2d 170 (Miss. Ct. App. 1999).

There was no confiscatory taking without payment of due compensation when the defendant city refused to rezone residential property to light commercial, notwithstanding that property across the street had already been commercially developed by various businesses, since the city's decision was "fairly debatable." Burdine v. City of Greenville, 755 So. 2d 1154 (Miss. Ct. App. 1999).

A restrictive covenant is an interest in real property for which due compensation must be paid upon a taking by the exercise of eminent domain powers. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284 (Miss. 1994).

In an action by the owner of a building for damages allegedly caused to the structure by construction work on a city street by contractors employed by the city and its urban renewal agency, the trial court erred in directing a verdict in favor of the agency and the city where factual questions existed as to whether there was a causal connection between the construction work and the damage to the building. Walker v. Laurel Urban Renewal Agency, 383 So. 2d 149 (Miss. 1980).

Due compensation requirements of the United States and Mississippi constitutions did not prohibit taxing a landowner with appeal costs and damages pursuant to Code 1972 §§ 11-3-23 [repealed] and 11-27-29 where he appealed from a judgment in a special court of eminent domain and was not successful in having the award increased. Antley v. Mississippi State Hwy. Comm'n, 318 So. 2d 847 (Miss. 1975).

This section does not contemplate or require that condemned land must be evaluated on the same day that a physical entry is made of it, but rather that payment, based upon an evaluation within a reasonable time prior thereto, must be made to the condemnee before actual physical possession of the property is taken by the condemnor. Pearl River Valley Water Supply Dist. v. Wright, 203 So. 2d 296 (Miss. 1967).

If, in an eminent domain proceeding, the landowner is required to pay the costs of appeal to the Supreme Court when the condemning agency has appealed, the owner will be paid less than due compensation for his property and the constitutional requirement set forth in this section would thereby be nullified. Pearl River Valley Water Supply Dist. v. Brown, 254 Miss. 700, 184 So. 2d 407 (1966).

The condemnor must offer evidence of the value of the property taken. Morgan v. State, 161 So. 2d 780 (Miss. 1964).

The owners of an executory interest in land following a defeasible fee, upon an uncertain event, have a compensable interest on a taking or damaging. Hemphill v. Mississippi State Hwy. Comm'n, 245 Miss. 33, 145 So. 2d 455 (1962).

Since the littoral rights incident to the ownership of beach front property along the Mississippi Gulf Coast is a most valuable attribute of such property, the state, acting through the county, could not, without first paying just compensation, "pump up" the submerged bottoms adjacent to privately owned uplands, and thereby cut off direct access to the water. Williams v. Otis Eng'g Corp., 140 So. 2d 838 (Miss. 1962).

An assessment of damages for a taking for public use should not be set aside unless so excessive as to be contrary to the great weight of the evidence or to indicate bias or prejudice. Mississippi State Hwy. Comm'n v. Baker, 241 Miss. 738, 133 So. 2d 277 (1961).

The annexation of lands to a city over the objection of their owners is not a taking of property without compensation. In re City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959).

Private property shall not be damaged for public use without compensation. City of Jackson v. Cook, 214 Miss. 201, 58 So. 2d 498 (1952).

Statute authorizing county supervisors to take land for a sea wall and requiring landowners to claim compensation within a specified time does not violate the Constitution forbidding the taking of property without compensation first being made. Henritzy v. Harrison County, 180 Miss. 675, 178 So. 322 (1938).

Neither the State nor any of its political subdivisions is required to tender in actual cash just compensation for property taken or damaged in eminent domain proceeding, and the requirement of just compensation in advance is satisfied when public faith and credit are pledged to a reasonably prompt ascertainment of payment and there is adequate provision for enforcing the pledge. Byrd v. Board of Supvrs., 179 Miss. 880, 176 So. 386 (1937), error overruled, 179 Miss. 889, 176 So. 910 (1937).

To make it liable the board of supervisors must give such directions as make the act of the overseer their act, and mere notice of bad condition and failure to repair does not make it liable. Rainey v.

Hinds County, 79 Miss. 238, 30 So. 636 (1901).

The owner of land damaged by the taking of the land of another is entitled to compensation. Richardson v. Board of Miss. Levee Comm'rs, 77 Miss. 518, 26 So. 963 (1899).

The legislature may authorize the guardian of an infant, or person of unsound mind, to agree upon damages to be paid for the property of the ward taken for public use. Louisville, N.O. & T. Ry. v. Blythe, 69 Miss. 939, 11 So. 111, 30 Am. St. R. 599 (1892).

The legislature cannot limit the time within which the owner may claim compensation. Yazoo-Mississippi Delta Levee Bd. v. Dancy, 65 Miss. 335, 3 So. 568 (1888).

Compensation must be in money, and cannot be diminished by supposed benefits resulting from the improvement. Brown v. Beatty, 34 Miss. 227 (1857); Isom v. Mississippi Cent. R.R., 36 Miss. 300 (1858); Penrice v. Wallis, 37 Miss. 172 (1859); New Orleans, J. & G.N.R.R. v. Moye, 39 Miss. 374 (1860).

Compensation must precede the seizure of the property for public uses. Thompson v. Grand G.R.R. & Banking Co., 4 Miss. (3 Howard) 240 (1839); Yazoo-Mississippi Delta Levee Bd. v. Dancy, 65 Miss. 335, 3 So. 568 (1887).

18. Construction and operation of railroads, right to due compensation.

State may lawfully require interstate railroad to abolish at own expense highway grade crossings, without regard to financial ability, if reasonably required by public safety. New Orleans & N.E.R. Co. v. State Hwy. Comm'n, 164 Miss. 343, 144 So. 558 (1932).

Under municipal authority a street railway may lay its tracks across railroad tracks in the street without making compensation. Mississippi Cent. R.R. v. Hattiesburg Traction Co., 109 Miss. 101, 67 So. 897 (1915).

A railroad previously chartered held not exempt from liability to a private property owner for damages to her property caused by the operation of the road in such a manner as to create a private nuisance. Alabama & V. Ry. Co. v. King, 93 Miss. 379, 47 So. 857 (1908).

This section contemplates damage caused from smoke, soot and cinders. King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 42 So. 204, 117 Am. St. R. 749 (1906).

A railroad company cannot escape liability for damages to property, not taken on the ground that they are only such as necessarily and naturally arise from the proper management and control of its trains. Alabama & V. Ry. Co. v. Bloom, 71 Miss. 247, 15 So. 72 (1894).

The legislature cannot provide for the appropriation of private property to a mere private enterprise, but it is not essential that the enterprise should be exclusively a state undertaking; the right of eminent domain may be exercised for the construction of railroads. Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389 (1857).

19. Airports and air space, right to due compensation.

Although a municipal airport had informally, without resorting to eminent domain or other legal process, acquired an overflight easement in the air space above the plaintiffs' land, there had been an actual taking for public use of private property where low overflights of great numbers of aircraft habitually and constantly invaded the air space and substantially impaired the plaintiffs' use and enjoyment of their property, and the owners were entitled to compensation. Emmons v. Pope, 232 So. 2d 709 (Miss. 1970).

Where the use of the air space above the plaintiffs' land by aircraft approaching and taking off from a municipal airport amounted to a taking for which the plaintiffs were entitled to compensation, they were not limited to recovery against the United States on the theory that federal legislation had placed navigable air spaces in the public domain and had preempted the field. Emmons v. Pope, 232 So. 2d 709 (Miss. 1970).

20. Sewerage systems, right to due compensation.

Where private builders had dedicated to public use, without any reservation, a part of a sewer system laid in public roads and streets, such portion of the sewer system was not private property protected by this section of the constitution, and a municipality, which had expanded its city limits and had taken over this portion of the system, was not required to pay compensation to the private builders. Stegall v. City of Jackson, 244 Miss. 169, 141 So. 2d 236 (1962), suggestion of error sustained in part, overruled in part 244 Miss. 169, 143 So. 2d 298 (1962).

City was liable for any special and different damage suffered by property owner, not common to general public, caused by construction and maintenance of its sewerage system whether properly constructed and maintained or not. Thompson v. City of Philadelphia, 180 Miss. 190, 177 So. 39 (1937).

In action by property owners against city for damages from sewerage system, instruction in substance that jury could not find for plaintiffs unless it believed from preponderance of evidence that injuries, if any, were caused by negligent construction and maintenance of sewerage system by city, held erroneous as presenting false issue and misleading because liability did not depend on negligence. Thompson v. City of Philadelphia, 180 Miss. 190, 177 So. 39 (1937).

Landowners could recover for damages to land caused by overflow from defective municipal sewage septic tank, in view of constitutional prohibition against taking or damaging of private property for public purposes, as regards municipality's contention that in maintaining septic tank it was exercising police power of conserving public health, which was governmental function, in exercise of which, although wrongful, municipality was not liable for damage. Hodges v. Town of Drew, 172 Miss. 668, 159 So. 298 (1935).

The Drainage Act of 1912 held not to authorize the taking of property without compensation. Jones v. Belzoni Drainage Dist., 102 Miss. 796, 59 So. 921 (1912).

City was liable for damage caused by discharging sewerage into a stream flowing through plaintiff's land. Thompson v. City of Winona, 96 Miss. 591, 51 So. 129, Am. Ann. Cas. 1912B,449 (1910).

21. Waterworks, right to due compensation.

After annexation of the service area of a certificated private water company, a municipality has no right to invade that area in competition with the private company without first paying compensation as provided in this section. City of Jackson v. Creston Hills, Inc., 252 Miss. 564, 172 So. 2d 215 (1965).

Public uses for which land bordering a water supply reservoir may be taken include facilities for visitors, and a wild life sanctuary. Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So. 2d 572 (1963), motion overruled, 248 Miss. 23, 158 So. 2d 694 (1963), cert. denied, 376 U.S. 970, 84 S. Ct. 1136, 12 L. Ed. 2d 84 (1964).

Persons asserting a constitutional right to damages for a city's negligently diverting water across their property are not required to elect whether to proceed on the ground of negligence or under the Constitution. McDowell v. City of Natchez, 242 Miss. 386, 135 So. 2d 185 (1961).

Rights of riparian owners were subordinate to the rights of the state insofar as the soil beneath the navigable waters was concerned and the use of these lands for the benefit of the public was vested in the state and the state had the right to impose further and additional uses upon such property for the benefit of the public and in doing so the state was not taking private property for public use. Xidis v. City of Gulfport, 221 Miss. 79, 72 So. 2d 153 (1954).

Trial court having found as fact that public necessity existed for water tower, granting of writ of prohibition restraining eminent domain court from condemning particular site selected by city grounded upon availability of other suitable sites was without authority. McLaurin v. State, 41 So. 2d 41 (Miss. 1949).

Decision by city that particular site which it seeks to condemn is best adapted to its proposed public use as site for water tower is legislative and is not reviewable by courts; and city is not to be restricted in its choice between two or more available sites. McLaurin v. State, 41 So. 2d 41 (Miss. 1949).

In city's proceeding to condemn in part right to construct waterworks system, complainants were entitled to compensation for part of easement taken and damages resulting as consequence. City of

Greenwood v. Gwin, 153 Miss. 517, 121 So. 160 (1929).

Damages authorized to be paid by a drainage district does not contemplate the allowance of compensation for damages resulting from negligence. Stephens v. Beaver Dam Drainage Dist., 123 Miss. 884, 86 So. 641 (1921).

22. — — Construction and use of streets and highways, right to due compensation.

In a case where a city widened ditches on the owner's property, a chancery court failed to determine if this exceeded the scope of the city's prescriptive easement. If, on remand, the chancellor found that the city exceeded the scope of its easement by widening the ditch, the owner would have at least been entitled to damages for the physical occupation of his property, even if the chancellor found no damages to the remainder. Fratesi v. City of Indianola, 972 So. 2d 38 (Miss. Ct. App. 2008).

Homeowners who suffered additional damages allegedly attributable to a highway construction project a few years after the homeowners were compensated for the taking of their property by the condemning authority in an eminent domain action could not recover for the additional damages, even if those damages were not reasonably foreseeable at the time of the original eminent domain trial. King v. Mississippi State Hwy. Comm'n, 609 So. 2d 1251 (Miss. 1992).

Where state highway commission wrote landowner that fair market value of property to be taken including all damages was some $40,000, yet when the matter came on for hearing, the commission offered only two appraisers, who testified that the fair market value was $19,000 and $19,700 respectively, and the appraisers testified there were no damages to the remainder despite the facts that the property was being divided into two parcels by a controlled access highway, and the landowner would be forced to travel 3 to 4 miles in going from one parcel to another, the highway would be from 5 to 14 feet above the surrounding land and residences constructed would be greatly below the surface of the highway, and lastly the larger parcel of the remaining property would be completely separated by the highway from the navigable portion of a creek running along the western boundary of the property, an award of $19,700 did not give the landowner full and adequate compensation for the taking of her property. Starkville Coca-Cola Bottling Co. v. Rutherford, 275 So. 2d 381 (Miss. 1973).

Where the construction of a frontage road paralleling a limited access highway will substantially impair or damage an abutting property owner's right of access to the highway in question and will effectively destroy his right of direct and free access thereto as it had previously existed, he is entitled to be compensated for this loss of access as well as for the value of a small parcel of land which will be embraced within the frontage road's easement. McLaughlin v. State, 210 So. 2d 661 (Miss. 1968).

The adoption of a declaratory order by the State Highway Commission wherein a certain highway was designated as a limited access highway did not amount to a taking of an abutting property owner's right of direct and free access to the highway, nor did it obviate the constitutional necessity of paying just compensation and damages when and if it actually should be taken or damaged. McLaughlin v. State, 210 So. 2d 661 (Miss. 1968).

The highway commission is liable in damages to a property lessee where, as a consequence of the reconstruction of a highway, the natural flow of water from the area was caused to increase and carry with it dirt, sand, clay, and other materials so that a lake on the lessee's land became partially filled. Mississippi State Hwy. Comm'n v. Thomas, 202 So. 2d 925 (Miss. 1967).

Where the Highway Commission acquired a tract of land for the purpose of removing sand and clay therefrom for use as topping material, and after the property was cleared water ran off more rapidly and in greater quantity and carried with it sand, clay, and debris upon the property of an adjacent owner, the consequential damage was the result of the taking of property by the commission for public use for which recovery could be had under this section. Mississippi State Hwy.

Comm'n v. Engell, 251 Miss. 855, 171 So. 2d 860 (1965).

Diminution in the flow of traffic past property by changes in the highway system is not such a taking as to require compensation, even though the value of the property may thereby be diminished. Morris v. Mississippi State Hwy. Comm'n, 240 Miss. 783, 129 So. 2d 367 (1961).

Where a highway, which had not been a limited access highway, was made into a nonaccess highway, this was the equivalent of an appropriation of the abutting property owner's right to have an easy way of access to the main highway. Carney v. Mississippi State Hwy. Comm'n, 233 Miss. 598, 103 So. 2d 413 (1958).

In a proceeding to condemn land for the construction of a cloverleaf at the intersection of certain highways, which had not been limited access highways, an instruction that abutting landowner was not entitled to damages resulting solely from inconvenience in entering and leaving his remaining property, provided that the public at large suffered the same inconvenience, was erroneous. Carney v. Mississippi State Hwy. Comm'n, 233 Miss. 598, 103 So. 2d 413 (1958).

In a proceeding to condemn land for the construction of a cloverleaf at the intersection of certain highways, which had not been limited access highways, an instruction that the Highway Commission could construct the interchange on its right of way without payment of damages to an abutting property owner was erroneous, where it appeared that the construction included a high embankment near the owner's land, and the commission had revoked the owner's permit to enter the highway directly, so that his right of access to the highway was impaired. Carney v. Mississippi State Hwy. Comm'n, 233 Miss. 598, 103 So. 2d 413 (1958).

Since the city had no power to close an alley except upon first making due compensation to the abutting landowners, if the city had closed the alley without making due compensation and the State Highway Commission had entered upon and obstructed it by a dirt embankment, the city and Highway Commission would have been jointly liable. Collins v. Mississippi State Hwy. Comm'n, 233 Miss. 474, 102 So. 2d 678 (1958).

A right of ingress and egress to an abutting property owner is a property right and cannot be taken without compensation therefor. Mississippi State Hwy. Comm'n v. Spencer, 233 Miss. 155, 101 So. 2d 499 (1958).

County has jurisdiction over road so as to make it liable for damage resulting from an overflow caused by improper construction of road where county followed method prescribed by law, Code 1942, § 8314, notwithstanding State Highway Department and WPA workers did part of the actual construction of the road, with permission of county supervisors. Stigall v. Sharkey County, 207 Miss. 188, 42 So. 2d 116 (1949).

A survey by state and aid in construction of a road would not divest county and invest State with jurisdiction of the road since that must be done by affirmative act of Legislature. Stigall v. Sharkey County, 207 Miss. 188, 42 So. 2d 116 (1949).

Relocation of state highway and abandonment by state highway commission of old highway on which property owner's premises abutted, allegedly depriving the owner of the right of ingress and egress if the old highway should not be maintained, did not render commission liable to property owner since it was under no duty to maintain the old highway, notwithstanding refusal of the county board of supervisors to maintain it. Quin v. Mississippi State Hwy. Comm'n, 194 Miss. 411, 11 So. 2d 810 (1943).

State Highway Commission was liable to a property owner for damage to her land, resulting from its use thereof for parking road machinery during the course of road construction and as an essential part of its work, over the protest of the landowner. State Hwy. Comm'n v. Mason, 192 Miss. 576, 4 So. 2d 345 (1941), error overruled, 192 Miss. 595, 6 So. 2d 468 (1942).

Where the evidence in a proceeding for condemnation by the State Highway Commission tended to show that construction of a railroad right of way adjacent to defendants' land rendered defendants' access to their land more inconvenient, it was error to instruct the jury that the defendants could not be allowed anything for the railroad's right of way or for any grading or construction on such right of way, since this section of the Constitution prohibits both the taking and damaging of private property for public use and property may be damaged without the taking. Smith v. Mississippi State Hwy. Comm'n, 183 Miss. 741, 184 So. 814 (1938).

Landowners held entitled to recover compensation from State Highway Commission for strip of land taken for State highway without condemnation or compensation, as against contention of Commission that it was not at time of taking of land a corporation so that it could be sued, where Commission was thereafter incorporated, since trespass was continuing one so that cause of action arose when Commission was incorporated. State Hwy. Comm'n v. Flint, 177 Miss. 830, 172 So. 299 (1937).

County supervisors' order transferring portion of highway to highway commission sufficiently established county's claim of ownership, as respects right to compensation for taking. Herod v. Carroll County, 162 Miss. 78, 138 So. 800 (1932).

County cannot assume jurisdiction over highway, and expend public funds in constructing and repairing it, without paying for damages for taking. Herod v. Carroll County, 162 Miss. 78, 138 So. 800 (1932).

The streets of the city may be devoted to any proper use incident to construction and maintenance of a public thoroughfare, but a city is liable for damages inflicted on abutting property by negligent use of street in failing to provide proper drains. City of Laurel v. Hearn, 143 Miss. 201, 108 So. 491 (1926).

Where a levee or a public road constructed by the county which merely obstructs the flow of overflow waters and returns them to the channels earlier than they would be, the county is not liable to damages from a greater overflow on property not contiguous to the highway caused by the levee. Herring v. Lee County, 130 Miss. 1, 93 So. 436 (1922).

A county is liable where its supervisors approved plans and specifications and accepted work for the negligent construction of a roadbed. Covington County v. Watts, 120 Miss. 428, 82 So. 309 (1919).

The laying of an additional track in the street by street railway would not require compensation to abutting owners. Williams v. Meridian Light & Ry. Co., 110 Miss. 174, 69 So. 596 (1915).

A municipality is not authorized to extend a street over the right of way of a railroad without exercising the right of eminent domain. Illinois Cent. R.R. v. State, 94 Miss. 759, 48 So. 561 (1909).

The legislature may authorize the use of the streets of a municipality to a corporation without compensation to the municipality where the use is confined to its right of way. Mayor of Canton v. Canton Cotton Whse. Co., 84 Miss. 268, 36 So. 266, 105 Am. St. R. 428 (1904).

A county is not liable for the negligent or tortious acts of a road overseer. Rainey v. Hinds County, 79 Miss. 238, 30 So. 636 (1901).

Under this section a county is liable to the owner for damages to land which it wrongfully causes to be covered with water by the improper construction of a public causeway. Raney v. Hinds County, 78 Miss. 308, 28 So. 875 (1900).

23. Change of grade of street or highway, right to due compensation.

An actual taking or physical invasion of property is not the only basis for compensation. Damage to adjacent private property caused by public use is also compensable. Property is damaged when it is made less valuable. Personal inconvenience, discomfort, or interference with use is not compensable unless it results in the depreciation of value. Even then, compensation is not definite, but these factors are evidence of conditions which adversely affect the value of land. Persons owning property abutting streets have a right to reasonable access to their property from the street, and altering that access may damage the property. Where alteration of access, including light, air and view, diminishes the value of the property, the owner is entitled to compensation; such compensation is commonly termed consequential damages. Gilich v. Mississippi State Hwy. Comm'n, 574 So. 2d 8 (Miss. 1990).

Compensation is required for a change of grade in a roadway which adversely affects the value of adjacent property, such as where a change in grade casts increased quantities of water upon the landowner's property. City of Gulfport v. Anderson, 554 So. 2d 873 (Miss. 1989).

The alteration of access to property requires compensation only where, and to the extent that, alteration of access diminishes the value of the property. Matters such as parking and increased difficulty in maneuvering automobiles may likewise be considered to the extent of their adverse effect on property value. Additionally, loss of frontage that "moves" buildings and facilities closer to a roadway may adversely affect value and require compensation. However, compensation for such losses is due only to the extent that the damage is caused by governmental action as distinguished from landowner improvements. Thus, such losses are legally illusory where there has been no taking, but only a reclaiming of a right-of-way that the landowner has theretofore enjoyed and where the landowner has boxed himself or herself in by the manner in which he or she has constructed or purchased the improvements on the property. So long as, after the governmental action at issue, there remains access which would be reasonable if the property had been reasonably improved, no compensation is due. City of Gulfport v. Anderson, 554 So. 2d 873 (Miss. 1989).

While municipalities have the right to alter, change, construct and reconstruct its streets and individual litigants have no right to control their action, yet if in so doing private property is damaged the city is liable for such damage under this section. City of Jackson v. Cook, 214 Miss. 201, 58 So. 2d 498 (1952).

A municipality is liable to an abutting property owner who has made valuable improvements according to the prior established grade of a street, when the municipality raises or lowers the grade to the damage of the property owner. City of Water Valley v. Poteete, 203 Miss. 382, 33 So. 2d 794 (1948).

Injury to abutting property by change of grade of highway by municipality or any other person, natural or artificial, held within constitutional provision that private property shall not be "damaged" for public use without due compensation. Parker v. State Hwy. Comm'n, 173 Miss. 213, 162 So. 162 (1935).

Statutes held to impliedly authorize payment by State Highway Commission for damage to private property incurred through public use, as by change in grade of highway, although no land is actually appropriated. Parker v. State Hwy. Comm'n, 173 Miss. 213, 162 So. 162 (1935).

Each of different persons having interest in property damaged by change of grade in street is entitled to compensation. Eady v. State, 121 So. 295 (Miss. 1929).

Owners of abutting property injured by city changing grade of street must be compensated for damage. Eady v. State, 121 So. 295 (Miss. 1929).

Under this section a county or municipality by changing the grade of a street or road to the damage of an abutting property owner is liable for such damages. Tishomingo County v. McConville, 139 Miss. 589, 104 So. 452 (1925).

A city must make compensation where it damages private property for the general welfare by a change of grade of street. Funderburk v. City of Columbus, 117 Miss. 173, 78 So. 1 (1918).

Barricades in a street erected by the city which interfered with egress and ingress from and to plaintiff's property entitles him to damages, and this is true where the party damaged has only an equitable title and possession of the property. Funderburk v. City of Columbus, 117 Miss. 173, 78 So. 1 (1918).

An abutting property owner is not estopped from asserting the liability of the city for injury caused by a change in grade of a street by merely signing a petition to have the street paved. Robinson v. City of Vicksburg, 99 Miss. 439, 54 So. 858 (1911).

Although a city authorized a railroad to raise a street grade to the damage of abutting property owners, the railroad company will be liable for damages. Yazoo & Miss. V. Ry. v. Lefoldt, 87 Miss. 317, 39 So. 459 (1905); Brahan v. Meridian Home Tel. Co., 97 Miss. 326, 52 So. 485 (1910).

24. Vacation or closing of street or highway, or railroad, right to due compensation.

A circuit court erred in reducing the acreage of a railroad right-of-way sought to be condemned by the State for a penitentiary based on its finding that the State had shown no need for more than a short stretch of the right-of-way where the circuit court found neither fraud nor clear abuse of discretion. Governor's Office of Gen. Servs. v. Carter, 573 So. 2d 736 (Miss. 1990).

This section does not require that a person who seeks to vacate a street pay compensation to persons claiming damage from the vacation. Burkett v. Ross, 227 Miss. 315, 86 So. 2d 33 (1956).

Where there was a finding by chancellor that closing of streets was for public good, in a suit by landowners, whose land did not abut on the closed section of the street, closing ordinance did not violate the constitution. Puyper v. Pure Oil Co., 215 Miss. 121, 60 So. 2d 569 (1952).

The adoption of street closing ordinance was itself a determination by the mayor and board of aldermen that the public interest and welfare required that the street be closed. Puyper v. Pure Oil Co., 215 Miss. 121, 60 So. 2d 569 (1952).

Damages of $5,000 for a condemned highway right of way across middle of a farm for a distance of a mile and a half, consisting of 35.1 acres, was sustained by the evidence, where witnesses estimated the value of the land taken and the reduced value of that remaining at from $2,000 to $15,000, especially where jurors personally inspected and examined the land. Mississippi State Hwy. Comm'n v. Treas, 197 Miss. 670, 20 So. 2d 475 (1945).

Upon abandonment of old highway on which property owner's premises abutted and relocation of state highway by state highway commission, the mere fact that such owner's premises have been left off the new paved highway does not of itself afford a legal basis for the recovery of damages; and the damages thereby sustained are not recoverable so long as there remains a public highway, maintained as such in substantially the same location where the old highway existed. Quin v. Mississippi State Hwy. Comm'n, 194 Miss. 411, 11 So. 2d 810 (1943).

A county is liable for damages to an abutting landowner for abandoning a public highway. Jackson v. Monroe County, 124 Miss. 264, 86 So. 769 (1921).

An abutting owner is entitled to compensation where to his damage the county has vacated a country road depriving him of access to a farm. Morris v. Covington County, 118 Miss. 875, 80 So. 337 (1919).

The courts have supervisory power over closing an alley by municipal ordinance and it must be judicially determined that the use is a public one. Polk v. City of Hattiesburg, 109 Miss. 872, 69 So. 675 (1915), error overruled, 110 Miss. 80, 69 So. 1005 (1915).

Where a municipality closes and vacates an established street, it deprives the owner of abutting lots of a right which is property, and which cannot be taken except on due compensation being first made as provided in this section. Laurel Imp. Co. v. Rowell, 84 Miss. 435, 36 So. 543 (1904).

25. Additional public use of property devoted to public use, right to due compensation.

Where an abutting property owner's predecessor in title had conveyed a highway right of way to the state highway commission, and subsequently a gas company, pursuant to permission obtained from the state highway commission, laid a gas distribution line wholly within the right of way, the abutting property owner was not entitled to rent from the gas company, under evidence showing that his property was not damaged or depreciated in value by the use of the right of way for the distribution line; nor was there violation of the abutting property owner's rights under § 17 of the Mississippi Constitution. Mississippi Valley Gas Co. v. Boydstun, 230 Miss. 11, 92 So. 2d 334 (1957).

Where a right of way was conveyed to the state highway commission for highway purposes, and electric power company constructed power lines on the highway right of way, the landowner could recover damages for the additional servitude on the ground that private property should not be taken or damaged for public use except on due compensation. Berry v. Southern Pine Elec. Power Ass'n, 222 Miss. 260, 76 So. 2d 212 (1954).

Where state constructed a bridge across the bay of St. Louis, which bridge was partly across area of riparian owners who had been granted the privilege and license of planting and gathering oysters and erecting bath-houses and other structures, the state by building this bridge exercised its power to impose an additional public use upon a property which was already set aside for public purposes and the exercise of this power was not taking of property for which compensation must be made. Crary v. State Hwy. Comm'n, 219 Miss. 284, 68 So. 2d 468 (1953).

This section of the Constitution prohibits the taking of private property for public use without compensation but does not prevent the imposition of an additional public use upon property already set aside for a public purpose. Bailey v. Pierce, 194 So. 743 (Miss. 1940).

The public interest is subject to legislative control, and the legislature may devote public property to an additional public use without compensation for such use. Bailey v. Pierce, 194 So. 743 (Miss. 1940).

Under this section the State Highway Commission was not required to make compensation to the county for the use of school lands because of construction across such lands of a public highway. Bailey v. Pierce, 194 So. 743 (Miss. 1940).

26. Measure of compensation or damages, right to due compensation.

Landowner's expert appraiser's opinion as to the diminution in value of the remainder of the landowner's property occasioned by the taking of an easement for a pipeline should have been excluded under Miss. R. Evid. 702 because he failed to offer admissible market-data or comparable-sales evidence. Gulf S. Pipeline Co., LP v. Pitre, 35 So. 3d 494 (Miss. 2010).

Company, which was leasing the property that was taken by the Mississippi Transportation Commission, was not entitled to any of the condemnation award of the lessor because it had no leasehold interest as its leases had terminated. Thus, the special court properly granted the Commission's motion for partial summary judgment finding that (1) the company was only entitled to compensation for the value of the billboards on the property that was taken and (2) compensation could only be calculated using the cost analysis, which would provide the company with the new cost of its signs, less depreciation. Eller Media Co. v. Miss. Transp. Comm'n, 882 So. 2d 198 (Miss. 2004).

In an eminent domain case, the special court properly granted the Mississippi Transportation Commission's motion for summary judgment awarding the company, which was leasing the property that was taken and on which it had placed three billboard signs, $ 57,700 for each billboard sign because the parties had entered into and filed a stipulation that the cost new, less depreciation, for each billboard on the property was $ 57,700. Eller Media Co. v. Miss. Transp. Comm'n, 882 So. 2d 198 (Miss. 2004).

Where jury's verdict of amount owed to landowners for property taken by the State was between the values set by all three experts, the verdict was not contrary to the weight of the credible evidence, or the result of bias, passion, or prejudice. Gautier v. Miss. Transp. Comm'n, 839 So. 2d 588 (Miss. Ct. App. 2003).

Where a contractor demolished more property than was condemned, such additional property was not taken without compensation, and a new trial to determine the value of such property was not required; instead, the property owner's remedy was an action for the damage to the remaining property. Checkers Drive-In Restaurants, Inc. v. Mississippi Transp. Comm'n, 755 So. 2d 1238 (Miss. Ct. App. 2000).

Where public improvements are to be financed by a special assessment upon a class of property owners, a condemnee may not claim the present value of the assessment in diminution of the value of the remainder of his or her property after a portion has been taken. Dear v. Madison County ex rel. Madison County Bd. of Supvrs.., 649 So. 2d 1260 (Miss. 1995).

Neither access to property remaining after taking for public road nor parking on property are attributes or capabilities of land subject to separate valuation in eminent domain proceedings; they may be considered only insofar as they affect value of property remaining after taking. Trustees of Wade Baptist Church v. Mississippi State Hwy. Comm'n, 469 So. 2d 1241 (Miss. 1985).

In arriving at fair market value of entire tract before taking, evidence of the reproduction cost of buildings on the property taken is admissible as a factor to be considered by the jury in arriving at a fair market value; although whether testimony relative to the reproduction cost is admissible in a given case lies largely in the sound discretion of the trial judge, such testimony is always admissible when it is established that the improvements are reasonably adopted to the land and the depreciated value of the improvement adds to the value of the entire property by the amount of their depreciated value; when such testimony is admitted, the condemnor is entitled to such instruction that such testimony is not evidence of market value but only a factor to be considered along with the other testimony in arriving at a fair market value. Mississippi State Hwy. Comm'n v. Owen, 308 So. 2d 228 (Miss. 1975), corrected, 310 So. 2d 920 (Miss. 1975).

Although there is a danger in admitting testimony as to specific items of damage in an eminent domain proceeding, in that it could result in the pyramiding of damages by the jury, such testimony is competent when related to the before and after value rather than as a basis for a separate verdict, and in a proceeding involving the taking of a grocery store, testimony as to the cost of removing the stock of goods and store fixtures from the premises was admissible, as a consequence of the taking and as an element of damage. Blackwelder v. Bryant, 246 So. 2d 512 (Miss. 1971).

In arriving at the before and after value in an eminent domain proceeding, a witness may testify as to any injuries which depreciate the value of the remaining land, provided that the witness connects such injuries with the before and after value and considers them not as a specific item of damage but as bearing on such market value. Blackwelder v. Bryant, 246 So. 2d 512 (Miss. 1971).

The acceptance of testimony as to the value of condemned land on the date of hearing was error as contrary to the rule establishing the date of filing of the condemnation proceeding as the proper date to be used to determine values by the "before and after" method, but such error was harmless where it was not contended that there was any change in market value between the date of filing and the date of hearing. Mississippi State Hwy. Comm'n v. Frierson, 240 So. 2d 457 (Miss. 1970).

In an action for damages brought by lessees against the highway commission for damages, it was reversible error for the trial court to give conflicting instructions on the measure of damages recoverable. Mississippi State Hwy. Comm'n v. Thomas, 202 So. 2d 925 (Miss. 1967).

A proper instruction as to the measure of damages where a leasehold has been damaged without an actual taking is the difference between the fair market value of the leasehold before and after the completion of the work for public use from which the damage results. Mississippi State Hwy. Comm'n v. Thomas, 202 So. 2d 925 (Miss. 1967).

In the absence of some stipulation to the contrary, the date of the institution of the suit in the special eminent domain court is the date of the taking, and it is the value of the land immediately before this taking which this section contemplates will constitute the "before the taking" computation. Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 172 So. 2d 196 (1965).

The anticipated profits from a cemetery business cannot be taken into consideration in determining the fair, cash market value of the land sought to be acquired. Green Acres Mem. Park v. Mississippi State Hwy. Comm'n, 246 Miss. 855, 153 So. 2d 286 (1963).

Save in exceptional cases where part of a tract is taken, due compensation is the value of property taken and the damage done to the fair market value of the entire tract by the taking. Green Acres Mem. Park v. Mississippi State Hwy. Comm'n, 246 Miss. 855, 153 So. 2d 286 (1963).

Any type of damage may be considered insofar as it affects the fair market value of the remaining property. Mississippi State Hwy. Comm'n v. Colonial Inn, Inc., 246 Miss. 422, 149 So. 2d 851 (1963).

The cost of removing personal property from the premises condemned may be shown as bearing upon the question of value. Mississippi State Hwy. Comm'n v. Rogers, 242 Miss. 439, 136 So. 2d 216 (1961).

The compensation awarded the landowner in an eminent domain proceeding is conclusively presumed to include all damages resulting to him from the proper use of the land taken. Mississippi State Hwy. Comm'n v. Tomlinson, 223 Miss. 623, 78 So. 2d 797 (1955).

Where land was condemned to raise grade of highway, a judgment in the eminent domain covered all damages which might reasonably result to the property owners from the construction of the highway and the property owners were not entitled to any further damage resulting from the second elevation of the grade of the highway. Mississippi State Hwy. Comm'n v. Tomlinson, 223 Miss. 623, 78 So. 2d 797 (1955).

In eminent domain proceedings, under unusual conditions where the before and after values test is inapplicable to the peculiar facts, court will adopt rule supported by reason, logic and common sense, designed to result, as far as may be humanly possible, in ascertainment of true, accurate damage suffered by property owner. Baker v. Mississippi State Hwy. Comm'n, 204 Miss. 166, 37 So. 2d 169 (1948).

In eminent domain proceedings, measure of damage to property not actually taken is difference between fair market value of such property before, as compared to such value after, the taking. Baker v. Mississippi State Hwy. Comm'n, 204 Miss. 166, 37 So. 2d 169 (1948).

In eminent domain proceedings, measure of damage to property not actually taken, if property has no market value, is difference between fair, reasonable value of such property before, as compared to such value after, the taking. Baker v. Mississippi State Hwy. Comm'n, 204 Miss. 166, 37 So. 2d 169 (1948).

In eminent domain proceedings, jury must base its verdict on difference in before and after value of property, but replacement, reconstruction and remedying costs may be shown and used as bearing upon accuracy, or inaccuracy, of amount of damage deduced from proof of comparative values. Baker v. Mississippi State Hwy. Comm'n, 204 Miss. 166, 37 So. 2d 169 (1948).

Landowner, in condemnation proceedings, cannot recover damages for specific injuries to his remaining land, but evidence of such injuries is competent if, but not unless, such would affect the market value of the remaining land. Mississippi State Hwy. Comm'n v. Treas, 197 Miss. 670, 20 So. 2d 475 (1945).

Admitting evidence, in proceedings to condemn highway right of way, of specific injuries to remaining land, such as cost of rebuilding and removing barns and silo, digging new pools, and constructing three miles of fence, was not error where landowner was careful to connect the specific items of cost with, and have witnesses consider them only as bearing upon, market value of the remaining land. Mississippi State Hwy. Comm'n v. Treas, 197 Miss. 670, 20 So. 2d 475 (1945).

It was the province of the jury to fix damages from conflicting testimony in condemnation proceedings by state highway commission. Mississippi State Hwy. Comm'n v. Treas, 197 Miss. 670, 20 So. 2d 475 (1945).

Court may, in a proper case, allow interest as part of the damages or compensation to which the owner is entitled when property is taken under power of eminent domain. Mississippi State Hwy. Comm'n v. Treas, 197 Miss. 670, 20 So. 2d 475 (1945).

Question in condemnation proceeding of prior interest and rate thereof, as element of damage, should have been admitted to and passed upon by the jury, and the amount of the verdict constituted the total damage fixed by the jury, and the trial judge had no power to add thereto prior interest, nor to fix the rate thereof. Mississippi State Hwy. Comm'n v. Treas, 197 Miss. 670, 20 So. 2d 475 (1945).

Upon relocation of state highway and abandonment of old highway, allegedly depriving property owner of right of egress and ingress of old highway should not be repaired and maintained, the proper measure of damages is not the difference in the value of plaintiff's property as now located by reason of such relocation and abandonment and its value if it abutted on the new highway, but it is the difference in its value as now located and the amount that it would be worth if the old highway were maintained as theretofore. Quin v. Mississippi State Hwy. Comm'n, 194 Miss. 411, 11 So. 2d 810 (1943).

Since due compensation hereunder entails the ascertainment of such compensation, and the duty of ascertaining the amount is necessarily cast upon the parties seeking to condemn or who have damaged the property for public use, the full measure of due compensation required hereunder includes the cost incurred in its ascertainment. State Hwy. Comm'n v. Mason, 192 Miss. 576, 4 So. 2d 345 (1941), error overruled, 192 Miss. 595, 6 So. 2d 468 (1942).

Due compensation for the taking or damaging of property for public use includes an allowance of five per cent upon the amount of an affirmed judgment against the condemning authority. State Hwy. Comm'n v. Mason, 192 Miss. 576, 4 So. 2d 345 (1941), error overruled, 192 Miss. 595, 6 So. 2d 468 (1942).

Due compensation hereunder includes interest at the legal rate on a judgment obtained for damages from the date of the original rendition thereof. State Hwy. Comm'n v. Mason, 192 Miss. 576, 4 So. 2d 345 (1941), error overruled, 192 Miss. 595, 6 So. 2d 468 (1942).

Where the rule that the measure of damages in an eminent domain proceeding is the difference between the fair market value of the property before the taking and the fair market value after the taking, is applicable, the owner of the land cannot recover damages for specific injuries to the remaining land, although evidence of such injuries is competent if, but not unless, they would affect the market value of the remaining land. Mississippi State Hwy. Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

Due compensation hereunder is a judicial and not a legislative question. Mississippi State Hwy. Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

The market value of property is the price which it will bring when it is offered by sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. Mississippi State Hwy. Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

The formula for measuring compensation to be awarded the owner in an eminent domain proceeding, when a part of his land is taken for public use is: When part of a larger tract of land is taken for public use, the owner should be awarded the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering the general benefits or injuries resulting from the use to which the land taken is to be put, that are shared by the general public. Mississippi State Hwy. Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

The formula or the rule of before and after taking, must be construed in connection with the facts of the case the court is then considering and the particular questions there presented for decision. Mississippi State Hwy. Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

The compensation awarded the landowner in an eminent domain proceeding is conclusively presumed to include all damages resulting to him from the proper use of the land taken, as in the case of a highway, the proper construction of the contemplated highway. Mississippi State Hwy. Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

The many items which may arise in a highway condemnation case as to depreciation caused property are never competent as separate items of recoverable damage. State Hwy. Comm'n v. Day, 181 Miss. 708, 180 So. 794 (1938).

For measure of damages, see Richardson v. Levee Comm'rs, 68 Miss. 539, 9 So. 351 (1891).

The legislature may direct the appointment of commissioners by the chancery court to estimate damages. New Orleans, B.R., V. & M.R. Co. v. Drake, 60 Miss. 621 (1882).

27. — — Burden of proof, right to due compensation.

Because an expert in an eminent domain action had little or no knowledge as to the valuation of a business sign based on the cost approach, his testimony based on a quote from a sign company should have been stricken since he was merely acting as a conduit for hearsay about another expert's opinion, in violation of Miss. R. Evid. 703; however, additur was not an appropriate remedy in this case because the jury verdict was based on inadmissible evidence. Martin v. Miss. Transp. Comm'n, 953 So. 2d 1163 (Miss. Ct. App. 2007).

The condemnor has the burden of proving the value of the condemned property. Ellis v. Mississippi State Hwy. Comm'n, 487 So. 2d 1339 (Miss. 1986).

Additur was not appropriate in an eminent domain case because the damages awarded to two land owners were not contrary to the overwhelming weight of the evidence; the admissibility of an expert's opinion regarding the value of the land was waived, so the jury properly took into account the valuation evidence presented by both parties in making its decision. Martin v. Miss. Transp. Comm'n, 953 So. 2d 1163 (Miss. Ct. App. 2007).

In action by owner, or lessee, against State Highway Commission for damages to plaintiff's property and business resulting from raising of grade of highway adjoining plaintiff's property, burden is on plaintiff to show legal damage and extent thereof. Baker v. Mississippi State Hwy. Comm'n, 204 Miss. 166, 37 So. 2d 169 (1948).

Burden of proof is on condemnor on issue of damages sustained by the taking. Mississippi State Hwy. Comm'n v. Treas, 197 Miss. 670, 20 So. 2d 475 (1945).

In an eminent domain proceeding by the state highway commission to condemn land for the construction of a state highway, the burden of proof on the question of damages was on the highway commission, and the court below did not err in refusing an instruction that the burden of proof was upon the landowner to establish by a preponderance of the evidence the damages sustained by the taking of the property for a public highway. Mississippi State Hwy. Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

28. Actions and remedies—In general.

Suit against the state transportation commission, alleging a taking without just compensation in violation of Miss. Const. Art. 3, § 17, need not have been brought under the Mississippi Tort Claims Act, and thus was not time-barred under Miss. Code Ann. § 11-46-11(3), because the constitutional provision was self-executing. McLemore v. Miss. Transp. Comm'n, 992 So. 2d 1107 (Miss. 2008).

While the question of whether the taking of property is necessary is a legislative question which the courts should not disturb absent fraud or abuse of discretion, the question of whether there is a public use is a judicial question without regard to legislative assertions that the use is public; thus, a trial court did not err when it determined whether a landowner's property was in fact taken for a contemplated public use without giving discretion to the city legislature's determination of public necessity. Mayor of Vicksburg v. Thomas, 645 So. 2d 940 (Miss. 1994).

A trial court did not err by determining that the condemnor city, rather than the landowner, had the burden of proving that the landowner's property was being taken for a public use, even though the city legislature had made a determination of public necessity. Mayor of Vicksburg v. Thomas, 645 So. 2d 940 (Miss. 1994).

In a suit to enjoin the county sheriff and members of the board of supervisors of the county from removing top soil from a portion of land leased to plaintiff and to nullify an order by the board of supervisors cancelling plaintiff's lease, the chancery court had jurisdiction to hear the dispute and award damages against the governmental subdivision in order to provide a remedy for plaintiff's constitutionally guaranteed right against taking of property without payment of due compensation therefor. Williams v. Walley, 295 So. 2d 286 (Miss. 1974).

Landowners, joining in equity suit to abate common nuisance and for damages, have right to have their controversy adjudicated in court of competent jurisdiction, and chancery court in which suit was brought has jurisdiction to proceed, after settlement of suit on abatement of nuisance issue, to full and complete determination of all remaining issues, even though they may cover only legal rights and require granting of none of legal remedies. McClendon v. Mississippi State Hwy. Comm'n, 205 Miss. 71, 38 So. 2d 325 (1949).

29. — — Actions by or against political subdivisions, actions and remedies.

Developer's regulatory takings claim, that a city erroneously applied an otherwise valid flood plain ordinance, was unripe for review because, when the developer was notified that Moderate Rehabilitation program contracts related to an apartment complex the developer owned would not be renewed, it suspended plans to rehabilitate the complex and abandoned all avenues of review that were available to it; consequently, the court was unable to evaluate the extent to which the city interfered with the developer's reasonable investment-backed expectations because no final decision had been made, nor even sought, regarding the application of the flood-zone ordinance. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

To the extent that a developer alleged an ordinary takings claim against a city, such claim was unripe because the city had not made a final decision on whether to condemn the developer's property, and had done nothing more than state its intent to proceed with condemnation. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

Regional housing authority, in distributing alternative housing vouchers to the tenants of a flooded apartment complex, did not effect a taking under Mississippi law because the housing authority did not force the tenants to abandon their leases or interfere with the owner/developer's reasonable investment-backed expectations since the tenants were simply given an option to either accept the voucher and use it elsewhere, or to decline the voucher and remain under their leases at the apartment complex. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

In a dispute surrounding the enactment of a district ordinance regulating the disposal of wastewater, residents, who owned septic systems, alleged that the enactment of the ordinance amounted to a taking. A genuine issue of material fact existed; therefore, the chancellor erred in granting summary judgment on this issue, and the record was insufficiently developed to afford review. Green v. Cleary Water, Sewer & Fire Dist., 910 So. 2d 1022 (Miss. 2005), writ of certiorari denied by 547 U.S. 1098, 126 S. Ct. 1883, 164 L. Ed. 2d 568, 2006 U.S. LEXIS 3287, 74 U.S.L.W. 3598 (2006).

Section 47-5-112 [repealed] did not violate any "right" enjoyed by a county under the Fifth Amendment to the United States Constitution or § 17 of the Mississippi Constitution, since political subdivisions of a state have no Fifth or Fourteenth Amendment protections against the state, and § 17 of the Mississippi Constitution applies only to "private" property. State v. Hinds County Bd. of Supvrs., 635 So. 2d 839 (Miss. 1994).

The theory of the allowance of damages under this section is not maintainable under a declaration grounded directly and solely upon the negligence of a municipality, since the defenses available to the defendant in a suit for damages under this provision, and a suit based on the theory of negligence, are entirely different. City of Meridian v. Peavy, 188 Miss. 168, 194 So. 595 (1940).

Suit against State Highway Commission will lie only for liability imposed by statute, though Commission is body corporate and may sue and be sued. State Hwy. Comm'n v. Knight, 170 Miss. 60, 154 So. 263 (1934).

30. Determination of public use, actions and remedies.

The evidence was sufficient to support a trial court's dismissal of a city's condemnation petition based on a finding of no public use where the city's contract with a gaming corporation for use of the land for the alleged purpose of urban renewal did not comply with § 43-35-19(b)'s competitive bidding requirement, and the city failed to provide conditions, restrictions, or covenants in its contract with the gaming corporation to ensure that the property would be used for the purpose of gaming enterprise or other related establishments. Mayor of Vicksburg v. Thomas, 645 So. 2d 940 (Miss. 1994).

In a hearing on a motion to dismiss an eminent domain action on the ground that the taking was not one for public use, the mandate of Article 3, § 17 of the Mississippi Constitution that the question of public use be decided as a judicial, not a legislative, question was not complied with where there was merely a legislative assertion of public use but no evidence that the use would in fact be public. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284 (Miss. 1994).

31. Injunctions, actions and remedies.

Equity has jurisdiction, on grounds of injunctive relief and to prevent multiplicity of suits, of suit filed by a number of landowners against State Highway Commission for injunction to restrain continuation by defendant of common nuisance caused by obstruction of water course through respective lands of plaintiffs and for damages done to their crops and lands. McClendon v. Mississippi State Hwy. Comm'n, 205 Miss. 71, 38 So. 2d 325 (1949).

Where officers or agents of State, as such, seize or trespass upon private property, owner can maintain suit to eject officers or agents or to enjoin further trespass. State Mineral Lease Comm'n v. Lawrence, 171 Miss. 442, 157 So. 897 (1934).

The use to be made of the property to be taken can only be raised by injunction. Vinegar Bend Lumber Co. v. Oak Grove & G.R.R., 89 Miss. 84, 43 So. 292 (1907).

32. Negligence, actions and remedies.

Where plaintiffs in declaration in a suit against city allege that the city was liable for negligently flooding plaintiff's property by draining water from a street, and plaintiff also alleged liability under the Constitution, the two grounds are not inconsistent, because negligence charge is simply an enlargement of the charge of damage without negligence. City of Jackson v. Cook, 214 Miss. 201, 58 So. 2d 498 (1952).

This section was not applicable to a suit to recover damages to plaintiff's property grounded on a municipality's negligence in constructing and maintaining a culvert and sewer, so as to justify an instruction that plaintiff was entitled to recover unless plaintiff's damage was caused solely by an unprecedented rainfall. City of Meridian v. Peavy, 188 Miss. 168, 194 So. 595 (1940).

ATTORNEY GENERAL OPINIONS

City must reimburse individuals for water line laid and maintained at expense of individuals, where land was later annexed by city; however, owners of water line may dedicate water line to municipality which will then maintain water line as part of municipal water system. Belk, Oct. 14, 1992, A.G. Op. #92-0699.

RESEARCH REFERENCES

ALR. Profits derived from business conducted on property taken by eminent domain as evidence of market value. 7 A.L.R. 163.

Exercise of eminent domain for purpose of irrigating land of private owner. 9 A.L.R. 583, 27 A.L.R. 519.

Right to condemn property previously condemned or purchased for public use, but not actually so used. 12 A.L.R. 1502.

Right of abutting owner for compensation to railroad in street under constitutional provision against damaging property for public use without compensation. 22 A.L.R. 145.

Right to use or permit use of street or highway for private telephone or telegraph line. 34 A.L.R. 405.

Liability of municipality for damages or compensation for abating as a nuisance what is not in fact such. 46 A.L.R. 362.

Eminent domain: combination of public and private uses or purposes. 53 A.L.R. 9.

Public benefit or convenience as distinguished from use by the public as ground for the exercise of the power of eminent domain. 54 A.L.R. 7.

Furnishing electricity to public as public use or purpose for which power of eminent domain may be exercised. 58 A.L.R. 787.

Protection of rights of mortgagee in eminent domain proceedings. 58 A.L.R. 1534; 110 A.L.R. 542; 154 A.L.R. 1110.

Power to extend boundaries of municipal corporation. 64 A.L.R. 1335.

Exercise of eminent domain for purpose of library. 66 A.L.R. 1496.

Exercise of power of eminent domain for purposes of logging road or logging railroad. 86 A.L.R. 552.

Exercise of eminent domain for purpose of increasing right or interest which petitioner already owns or relieving the property or petitioner of some burden or obligation in respect of property. 108 A.L.R. 1522.

Right to take property under eminent domain as affected by fact that property is already devoted to cemetery purposes. 109 A.L.R. 1502.

Right to abandon and effect of abandonment of eminent domain proceedings. 121 A.L.R. 12.

Injunction against exercise of power of eminent domain. 133 A.L.R. 11; 93 A.L.R.2d 465.

Lack of diligence to contest a public use on ground that compensation has not been made for private property or rights as affecting right to relief. 133 A.L.R. 11; 93 A.L.R.2d 465.

Deduction of benefits in determining compensation or damages in eminent domain. 145 A.L.R. 7.

Increment to value, from projects for which land is condemned, as a factor in fixing compensation. 147 A.L.R. 66.

Damage to private property caused by negligence of governmental agents as "taking," "damage," or "use" for public purposes, in constitutional sense. 2 A.L.R.2d 677.

Electric light or power line in street or highway as additional servitude. 58 A.L.R.2d 525.

Interference with view as matter for consideration in eminent domain. 84 A.L.R.2d 348.

Valuation at time of original wrongful entry by condemnor or at time of subsequent initiation of condemnation proceedings. 2 A.L.R.3d 1038.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensations. 5 A.L.R.3d 901.

Right to condemn property in excess of needs for a particular public purpose. 6 A.L.R.3d 297.

Zoning as a factor in determination of damages in eminent domain. 9 A.L.R.3d 291.

Eminent domain: deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway. 13 A.L.R.3d 1149.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to source of funds to pay for property. 19 A.L.R.3d 694.

Substitute condemnation: power to condemn property or interest therein to replace other property taken for public use. 20 A.L.R.3d 862.

Traffic noise and vibration form highway as element of damages in eminent domain. 51 A.L.R.3d 860.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor in fixing compensation. 51 A.L.R.3d 1050.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain. 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding. 58 A.L.R.3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking. 59 A.L.R.3d 488.

Eminent domain: Consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages. 59 A.L.R.3d 534.

Assemblage or plottage as factor affecting value in eminent domain proceedings. 8 A.L.R.4th 1202.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking. 44 A.L.R.4th 366.

Inverse condemnation state court class actions. 49 A.L.R.4th 618.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel. 59 A.L.R.4th 308.

Application of Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), to "Public Use" Restrictions in Federal and State Constitutions Takings Clauses and Eminent Domain Statutes. 21 A.L.R.6th 261.

What law determines just compensation when licensee of Federal Power Commission exercises power of eminent domain in federal court under § 21 of Federal Power Act (16 USCS § 814). 51 A.L.R. Fed. 929.

Jury trial under Rule 71A(h) of Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., Rule 71A(h), 28 U.S.C.S.) in condemnation proceedings by United States. 164 A.L.R. Fed. 341.

Am Jur. 26 Am. Jur. 2d, Eminent Domain §§ 1 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration—For condemnation—By state agency—For state transportation facility).

10 Am. Jur. Proof of Facts 2d, Eminent Domain: Lack of Necessity for Taking Property, §§ 9 et seq. (proof of lack of reasonable necessity for taking property for urban renewal project).

CJS. C.J.S. Eminent Domain §§ 27, 29, 71 to 200.

Lawyers' Edition. Public condemnee held entitled to no more than fair market value of condemned property under Fifth Amendment. 80 L. Ed. 2d 376.

Governmental regulation of place of amusement, entertainment, or recreation as violating rights of owner or operator under equal protection clause of Federal Constitution's Fourteenth Amendment-Supreme Court cases. 104 L. Ed. 2d 1078.

Law Reviews. Evidence of Business Factors in Condemnation Proceedings Concerning Certificates of Public Convenience and Necessity. 52 Miss. L. J. 927, December 1982.

Collins, Reliance on State Constitutions: Some Random Thoughts. 54 Miss L. J. 371, Sept.-Dec., 1984.

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Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

§ 17A. Taking private property by eminent domain; transfer to others prohibited for ten years; exceptions

No property acquired by the exercise of the power of eminent domain under the laws of the State of Mississippi shall, for a period of ten years after its acquisition, be transferred or any interest therein transferred to any person, non-governmental entity, public-private partnership, corporation, or other business entity with the following exceptions:

(1) The above provisions shall not apply to drainage and levee facilities and usage, roads and bridges for public conveyance, flood control projects with a levee component, seawalls, dams, toll roads, public airports, public ports, public harbors, public wayports, common carriers or facilities for public utilities and other entities used in the generation, transmission, storage or distribution of telephone, telecommunication, gas, carbon dioxide, electricity, water, sewer, natural gas, liquid hydrocarbons or other utility products.

(2) The above provisions shall not apply where the use of eminent domain (a) removes a public nuisance; (b) removes a structure that is beyond repair or unfit for human habitation or use; (c) is used to acquire abandoned property; or (d) eliminates a direct threat to public health or safety caused by the property in its current condition.

Editor's Note — During the November 8, 2011, election, a citizen-initiated Constitutional amendment, Initiative # 31 - Eminent Domain, was approved by a majority of the electors of Mississippi. The Governor, by Executive Order No. 1074, dated January

9, 2012, directed the Secretary of State to insert Initiative # 31 in the Mississippi Constitution as Article 3, § 17A.

Article 15, § 273(10) of the Mississippi Constitution provides that initiatives approved by the electors take effect thirty (30) days from the date of the official declaration of the vote by the Secretary of State. The Secretary of State certified the November 8, 2011, election on December 8, 2011.

Executive Order No. 1074, signed by Governor Haley Barbour on January 9, 2012, provides:

"To the Secretary of State

"State of Mississippi:

"WHEREAS, Three (3) Constitutional Initiatives proposed Amendments to the Mississippi Constitution and met the requirements of the Mississippi Constitution and the laws of this State to be placed on the November 8, 2011 ballot, as follows: Initiative # 26 - Definition of "Person"; Initiative # 27 - Voter Identification; and Initiative # 31 - Eminent Domain; and

"WHEREAS, The Constitution requires that the Initiatives "receive a majority of the votes thereon and not less than forty percent (40%) of the total votes cast at the election at which the measure was submitted to be approved." Miss. Const. Art. 15, § 273(7).

"WHEREAS, Initiative # 27 and Initiative # 31 were approved by the electors of Mississippi in accordance with Miss. Const. Art. 15, § 273(7); and

"WHEREAS, Art. 15, § 273 further provides that initiatives approved by the electors take effect thirty (30) days from the date of the official declaration of the vote by the Secretary of State. Miss. Const. Art. 15, § 273(10). The Secretary of State certified the November 8, 2011, election results on December 8, 2011; and

"WHEREAS, Unlike Initiative # 26, which failed to pass the electorate, Initiative # 27 and Initiative # 31 were both silent as to where the proposed Amendments to the Mississippi Constitution would be placed; furthermore, the Mississippi Constitution, as well as statutory law, is silent as to who has the administrative and/or ministerial authority to insert the initiatives of the people of Mississippi, passed by the electorate, as part of the Constitution; and

"WHEREAS, Article 5, § 123 of the Mississippi Constitution grants the Governor of the State of Mississippi the authority to "see that the laws are faithfully executed"; and

"WHEREAS, Section 7-1-5 of the Mississippi Code Annotated sets forth the powers of the Governor of the State of Mississippi, including, but not limited to, serving as the supreme executive officer of the State, seeing that the laws are faithfully executed, and supervising the official conduct of executive and ministerial officers; and

"WHEREAS, in the absence of constitutional and/or statutory provision providing otherwise, the Governor has the authority to provide direction for carrying out all lawful administrative and ministerial functions of state government; and

"NOW, THEREFORE, I, Haley Barbour, Governor of the State of Mississippi, under, and by virtue of the authority vested in me by the Constitution and Laws of this State, do hereby direct the Secretary of State C. Delbert Hosemann, Jr., as follows:

"To insert Initiative # 31 in the Mississippi Constitution as Art. 3, § 17A, to follow Art. 3, § 17, where the constitutional requirements for the taking of property for public use are located;

"To insert Initiative # 27 in the Mississippi Constitution as Art. 12, § 249A, to follow Art. 12, § 249, where the constitutional requirements to vote in the State of Mississippi are located;

"I do authorize and direct you, upon receipt of this Executive Order, to take notice and be governed accordingly.

"IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed.

"DONE at the Capitol, in the City of Jackson, this the 9th day of January, in the year of our Lord two thousand and twelve, and of the two hundred and thirty-sixth year of the United States of America."

§ 18. Freedom of religion

No religious test as a qualification for office shall be required; and no preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred. The rights hereby secured shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the state, or to exclude the Holy Bible from use in any public school of this state.

SOURCES: 1817 art I §§ 3, 4; 1832 art I §§ 3, 4; 1869 art I § 23.

Cross References — Right of parents to refuse tests on newborn infants, see § 41-21-203.

JUDICIAL DECISIONS

1. Free exercise of religion.
2. Establishment of religion—In general.
3. — — — Preference to religious sect, establishment of religion.
4. Marriage and family.
5. Jury selection.

1. Free exercise of religion.

Where defendant asserted that he fit into the exception carved out for ritual slaughter under § 75-33-3(3) of Mississippi's meat inspection law because he gave the meat away and only charged for the ritual slaughter, the chancellor's concern for not violating the First Amendment rights of defendant and his customers resulted in his allowing defendant greater freedoms than either § 75-33-3(3) or the First Amendment requires. Spell v. Muhammad, 756 So. 2d 748 (Miss. 2000).

A high school athletic association's anti-recruiting rule, which required that a participant in interscholastic activities attend a school in the school district of which his or her parents or guardian were bona fide residents, did not violate the constitutional right to free exercise of religion since the rule did not prevent a parent or child from actively practicing their chosen religion and did not regulate the conduct of student athletes to the point of interfering with any religious practice; any interference with religious practices was incidental to the stated purpose of the rule-to deter overzealous athletic recruiting practices-and the rule was reasonably related to that purpose. Mississippi High Sch. Activities Ass'n v. Coleman ex rel. Laymon, 631 So. 2d 768 (Miss. 1994).

Jehovah's Witness has right, based upon freedom of religion, to undergo surgery but refused to be given blood transfusion and such right outweighs interest of state in insuring that wounded Witness receive transfusion in order to insure that Witness is alive to testify in subsequent criminal trial. In re Brown, 478 So. 2d 1033 (Miss. 1985).

Code 1942 §§ 1273-01 and 1273-02 which authorize a majority of the beneficiaries of a religious trust to take over and divest the mother church of church property without regard to the habendum clause of the deed, if a court should determine that there is "deep seated disagreement", and which permit the court to appoint trustees, were violative of the religious liberty clauses of the Mississippi and federal constitutions. Sustar v. Williams, 263 So. 2d 537 (Miss. 1972).

Statute (Code 1942 § 2402), making it a criminal offense to indoctrinate any creed, theory, or any set of principles which reasonably tend to create an attitude of stubborn refusal to salute, honor or respect the flag of the United States or of the state, denies the liberty guaranteed by the Fourteenth Amendment to the United States Constitution. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d

663 (1943) (reversing 194 M 1, 11 So. 2d 663; Cummings v. State, 194 M 59, 11 So. 2d 683; Benoit v. State, 194 M 74, 11 So. 2d 689).

A statute which, as construed by the state courts, makes it a criminal offense to communicate to others views and opinions respecting governmental policies and prophecies concerning the state of this and other nations, irrespective of whether the communications was with an evil or sinister purpose of advocated or indicated subversive action against the nation or state, or threatened any clear and present danger to American institutions or government, denies the liberty guaranteed by the Fourteenth Amendment. Taylor v. Mississippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), reversing 194 Miss. 1, 11 So. 2d 663 (1943).

2. Establishment of religion—In general.

First Amendment did not shield a church administration from civil claims of sexual abuse by priests because there was nothing religious about such reprehensible conduct, and plaintiffs' claim of negligent hiring, retention and supervision of a priest was simply a negligence claim. Roman Catholic Diocese v. Morrison, 905 So. 2d 1213 (Miss. 2005).

Inclusion of invocation and benediction by member of clergy at public high school graduation ceremony is forbidden by establishment clause where public school officials direct performance of such exercise and state, in practical sense, compels attendance; state may not place students who object to such exercise in position of having to either participate or protest. Invocation and benediction are not rendered valid by fact that attendance is voluntary in strict legal sense, prayers were anticipated to be brief, there was attempt to make prayers inclusive and acceptable to most, and for many persons such occasion traditionally involves prayer would lack significance without such religious exercise. Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992).

If disbarred attorney's failure to participate in organized religion had been determinative of the denial of his petition for reinstatement, then his constitutional rights would have been violated. Williams v. Mississippi State Bar Ass'n, 492 So. 2d 578 (Miss. 1986).

3. — — — Preference to religious sect, establishment of religion.

Provisions for a textbook fund for the purchase of free textbooks and for the distribution and loan thereof to pupils in elementary schools including qualified private schools were not in contravention of constitutional prohibition against support of sectarian schools, or control by religious sects over any part of the school or other educational funds of the state, or the prohibition against loaning or giving public property or credit to private persons, the fact that the books were merely loaned to the pupils of such schools being in keeping with the state's paramount duty to educate children and avoid the constitutional prohibition against giving any preference to any religious sect. Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

4. Marriage and family.

The Constitution does not announce a paramount public policy prohibiting legislation which would allow a bigamous wife to recover benefits under the Workmen's Compensation Law. Pathfinder Coach Div. of Superior Coach Corp. v. Cottrell, 216 Miss. 358, 62 So. 2d 383 (1953).

Workmen's Compensation Act which allows payments of compensation to acknowledged illegitimate child dependent upon deceased's labor, and to bigamous wife upon death of the putative husband are not repugnant to the Constitution nor any public policy in regard to bigamy. Pathfinder Coach Div. of Superior Coach Corp. v. Cottrell, 216 Miss. 358, 62 So. 2d 383 (1953).

5. Jury selection.

Mississippi caselaw did not extend the Batson protection to religiously based peremptory strikes of jurors; the only objection offered by defendant was a Batson objection. Because defendant did not object that religiously based peremptory strikes violated Miss. Const. art. 3, § 18 and Miss. Code Ann. § 13-5-2, the trial judge did not err in accepting the reason offered by the State as a race-neutral reason not prohibited by Batson. Jackson v. State, 910 So. 2d 658 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

Peremptory challenges based on a person's membership in a particular religious order or denomination violates the State Constitution by permitting preference of one religion over another. Thorson v. State, 721 So. 2d 590 (Miss. 1998).

RESEARCH REFERENCES

ALR. Validity and construction of statute or ordinance relating to distribution of advertising matter. 22 A.L.R. 1484, 114 A.L.R. 1446.

Effect of, and remedies for, exclusion of eligible class or classes of persons from jury list in criminal case. 52 A.L.R. 919.

Power of municipal or school authorities to prescribe vaccination or other health measure as a condition of school attendance. 93 A.L.R. 1413.

Constitutionality, construction, and application of statute exempting schemes for benefit of public, religious, or charitable purposes from statutes or constitutional provisions against lotteries or gambling. 103 A.L.R. 875.

Validity of provision in respect of racial or religious differences, in zoning ordinance or regulation which is not confined to that matter but embraces, or is part of, a broader zoning plan. 126 A.L.R. 638.

Power of legislature or school authorities to prescribe and enforce oath of allegience, salute to flag, or other ritual of a patriotic character. 127 A.L.R. 1502; 141 A.L.R. 1030; 147 A.L.R. 698.

Validity of statutory or municipal regulation of soliciting of alms or contributions for charitable, religious, or individual purposes. 128 A.L.R. 1361, 130 A.L.R. 1504.

Discrimination because of race, color, or creed in respect of appointment, duties, compensation, etc., of schoolteachers or other public officers or employees. 130 A.L.R. 1512.

Use of streets or parks for religious purposes. 133 A.L.R. 1402.

Validity, construction, and application of statutes or regulations concerning recreational or social activities of pupils of public schools. 134 A.L.R. 1274.

Constitutional guaranty of freedom of religion as applied to license taxes or regulations. 146 A.L.R. 109, 152 A.L.R. 322.

Sectarianism in schools. 45 A.L.R.2d 742.

Validity, under establishment of religion clause of federal or state constitution, of provision making day of religious observance a legal holiday. 90 A.L.R.3d 752.

Validity of guardianship proceeding based on brainwashing of subject by religious, political, or social organization. 44 A.L.R.4th 1207.

Free exercise of religion as applied to individual's objection to obtaining or disclosing social security number. 93 A.L.R.5th 1.

Landlord's refusal to rent to unmarried couple as protected by landlord's religious beliefs. 10 A.L.R.6th 513.

Wearing of Religious Symbols in Courtroom as Protected by First Amendment. 18 A.L.R.6th 775.

State Constitutional Challenges to the Display of Religious Symbols on Public Property. 26 A.L.R. 6th 145.

Constitutionality of Legislative Prayer Practices. 30 A.L.R.6th 459.

Free exercise of religion clause of First Amendment as defense to tort liability. 93 A.L.R. Fed. 754.

Giving of invocation with religious content at public-school-sponsored events to which public is invited or admitted as violation of establishment clause of First Amendment. 98 A.L.R. Fed. 206.

Constitutionality of teaching or suppressing teaching of Biblical creationism or Darwinian evolution theory in public schools. 102 A.L.R. Fed. 537.

Constitutionality of teaching or otherwise promoting secular humanism in public schools. 103 A.L.R. Fed. 538.

Bible distribution or use in public schools—modern cases. 111 A.L.R. Fed. 121.

Validity and construction of public school regulation of student distribution of religious documents at school. 136 A.L.R. Fed. 551.

What constitutes "hybrid rights" claim under Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876. 163 A.L.R. Fed. 493.

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 321, 375-378.

CJS. C.J.S. Constitutional Law §§ 513 to 517.

C.J.S. Officers and Public Employees § 34.

Lawyers' Edition. Establishment and free exercise of religion clauses of Federal Constitution's first Amendment as applied to public schools — Supreme Court Cases. 96 L. Ed. 2d 828.

Tax legislation as violating Federal Constitution's First Amendment — Supreme Court cases. 103 L. Ed. 2d 951.

Establishment and free exercise of religion clauses of Federal Constitution's First Amendment as applied to governmental regulations or activities allegedly supporting public observance of Sabbath or of religious holiday. 106 L. Ed. 2d 752.

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Roy, Constitutional Law — Mississippi's Recognition of a Privacy Right To Refuse Medical Treatment. 7 Miss. C. L. Rev. 47, Fall, 1986.

Comment: a call to secure religious exercise under the Mississippi constitution. 62 Miss. L. J. 133, Spring, 1992.

§ 19. Repealed

Repealed by Laws, 1977, ch. 584, eff December 22, 1978.
[1817 art VI § 2; 1832 art VII § 2; 1869 art I § 27]

Editor's Note — Former Section 19 prohibited dueling and both disenfranchised and disqualified persons involved in a duel from holding public office.

The repeal of Section 19 of Article 3 of the Constitution of 1890 was proposed by Laws, 1977, Ch. 584 (Senate Concurrent Resolution No. 528) and upon ratification by the electorate on November 7, 1978, was deleted from the Constitution by proclamation of the Secretary of State on December 22, 1978.

§ 20. Specific term of office

No person shall be elected or appointed to office in this state for life or during good behavior, but the term of all officers shall be for some specified period.

SOURCES: 1817 art VI § 12; 1832 art I § 30; 1869 art I § 29.

JUDICIAL DECISIONS

1. Public office and officers—In general.
2. Failure to fix term of office, public office and officers.
3. Police and fire officers, public office and officers.

1. Public office and officers—In general.

Claimant to office of Jones County Community Hospital trustee could not prevail upon a contention that he had been removed from office in violation of Mississippi Constitution §§ 20 and 175. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

In order to come within this provision and § 175 of the Constitution, the officer's duty must be continuing, be defined by rules prescribed by law, to be discharged by him in his own right and not by permission and under the supervision and control of another. Glover v. City of Columbus, 197 Miss. 467, 19 So. 2d 756, 156 A.L.R. 1350 (1944).

Position is "public office" when created by law with duties cast upon incumbent involving exercise of some portion of sovereign power in performance of which public is concerned and which are continuing in their nature, "continuing" meaning enduring and permanent, whereas "public employment" is position lacking one or more foregoing elements. State ex rel. Mitchell v. McLaurin, 159 Miss. 188, 131 So. 89 (1930).

Length of time required to perform special and transient duties is not test of whether person discharging duties is public officer or employee. State ex rel. Mitchell v. McLaurin, 159 Miss. 188, 131 So. 89 (1930).

Members of State hospital removal improvement and land sale commission held not "public officers" within constitutional provision and statute relating to term of office. State ex rel. Mitchell v. McLaurin, 159 Miss. 188, 131 So. 89 (1930).

Under this section neither a deputy auditor nor a deputy land commissioner is a public officer. State ex rel. Brown v. Christmas, 126 Miss. 358, 88 So. 881 (1921).

2. Failure to fix term of office, public office and officers.

Act creating seawall districts and providing for appointment of commissioners was not unconstitutional because of failure to fix terms of such commissioners in view of general statute fixing the terms of all officers not otherwise provided for by law. Town of Waveland v. Moreau, 109 Miss. 407, 69 So. 214 (1915).

If the legislature create an office and provide that the officer shall hold until his successor is elected, and yet make no provision for an election of a successor, the officer will hold until the next general election, but no longer. Houston v. Royston, 8 Miss. (7 Howard) 543 (1843).

3. Police and fire officers, public office and officers.

A policeman, serving only by permission of the mayor and council of a city, who not only prescribed his duties but also supervised and controlled the performance thereof, is not a public officer entitled to invoke the constitutional provisions (§§ 20 and 175) against removal during term of office except upon conviction of wilful neglect of duty or misdemeanor in office. Glover v. City of Columbus, 197 Miss. 467, 19 So. 2d 756, 156 A.L.R. 1350 (1944).

Act (Laws 1940, ch 287; Code 1942 §§ 3472-3494) providing for retirement benefits for firemen and policemen but making them available for supernumerary tasks after retirement does not violate this section. Mayor & Aldermen of Vicksburg v. Crichlow, 196 Miss. 259, 16 So. 2d 749 (1944).

An act of the legislature or an ordinance of a municipality authorizing the appointment of a policeman during good behavior is unconstitutional and void. Monette v. State, 91 Miss. 662, 44 So. 989, 124 Am. St. R. 715 (1907), overruled on other grounds, Glover v. Columbus, 197 Miss. 467, 19 So. 2d 756 (1944).

RESEARCH REFERENCES

ALR. Beginning or expiration of term of elective officer where no time is fixed by law. 80 A.L.R. 1290, 135 A.L.R. 1173.

Power of legislature to extend term of public office. 97 A.L.R. 1428.

CJS. C.J.S. Counties §§ 101 to 103.

C.J.S. Municipal Corporations §§ 362, 363.

C.J.S. Officers and Public Employees §§ 86-94.

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Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond, 56 Miss L. J. 73, April, 1986.

§ 21. Writ of habeas corpus

The privilege of the writ of habeas corpus shall not be suspended, unless when in the case of rebellion or invasion, the public safety may require it, nor ever without the authority of the legislature.

SOURCES: 1817 art I § 13; 1832 art I § 13; 1869 art I § 5.

JUDICIAL DECISIONS

1. Acts subject to judicial review.
2. Habeas corpus applications within section.
3. Double Jeopardy.

1. Acts subject to judicial review.

Mandamus, prohibition, or injunction cannot direct or restrain Governor in the exercise of his power, but any act which may injure a citizen in his legal rights under the law is subject to redress in the courts. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Action of Governor calling out national guard and what members of militia may do in pursuance of such order, held subject to judicial review at suit or other appropriate legal challenge of any citizen who can show he has been unlawfully affected in his private personal or private property rights. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

2. Habeas corpus applications within section.

Petitioner was not denied his right to a writ of habeas corpus when his notice of appeal in writ of state habeas corpus was denied as a successive writ; the Mississippi Legislature had enacted a comprehensive procedure for postconviction relief through the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-3(1). Austin v. State, 914 So. 2d 1281 (Miss. Ct. App. 2005).

Mississippi Post-Conviction Collateral Relief Act does not suspend the writ of habeas corpus in violation of Miss. Const. Art. III, § 21, as the act is merely a codification of existing constraints on review traditionally practiced by the Mississippi Supreme Court. Putnam v. State, 877 So. 2d 468 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 861 (Miss. 2004).

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art I § 9 of the United States Constitution and Art 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

The time limitations provisions of the Mississippi Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) do not work an unconstitutional suspension of the writ of habeas corpus. Cole v. State, 608 So. 2d 1313 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993).

One who has been denied bail may seek his or her liberty via habeas corpus. There is nothing in the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.),

§ 99-35-115, Miss. Sup. Ct. R. 9 or Unif. Crim. R. Cir. Ct. Prac. 7.02 which purports to suspend this right nor could the right ever be suspended except in the limited circumstance provided for by the constitution. Although purely collateral post-conviction remedies attacking a judgment of conviction or sentence should be sought under authority of the Post-Conviction Collateral Relief Act since that Act, in the pure post-conviction collateral relief sense, is arguably "post-conviction habeas corpus renamed," matters of appeal may appropriately be addressed through true habeas corpus actions; bail pending appeal via habeas corpus is incident to the direct review of a conviction or sentence and, therefore, is not affected, prohibited or otherwise governed by the Uniform Post-Conviction Collateral Relief Act. Habeas corpus is one way of seeking liberty following conviction and pending appeal, and statutory and uniform rule procedure another, although the standards for granting or denying bail remain the same in either situation. Treigle v. Treigle, 555 So. 2d 738 (Miss. 1990).

3. Double Jeopardy.

Under the Fifth Amendment and Miss. Const. Art. 3, § 21, a trial court's imposition of defendant's original ten-year term after his second parole violation was not an unlawful extension or increase of his sentence in violation of his right against double jeopardy because, although the written sentencing order did not reflect the court's imposition of the ten-year sentence but merely that all but 18 months of that sentence were suspended, on two occasions defendant was clearly informed in open court that his sentence was for ten years. Harvey v. State, 919 So. 2d 282 (Miss. Ct. App. 2005).

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§ 22. Double jeopardy

No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.

SOURCES: 1817 art I § 13; 1832 art I § 13; 1869 art I § 5.

JUDICIAL DECISIONS

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23. Different elements, no double jeopardy.

1. In general.

In a case in which defendant appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that he was subjected to double jeopardy because he was charged with armed robbery on three occasions: (1) in Count II of his indictment, (2) in Count IV of his indictment, and (3) when he pled guilty to the charge of armed robbery. The State filed an Order of Nolle Prosequi on Counts I, II, III, and V; therefore, the burglary charge in Count II was passed to the file, and defendant was no longer charged with nor convicted of Count II. Ewing v. State, 34 So. 3d 612 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Denial of the inmate's petition for post-conviction relief was appropriate where he was not permitted to address a double jeopardy claim for the first time in a postconviction relief motion. Hoskins v. State, 934 So. 2d 326 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of the inmate's motion for post-conviction relief because the inmate was not subjected to double jeopardy for the separate convictions of conspiracy to commit capital murder and attempted capital murder as they are two separate crimes. Lee v. State, 918 So. 2d 87 (Miss. Ct. App. 2006).

Defendant was not subjected to double jeopardy, as while the two offenses were committed close in time and against the same victim, the record reflected that the grand larcenies occurred at different times, in different locations, and arose from separate acts. Hughery v. State, 915 So. 2d 457 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2005 Miss. LEXIS 779 (Miss. 2005).

Defendant was prosecuted for aggravated assault in State court, not possession of a firearm by a priorly convicted felon but even if he had been prosecuted for possession of a firearm by a priorly convicted felon, there would have been no bar to his prosecution by the State because the State of Mississippi and the federal government were different and distinct sovereigns. There was no double jeopardy violation, and res judicata or collateral estoppel (argued by defendant), did not apply in said criminal action. Acreman v. State, 907 So. 2d 1005 (Miss. Ct. App. 2005).

Defendant was not subjected to double jeopardy where the crimes of aggravated assault and armed robbery. although they arose from the same incident, the two crimes were separate. Johnson v. State, 848 So. 2d 906 (Miss. Ct. App. 2003).

There was no double jeopardy violation in a case where DUI defendant's two prior DUI convictions were considered for the sole purpose of enhancing punishment. Horn v. State, 825 So. 2d 725 (Miss. Ct. App. 2002).

Although state may freely define crimes and assign punishments, it is not allowed to punish defendant for crime containing elements which are completely enveloped by offense for which defendant was previously convicted. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S.

Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Where there is a conviction for both capital murder and the underlying felony, at the most the double jeopardy clause is violated only if the charges for the felony murder and the underlying felony are tried separately. Woodward v. State, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

The constitutional principles of double jeopardy are not violated by the "double use" of the pecuniary gain factor in elevating a murder to the status of capital murder because it was perpetrated by one who had been given something of value for the killing pursuant to § 97-3-19(2)(d) and in imposing the death penalty for committing murder by pecuniary gain pursuant to § 99-19-101(5)(f). Nixon v. State, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

Submission of aggravating circumstance of pecuniary gain did not constitute double jeopardy and fail meaningfully to narrow class of persons eligible for death sentence. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Where the defendant has been acquitted on the merits of her case by reason of a directed verdict, such acquittal is a bar to any future accusation of the same offense. State v. Thornhill, 251 Miss. 718, 171 So. 2d 308 (1965); Smith v. State, 198 So. 2d 220 (Miss. 1967).

An actual conviction or acquittal on the merits must be shown to support a plea of former jeopardy. Conwill v. State, 124 Miss. 716, 86 So. 876 (1921); Lovern v. State, 140 Miss. 635, 105 So. 759 (1925); Harris v. State, 158 Miss. 439, 130 So. 697 (1930).

2. When jeopardy attaches—In general.

In a case where defendant was convicted of several crimes relating to the arson and burglary of a residence, his double jeopardy rights were not violated due to the fact that some of the elements of the crimes overlapped; each of the crimes involved required proof of an additional fact that the other did not. McCollins v. State, 952 So. 2d 305 (Miss. Ct. App. 2007).

Because the first indictment was nolle prosequi before defendant pled guilty, defendant was not subject to double jeopardy as there was no prejudice. McKenzie v. State, 856 So. 2d 344 (Miss. Ct. App. 2003), writ of certiorari denied by 864 So. 2d 282, 2004 Miss. LEXIS 7 (Miss. 2004), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 57 (Miss. 2007).

Twenty-one-year delay between entry of nolle prosequi on murder indictment and reindictment for same murder did not violate defendant's due process rights, though witnesses for both state and defense had died during period between trials; testimony from previous trials was available and was read to jury, defendant did not put into record any facts he could have proved by deceased witnesses that did not go to jury through their prior testimony, and state did not intentionally delay prosecution to gain tactical advantage. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

A defendant's double jeopardy right not to be re-prosecuted for the same offense accrues instantly upon the happening of some event in criminal proceedings against him or her, though the original jeopardy must have "terminated" in order for such a right to accrue; thereafter, lapse of time neither strengthens nor diminishes the right as no subsequent event affects an accrued double jeopardy right. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

3. — — Judgments and judicial proceedings generally, when jeopardy attaches.

Jeopardy had not attached when the municipal court dismissed defendant's driving under the influence (DUI) charge in the municipal court, where the municipal judge received no evidence and heard no witnesses before dismissing the DUI charge. Moreover, the judge's comments on the order relative to the DUI charge did not contain any findings of the court, but rather, the court merely recorded the reasons that the prosecutor gave for not proceeding to trial on the DUI charge; such notations in the order did not constitute either an acquittal or an adjudication, such that the subsequent indictment or trial of defendant would be barred by the Double Jeopardy Clause, U.S. Const. amend. V, Miss. Const. art. 3, § 22. Deeds v. State, 27 So. 3d 1135 (Miss. 2009), writ of certiorari denied by 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S. LEXIS 5807, 79 U.S.L.W. 3196 (U.S. 2010).

Where defendant defrauded furniture sellers by telephone, wire communications, or mail, defendant's second indictment for wire fraud did not conflict with double jeopardy rules, because wire fraud charge was a distinct offense, and required proof of different elements than the initial charge of false pretenses, which had been dismissed. McGee v. State, 853 So. 2d 125 (Miss. Ct. App. 2003), writ of certiorari denied by 852 So. 2d 577, 2003 Miss. App. LEXIS 834 (Miss. Ct. App. 2003).

Juvenile who has been adjudicated delinquent in youth court may not subsequently be tried as adult on same charges. In re W.R.A., 481 So. 2d 280 (Miss. 1985).

In order for a plea of former jeopardy to avail, it must appear that the defendant was actually acquitted or convicted in a former trial on the merits of the crime for which he is again sought to be convicted. State v. Pace, 210 Miss. 448, 49 So. 2d 710 (1951).

Oral testimony was properly taken to settle the doubt as to whether the accused had actually been in former jeopardy. State v. Pace, 210 Miss. 448, 49 So. 2d 710 (1951).

If a former acquittal was obtained by collusion it will be no bar. Howell v. State, 104 Miss. 295, 61 So. 314 (1913).

For an instance where a defective affidavit charging defendant with assault and battery before a magistrate upon which he was convicted was sufficient to bar a trial under an indictment for assault, see Henry v. State, 97 Miss. 787, 53 So. 397 (1910).

An acquittal or conviction in a court without jurisdiction does not bar a subsequent prosecution for the same offense. Montross v. State, 61 Miss. 429 (1883).

A conviction or acquittal before a justice of the peace without an affidavit or written charge, is no bar to a subsequent prosecution. Bigham v. State, 59 Miss. 529 (1882); Wilcox v. Williamson, 61 Miss. 310 (1883); Woodson v. State, 94 Miss. 370, 48 So. 295 (1908).

A conviction or acquittal on an invalid indictment is no bar to a second prosecution. State v. McGraw, 1 Miss. (1 Walker) 208 (1825); Kohlheimer v. State, 39 Miss. 548 (1860).

4. — — Discharge of jury or juror, when jeopardy attaches.

Trial court did not err in declaring a mistrial in an armed robbery case because, by the time a Batson challenge was raised, other jurors in the case had already been dismissed; jeopardy did not attach because the record indicated that the jury had not been sworn, despite a trial court's order that stated otherwise. Gaskin v. State, 873 So. 2d 965 (Miss. 2004).

A plea of former jeopardy is not sustained by the facts that after the jury had been qualified, but before it had been accepted by both parties the justice of the peace discharged jury, and continued the case to a later date. Green v. Everson, 141 Miss. 129, 106 So. 265 (1925).

A prisoner is not entitled to a discharge because after the introduction of evidence one of the jurors was reminded that he had been upon the grand jury which found the indictment and, making the fact known, was discharged by the court. Roberts v. State, 72 Miss. 728, 18 So. 481 (1895).

A discharge of the jury upon the return of a verdict, in the absence of the prisoner while in jail, entitles the defendant to a discharge. Finch v. State, 53 Miss. 363 (1876).

5. — — Dismissal or nolle prosequi, when jeopardy attaches.

In a 28 U.S.C.S. § 2254 case, a pro se state inmate unsuccessfully argued that the initial indictment had to have been nolle prosequied before a second indictment could be issued in order for a second indictment to not place him in double jeopardy. Since he was only tried on the second and superseding indictment, double jeopardy was not implicated in the case. Eason v. King, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 79238 (S.D. Miss. Aug. 4, 2010).

The defendant's entry of a guilty plea did not violate double jeopardy where (1) the defendant was initially indicted for grand larceny, but subsequently agreed to enter a pre-trial intervention program and agreed with the district attorney to nolle prosse the charge, (2) the defendant thereafter failed to comply with the terms of the pre-trial intervention program, (3) the district attorney then filed a motion to remove the defendant from the program and filed an information charging him with grand larceny, (4) the circuit court judge entered an order for the defendant's removal from the pre-trial intervention program, and (5) the defendant waived his right to be re-indicted for grand larceny, pled guilty, and was sentenced. Martin v. State, 766 So. 2d 812 (Miss. Ct. App. 2000).

Where nolle prosequi is entered, that particular case is at an end on the docket, but this does not bar another prosecution for same offense if commenced in the court where the case originated. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Five-year period from defendant's mistrial on murder charges to entry of nolle prosequi on indictment did not violate defendant's due process rights, as formal accusation ended with entry of nolle prosequi. De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Because the first indictment was nolle prosequi before defendant pled guilty, defendant was not subject to double jeopardy as there was no prejudice. Thorson v. State, 653 So. 2d 876 (Miss. 1994), reh'g denied (Miss. Apr. 20, 1995).

A nolle prosequi entered upon the motion of the district attorney did not terminate the defendant's original jeopardy or accrue unto him the right not to be re-indicted and re-prosecuted for the same offense where the State had unsuccessfully sought the defendant's conviction through 2 successive trials which both ended when the jury became deadlocked so that there was a "manifest necessity" to declare a mistrial in each case, there was nothing to suggest any prosecutorial misconduct or manipulation in moving for the nolle prosequi, and there was no objection by the defendant to the entry of the nolle prosequi. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

Trial judge's actions were tantamount to acquittal on charge of armed robbery and thereby dismissed charge of armed robbery as to one victim where trial judge determined that state had failed to produce evidence to prove that defendant robbed alleged victim with deadly weapon, where State had attempted to establish armed robbery of alleged victim with testimony and had simply failed to prove armed robbery, rejecting claim that inability to produce alleged victim was result of manifest necessity due to his intervening illness, because state could have sought continuance but instead elected to proceed with proof until defense counsel made motion for directed verdict. Reed v. State, 506 So. 2d 277 (Miss. 1987).

An order of the justice of peace court, dismissing the case against the accused for want of prosecution, showing that the accused was not prosecuted or put in jeopardy in that court, was insufficient to sustain the accused's plea of former jeopardy in bar of judgment and sentence upon his being convicted, in a circuit court, of the charge of assault. Robinson v. State, 91 So. 2d 272 (Miss. 1956).

Defendant was not placed in jeopardy twice for the same offense where, upon his appeal to the circuit court from his conviction in the police court of keeping open a grocery store on the Sabbath, the prosecution was nol-prossed, and thereafter he was again arrested for the same offense, entered a plea of nolo contendere in the police justice's court and upon an appeal therefrom was convicted in the circuit court in a trial on the merits. Walton v. City of Tupelo, 229 Miss. 193, 90 So. 2d 193 (1956).

The use of the words "without prejudice" serves to prevent the dismissal from operating as a bar to any new suit or prosecution on the same charge. State v. Pace, 210 Miss. 448, 49 So. 2d 710 (1951).

That district attorney at close of evidence entered no. pros., did not prevent subsequent prosecution under another indictment. Maxey v. State, 158 Miss. 444, 130 So. 692 (1930).

Where defendant was tried on previous indictment, but jury did not agree and district attorney entered nol. pros., second prosecution was not barred. Smith v. State, 158 Miss. 355, 128 So. 891 (1930).

Nolle prosequi is not a bar to another indictment for the same offense. Casey v. State, 96 Miss. 427, 50 So. 978 (1910).

6. — — Mistrial, when jeopardy attaches.

Trial court did not err in failing to dismiss an indictment on the basis of double jeopardy because the prosecution had not deliberately provoked a mistrial by failing to disclose to defendant prior to trial that an officer would testify that defendant had surrendered defendant's driver's license prior to running from officers. Daniels v. State, 9 So. 3d 1194 (Miss. Ct. App. 2009).

Where the State moved for a mistrial, no double jeopardy emanated from the first trial because a manifest necessity arose in the discovery by the State during direct examination that its first witness (defendant's companion, charged as an accessory) was unrepresented by counsel. Because this witness had made incriminating statements, it was his rights, not defendant's, that the State believed were violated, and there was no showing of harm to defendant or bad faith prosecutorial misconduct. Knox v. State, 912 So. 2d 1004 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 686 (Miss. 2005).

Where the State's discovery violations during defendant's second murder prosecution were unintentional and a mistrial ordered, double jeopardy principles did not apply because there was no prosecutorial manipulation of its disclosure obligation. Roberson v. State, 856 So. 2d 532 (Miss. Ct. App. 2003), writ of certiorari denied by 859 So. 2d 1017, 2003 Miss. LEXIS 569 (Miss. 2003).

Where defendant's first trial resulted in a mistrial, based on a Batson challenge, because the jury had not been sworn, the rules prohibiting double jeopardy were not violated; as such double jeopardy protection did not attach to defendant's first proceeding, so as to preclude a second trial. Gaskin v. State, 856 So. 2d 363 (Miss. Ct. App. 2003).

Defendant who moves for mistrial generally is barred from later complaining of double jeopardy violation; to overcome bar, defendant must show that error occurred and that it was committed by the prosecution purposefully to force defendant to move for mistrial. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

Double jeopardy does not arise from grant of mistrial on defendant's motion without proof of judicial error prejudicing defendant or bad faith prosecutorial misconduct. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

Alleged error committed by the prosecution in requesting and receiving information on jury panel members from circuit clerk, resulting in mistrial on defendant's request, was insufficient to trigger double jeopardy so as to bar second trial where defendant failed to prove prosecutor's intent to force defendant to request mistrial. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

In a defendant's second trial conducted approximately one week after the declaration of a mistrial during his first trial did not violate the constitutional prohibition against double jeopardy where the first trial ended in a mistrial declared by the court on its own motion when the prosecutor brought to his attention that a juror had failed to divulge that she was related to a law enforcement officer. Box v. State, 610 So. 2d 1148 (Miss. 1992).

A reindictment and retrial after the first trial resulted in a mistrial due to a hung jury, did not violate the prohibition against double jeopardy, in spite of the defendant's argument that there was no manifest necessity for dismissing the first indictment and that the reindictment and retrial was for the purpose of allowing the prosecution to strengthen its case, where there was no variance between the indictments, the proof offered and the defense asserted, and the second indictment did not charge the defendant with a different or additional offense. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

A retrial of a defendant for rape, after the trial judge declared a mistrial sua sponte during a previous trial for the same offense, would not violate the double jeopardy provisions of the Mississippi and United States Constitutions, in spite of the defendant's argument that the mistrial was the fault of prosecution witnesses whose behavior could be imputed to the State, where the State did not elicit or provoke the witnesses' questionable behavior, the problem occurred on cross-examination, there was no evidence of bad faith on the part of the State, and it was the defendant's wife's outbursts from the gallery which finally triggered a mistrial. Spann v. State, 557 So. 2d 530 (Miss. 1990).

If the trial judge's declaration of a mistrial was a manifest necessity, and there was no abuse of discretion, then a criminal defendant may be tried again on the same charge. If there was not a manifest necessity for the mistrial, then a retrial is barred. Whether the standard has been met depends on the facts and circumstances of each case. Spann v. State, 557 So. 2d 530 (Miss. 1990).

A continuance in a bench trial is not sufficiently like a mistrial in all situations so as to invoke an analysis for determining whether the resumed hearing is barred by double jeopardy. King v. State, 527 So. 2d 641 (Miss. 1988).

The grant of a mistrial in a homicide case upon defendant's motion and on the ground that the jurors had failed to follow the trial judge's instruction to avoid media coverage of the trial did not form the basis of a double jeopardy claim in absence of showing of bad faith on the part of anyone connected with state having to do with the release of information to a news reporter, although a police officer had talked by phone with the reporter. Watts v. State, 492 So. 2d 1281 (Miss. 1986).

Fourth prosecution is not barred on double jeopardy grounds where 3 proceeding trials have ended in mistrials. Wallace v. State, 466 So. 2d 900 (Miss. 1985).

Under this section, in order for a plea of former jeopardy to avail, it must appear that defendant was actually acquitted or convicted in a former trial on the merits of the crime for which he is again sought to be convicted, and the fact of two prior mistrials caused by hung juries does not bar a third trial. Mallette v. State, 349 So. 2d 546 (Miss. 1977).

The trial court properly granted a mistrial after two jurors became separated from the others and visited in a motel lobby, after being sequestered and expressly instructed to remain together; defendant was not placed in double jeopardy when his trial was begun the second time. Schwarzauer v. State, 339 So. 2d 980 (Miss. 1976).

Where, on motion of the prosecution, the trial judge declared a mistrial because after the jury had been empaneled one juror expressed an opinion as to the sanity of the defendant, the mistrial furnished no basis for plea of former jeopardy. Smith v. State, 198 So. 2d 220 (Miss. 1967).

7. — — Plea agreements, when jeopardy attaches.

There was no double jeopardy violation when a trial court required defendant to pay restitution to a bank which was the victim of defendant's forgeries, when the forgery charges were retired to the inactive files because defendant pleaded guilty to a charge of shoplifting and agreed in plea negotiations to make restitution for both the shoplifting and forgery charges, as defendant was never acquitted or convicted of the forgeries. Smith v. State, 130 So. 3d 1187 (Miss. Ct. App. 2014).

Although defendant claimed that the court's decision to set his pleas aside and bring him to trial constituted a breach of the plea agreement on the State's behalf, an abuse of discretion, and double jeopardy, the circuit court did not abuse its discretion by disregarding the original plea agreement and putting the case on the trial docket because defendant's guilty pleas were involuntary. There was no reason why defendant should not have been proceeded against as if no trial had previously taken place; therefore, defendant could not get his convictions set aside and then claim that he was protected from a new trial by the Double Jeopardy Clauses of the Mississippi and United States Constitutions, Miss. Const. art. 3, § 22 and U.S. Const. amend. V. Catchings v. State, 111 So. 3d 1238 (Miss. Ct. App. 2013), writ of certiorari dismissed by 121 So. 3d 918, 2013 Miss. LEXIS 573 (Miss. 2013).

Defendant's voluntary refusal to testify against his co-defendant constituted a material breach of his plea bargain agreement with the State, and, as a result of his breach, the parties were returned to the status quo ante; thus, defendant had no double jeopardy defense available concerning re-indictment and conviction on the charges. Also, the transcript of defendant's guilty plea hearing clearly showed that he was aware that the State would seek to invalidate his plea and reinstate the charges if he failed to testify truthfully against his co-defendant; additionally, as to the reinstatement of a kidnapping charge, it was fully within the State's authority to re-indict defendant for the same offense after an order of nolle prosequi had been entered. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

Following vacation of defendant's second-degree murder conviction due to defendant's breach of plea agreement, state's prosecution of defendant for first-degree murder does not violate double jeopardy, where agreement specified that it would be null and void if defendant refused to testify as required by agreement. Ricketts v. Adamson, 483 U.S. 1, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987), on remand, 865 F.2d 1011 (9th Cir. Ariz. 1988).

8. — — Quashing of indictment, when jeopardy attaches.

In prosecution for attempted burglary of business dwelling, double jeopardy clause of United States and Mississippi Constitutions was not violated by retrial of defendant following order quashing indictment due to its insufficiency and failure to charge crime, since defendant was neither acquitted nor convicted, having successfully persuaded trial court not to submit issue of guilt or innocence to jury empaneled to try him. City of Jackson v. Keane, 502 So. 2d 1185 (Miss. 1987).

9. — — Reversal of conviction, when jeopardy attaches.

The double jeopardy clause did not bar reprosecution of a defendant for murder following the Supreme Court's reversal of his conviction where the conviction was reversed on procedural grounds and the defendant was allowed to plead guilty to lesser offenses pursuant to the bargain, but the defendant subsequently refused to plead guilty to the lesser offenses. The defendant could be prosecuted for the murder under the original indictment since the reversal of his murder conviction on procedural grounds did not constitute a rendering of the case nor a discharge of the defendant, and the defendant's refusal to plead guilty to the lesser offenses was a breach of the bargain. State v. Danley, 573 So. 2d 691 (Miss. 1990).

Where conviction of manslaughter under indictment for murder is reversed on application of accused, cause stands for trial de novo on original indictment, and accused may again be tried for murder. Butler v. State, 177 Miss. 91, 170 So. 148 (1936), overruled as stated in Odom v. State, 498 So. 2d 331 (Miss. 1986).

Where defendant was convicted with unlawfully possessing intoxicating liquors and the conviction was reversed and remanded because of failure to prove venue, the remanding of the case would not place defendant in double jeopardy, even though defendant had moved to exclude state's evidence and had requested peremptory instruction in his favor. Crum v. State, 216 Miss. 780, 63 So. 2d 242 (1953).

Reversal of conviction of manslaughter on ground that the trial court should have directed an acquittal did not constitute double jeopardy, and a demurrer to the plea of former jeopardy was properly sustained. Harris v. State, 158 Miss. 439, 130 So. 697 (1930).

10. — — Revocation of parole or probation, when jeopardy attaches.

Reinstatement of defendant's suspended sentence did not constitute double jeopardy because the trial court did not attempt to impose a greater sentence than that already levied on defendant. Leech v. State, 994 So. 2d 850 (Miss. Ct. App. 2008), writ of certiorari dismissed by 999 So. 2d 852, 2009 Miss. LEXIS 50 (Miss. 2009).

Protection guaranteed by the Double Jeopardy Clauses of the Fifth Amendment and Miss. Const. Art. 3, § 22, and the doctrine of collateral estoppel, did not preclude the State from charging defendant with a cocaine offense that was the basis for an unsuccessful petition to revoke his probation, because there were different issues and burdens of proof involved in a revocation hearing and a trial on the indictment. A revocation hearing is conducted to enforce the court's order imposing conditions on a defendant under a suspended sentence, and the issue to be determined at trial on the indictment is whether the State has proven beyond a reasonable doubt the elements of the charge; therefore, collateral estoppel does not apply. Oliver v. State, 922 So. 2d 36 (Miss. Ct. App. 2006).

Use of burglary charge against defendant to revoke his mistaken probation resulting from an embezzlement conviction was not a trial on the merits for burglary, and defendant's subsequent trial on burglary charge did not place him twice in jeopardy. Lightsey v. State, 493 So. 2d 375 (Miss. 1986).

11. — Revocation of bond, when jeopardy attaches.

The defendant in a murder prosecution was not subjected to double jeopardy when his bond on an unrelated pending charge was revoked based on the fact that there was probable cause to believe that he committed the murder at issue. Johnson v. State, 768 So. 2d 934 (Miss. Ct. App. 2000), writ of certiorari denied by 532 U.S. 930, 121 S. Ct. 1378, 149 L. Ed. 2d 304, 2001 U.S. LEXIS 2341, 69 U.S.L.W. 3618 (2001), remanded by 152 Fed. Appx. 403, 2005 U.S. App. LEXIS 23834 (5th Cir. Miss. 2005).

12. — — Attorney disciplinary proceedings, when jeopardy attaches.

Double jeopardy rights were not violated in attorney disciplinary proceedings where earlier proceedings before Mississippi State Bar Committee on Complaints were dismissed and no investigatory hearing held in connection therewith, such dismissal being functional equivalent of grand jury's refusal to indict or magistrate's refusal to bind defendant over to await action of next grand jury. Mississippi State Bar v. Young, 509 So. 2d 210 (Miss. 1987), petition dismissed, 523 So. 2d 323 (Miss. 1988).

13. — — Impaneling and swearing in of jury, when jeopardy attaches.

No jeopardy attached upon the impaneling and swearing in of the first jury, since the circuit court was without jurisdiction to try the minor defendant for manslaughter, and she was not placed in jeopardy for a second time by her subsequent trial for murder and conviction of manslaughter, after she had been certified by the youth court to the circuit court for trial as an adult. Butler v. State, 489 So. 2d 1093 (Miss. 1986).

14. Identity of offenses—In general.

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Defendant's double jeopardy rights were not violated by her convictions for three counts of driving under the influence and negligently causing death because the State was not required to specifically list the substance or substances that defendant allegedly was driving under the influence of at the time of the accident. Defendant was only convicted of one count of driving under the influence of hydrocodone and negligently causing the death or injury of another for each death or injury so caused. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Defendant argued that the jury's verdict of not guilty to the charge of capital murder also acquitted her of any underlying and lesser-included offenses, and that she should have been discharged as a matter of law and pursuant to the prohibition against double jeopardy; however, Miss. Code Ann. § 99-19-5(1) allowed a jury to find a defendant guilty of inferior offenses, the commission of which was necessarily included in the offense with which defendant was charged. Because murder was a lesser-included offense of capital murder, the trial court did not err in accepting a verdict of guilty of murder and defendant's double jeopardy rights were not violated. Colburn v. State, 990 So. 2d 206 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

Defendant's claim of double jeopardy, pursuant to the Fifth Amendment, was without merit where application of the Blockburger test revealed that elements of each of the crimes of shooting into a vehicle, Miss. Code Ann. § 97-25-47, and aggravated assault, Miss. Code Ann. § 97-3-7(2) were not contained in the other. Graves v. State, 969 So. 2d 845 (Miss. 2007).

Appellant's conviction for DUI manslaughter and two counts of DUI mayhem in violation of Miss. Code Ann. § 63-11-30 did not subject him to double jeopardy. Each of the counts were predicated upon separate felonies, one instance of manslaughter and two instances of mutilation or mayhem that appellant committed as a result of his drunk driving. Moreno v. State, 967 So. 2d 701 (Miss. Ct. App. 2007).

Trial court properly dismissed defendant's motion for post-conviction relief where he was not subjected to double jeopardy by being convicted of three criminal offenses arising out of a single incident; a criminal defendant could be convicted of more than one offense that arose out of a single event where each offense required proof of a different element. Ward v. State, 944 So. 2d 908 (Miss. Ct. App. 2006).

Offenses of kidnapping under Miss. Code Ann. § 97-3-53 and armed robbery under Miss. Code Ann. § 97-3-79 were clearly separate and distinct, with each requiring proof of additional facts the other did not; kidnapping, for example, required proof of intent to cause such person to be secretly confined or imprisoned against their will, whereas armed robbery did not, and armed robbery required the taking of personal property of another, but kidnapping did not. Thus, the crimes were separate and distinct regardless of their temporal overlap or their arising from a common nucleus of operative facts, and defendant's double jeopardy rights were not violated through being convicted of both kidnapping and armed robbery. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief was proper where double jeopardy protection was not implicated because Miss. Code Ann. § 63-11-30(5) required an element not required by Miss. Code Ann. § 97-3-47, namely, that of intoxication. Ramage v. State, 914 So. 2d 274 (Miss. Ct. App. 2005).

As defendant remained in possession of cocaine after he sold it to the officer, he could be convicted for both possession and sale of a controlled substance under Miss. Code Ann. § 41-29-139(a)(1) without a double jeopardy violation. McDonald v. State, 921 So. 2d 353 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 159 (Miss. 2006).

Where defendant was tried in a second case for statutory rape, sexual battery, and fondling, double jeopardy was not violated; while the victims were the same, the factual bases supporting the charges in the current indictment were totally different from the factual bases undergirding the charges in the first case. Moses v. State, 885 So. 2d 730 (Miss. Ct. App. 2004).

Where defendant robbed the victim, a store clerk, at gunpoint, and pistol whipped the victim numerous times, the offenses of robbery with the use of a deadly weapon, and aggravated assault, clearly required different elements of proof, and double jeopardy did not apply. Houston v. State, 887 So. 2d 808 (Miss. Ct. App. 2004), writ of certiorari denied by 888 So. 2d 1177, 2004 Miss. LEXIS 1448 (Miss. 2004).

Quantity of pseudoephedrine described in count one, a violation of Miss. Code Ann. § 41-29-313(1)(a)(ii), was the same quantity of the drug that was identified in count two, a violation of § 41-29-313(3); this exposed defendant to multiple punishments for the same conduct, and under double jeopardy considerations, the court reversed defendant's conviction under count two. Hunt v. State, 863 So. 2d 990 (Miss. Ct. App. 2004).

Convictions for armed carjacking and armed robbery occurring during the same episode did not constitute double jeopardy where the carjacking charge was based on the taking of a delivery truck and the robbery charge was based on the theft of money from one of the occupants of the truck. McCline v. State, 856 So. 2d 556 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

A prior conviction for reckless driving does not present a bar to a prosecution for felony murder, arising out of the same nucleus of facts, based on the underlying felony of driving while intoxicated as a third offender because proof of reckless driving is not necessary to prove felony driving while intoxicated or felony murder. Lee v. State, 759 So. 2d 390 (Miss. 2000).

For the purpose of double jeopardy analysis, the offense of speeding and the offense of failure to appear in court after being issued a traffic citation are entirely separate offenses, with each offense obviously containing some or all elements not contained in the other. Stidham v. State, 750 So. 2d 1238 (Miss. 1999).

The defendant's conviction for both attempted armed robbery and aggravated assault did not violate the double jeopardy provisions of the federal and state constitutions since each offense required different elements of proof. Greenwood v. State, 744 So. 2d 767 (Miss. 1999).

Blockburger or "same-elements test" of whether double jeopardy bar applies in context of multiple punishment or multiple prosecution inquires whether each offense contains an element not contained in the other; if not, they are same offense for double jeopardy purposes. Cook v. State, 671 So. 2d 1327 (Miss. 1996).

Test for determining when separate conspiracy exists, for purpose of determining whether subsequent prosecution is barred by double jeopardy, requires government to prove, by preponderance of the evidence, a separate conspiracy focusing upon elements of time, persons acting as coconspirators, statutory offenses charged in indictments, overt acts charged by government or any other description of offense charged which indicates nature and scope of activity which government sought to punish in each case, and place where events alleged as part of conspiracy took place. Cook v. State, 671 So. 2d 1327 (Miss. 1996).

Subsequent prosecution of defendants, who had been acquitted of conspiracy to commit forgery and/or defraud corporation out of money for forged soybean weight certificates, on charge of conspiracy to defraud Farmer's Home Administration was barred by double jeopardy clause, even though second prosecution accused defendants of trying to defraud different victim, as corporation was named in both indictments and, in addition, same time frame was involved, persons named as coconspirators were substantially the same, offenses charged in both indictments were conspiracy to defraud and to cheat, overt acts by defendants amounted to same course of conduct of transferring forged soybean certificates to company which issued checks in defendants' names representing payment for soybeans purportedly delivered to corporation, and conduct occurred in same counties. Cook v. State, 671 So. 2d 1327 (Miss. 1996).

In context of double jeopardy, underlying felony in felony murder is, by definition, included in greater offense and may not be punished separately. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A defendant's convictions for both murder-for-hire capital murder under § 97-3-19(2)(d) and conspiracy to commit capital murder under § 97-1-1 violated the constitutional protection against double jeopardy, since the definition of murder-for-hire in § 97-3-19(2)(d) completely encompasses the agreement or conspiracy to commit capital murder. Colosimo v. Senatobia Motor Inn, Inc., 662 So. 2d 552 (Miss. 1995), reh'g denied.

Since conspiracy and burglary are separate and distinct crimes requiring proof of different elements, a defendant did not have a double jeopardy claim based on the prosecution of these 2 crimes arising from the same incident, despite the fact that the prosecution chose to prosecute the defendant for these crimes at separate trials. House v. State, 645 So. 2d 931 (Miss. 1994).

A defendant's right to be free from double jeopardy was not violated, even though the defendant was tried, convicted and sentenced for two distinct offenses — simple assault and simple assault upon a law enforcement officer — arising from the same incident, because the defendant engaged in conduct which was severable into two separate offenses where he intervened in an ongoing assault to aid another perpetrator by preventing a third party from assisting the victim, and he subsequently committed an assault against the same victim by pointing his pistol at him. Moore v. State, 617 So. 2d 272 (Miss. 1993).

Section 63-11-30 proscribes the act of drunk driving rather than the act of negligent killing; thus, an indictment charging the defendant with 2 counts of violating § 63-11-30 based on only one act of drunk driving subjected the defendant to double jeopardy and required reversal of the conviction on the second count. Mayfield v. State, 612 So. 2d 1120 (Miss. 1992).

A defendant's right to be shielded from double jeopardy was violated where the defendant was convicted and punished for both kidnapping under § 97-3-53 and capital murder while engaged in the crime of kidnapping under § 97-3-19(2)(e); since the defendant was indicted, tried and found guilty of capital murder under § 97-3-19(2)(e) with the kidnapping as the underlying felony, and thereafter exposed to trial for his life, the State was precluded from punishing him further for the § 97-3-53 kidnapping. Meeks v. State, 604 So. 2d 748 (Miss. 1992).

An indictment charging the defendant with rape under § 97-3-65 was proper, even though the indictment used the language "a female person under the age of 14," while the statute states, in pertinent part, "a child under the age of 14." The indictment's language was wholly included within the statutory language, since a female person under the age of 14 is a child under the age of 14; the indictment need not use the precise words of the statute. Furthermore, the defendant was not prejudiced in the preparation of his defense or exposed to double jeopardy by the indictment's language. Allman v. State, 571 So. 2d 244 (Miss. 1990).

The constitutional prohibition against double jeopardy was violated where the defendant was prosecuted for 2 counts of aggravated assault arising from an automobile accident, after the defendant had been charged with and plead guilty to the misdemeanor offense of driving an automobile on the wrong side of the highway, since the defendant's conduct in driving on the wrong side of the highway was the same conduct which the state relied upon in the felony prosecution for the assault charges. Harrelson v. State, 569 So. 2d 295 (Miss. 1990).

The offenses of aggravated assault under § 97-3-7 and shooting into a dwelling house under § 97-37-29 did not constitute the "same offense" for double jeopardy purposes where at least 18 shots were fired into the house and the victim was not struck with all 18 shots; the 2 statutes require proof of different facts in that shooting into a dwelling house is not required to establish an aggravated assault, and neither injury nor attempt to injure is required to prove the offense of shooting into a dwelling house. Shook v. State, 552 So. 2d 841 (Miss. 1989).

Although a substantive offense and a conspiracy to commit are 2 separate offenses, where there is a common nucleus of operative facts existing in both indictments, and where the ultimate fact has been determined in a prior acquittal of the substantive offense by a final judgment, a conspiracy trial is barred thereafter under the constitutional double jeopardy provision. Griffin v. State, 545 So. 2d 729 (Miss. 1989).

A defendant's conviction and sentence on a charge of rape did not subject him to double jeopardy even though he had also been convicted and sentenced on a burglary charge which arose out of the same facts and circumstances as the rape charge. Norman v. State, 543 So. 2d 1163 (Miss. 1989).

The prosecution of a defendant for robbery with a deadly weapon after a prior conviction for kidnapping arising from the same incident was not barred by double jeopardy since the crimes of armed robbery and kidnapping required different elements of proof. Brock v. State, 530 So. 2d 146 (Miss. 1988).

Where a defendant was charged with misdemeanor driving under the influence of alcohol, forfeiture of his bond and entry of a sentence of guilty into the docket constituted a conviction such that a subsequent trial for felonious driving under the influence was barred by the principle of double jeopardy. Bennett v. State, 528 So. 2d 815 (Miss. 1988).

Defendant's constitutional double jeopardy right was violated where he had previously been acquitted of crime of murder while in commission of rape, which was based on same series of acts upon which subsequent conviction of kidnapping was based. Dixon v. State, 513 So. 2d 951 (Miss. 1987).

Double jeopardy clauses of federal and state constitutions were not violated where defendant was originally indicted for capital murder of rape victim, which was subsequently reduced to murder as result of plea bargain, and later charged with rape; in capital murder indictment, defendant was charged with underlying felony of burglary, and nothing in that indictment suggested defendant committed rape. McFee v. State, 511 So. 2d 130 (Miss. 1987).

Separate prosecutions for sales of illegal controlled substances, arising from incidents occurring one week apart from each other, do not violate double jeopardy even where same undercover agent has induced sales at same general location using same modus operandi. Barnette v. State, 478 So. 2d 800 (Miss. 1985).

Prosecution for aggravated assault on police officer is not barred by prior prosecution for aggravated assault on another police officer arising out of same incident. Lee v. State, 469 So. 2d 1225 (Miss. 1985).

Where a body of a victim was severely burned by a fire, which also consumed his house, and where the defendant was acquitted of the murder, double jeopardy clause of Article 3 § 22 did not bar the subsequent prosecution of the defendant for the arson of the victim's home. Harden v. State, 460 So. 2d 1194 (Miss. 1984).

Defendant's prior conviction for rape did not preclude, on double jeopardy grounds, his prosecution for burglary, even though both arose out of the same general set of facts and testimony in both trials was essentially the same, since the essential statutory elements of the two charges are entirely different. Smith v. State, 429 So. 2d 252 (Miss. 1983).

Defendant's motion to dismiss, on double jeopardy grounds, an indictment charging him with armed burglary of an inhabited dwelling at nighttime was improperly denied, where there was a common nucleus of operative facts from which arose the prosecution for burglary and an earlier prosecution for rape, where defendant had earlier been acquitted of the rape, where the not guilty verdict in the rape trial was well within the evidence, where defendant's only defense at the rape trial was that another person committed the crime, where the jury could not rationally have acquitted him on any other basis, and where the state offered substantial evidence during the rape trial to show that he broke and entered the rape victim's home. Sanders v. State, 429 So. 2d 245 (Miss. 1983).

Indictment of defendant for felonious battery of a child did not subject him to former jeopardy, though he had previously been acquitted of a charge of manslaughter with respect to the same child's death, since defendant was not thereby subjected to being tried twice for the same offense, the essentials of felonious battery including intent and mutilation, neither of which is necessary to a conviction for manslaughter, and the indictment for manslaughter thus did not constitute the basis for a conviction of felonious battery. State v. Cox, 339 So. 2d 1374 (Miss. 1976).

Where the fact clearly established that the possession and sale of marijuana was a single transaction, the defendant could properly be charged with possession and sale, but he could be convicted of only one charge, and the state having elected to try him first for the possession, his conviction and sentence on that charge precluded the state from trying him for the sale. Laughter v. State, 241 So. 2d 641 (Miss. 1970).

A defendant, convicted in a federal court of the offense of interstate transportation of stolen property, is not placed in double jeopardy when subsequently prosecuted in a state court for embezzlement of the same property. Bell v. State, 251 Miss. 511, 170 So. 2d 428 (1965).

Rule against double jeopardy is not violated by punishing as contempt of court an act which has been punished as a penal offense. Church v. State ex rel. District Att'y, 239 Miss. 1, 111 So. 2d 228 (1959).

One acquitted of violating the general statute penalizing adultery and fornication (Code 1942 § 1998) is not put twice in jeopardy by being charged under the statute penalizing incestuous relationships. (Code 1942 § 2000). Ratcliff v. State, 234 Miss. 724, 107 So. 2d 728 (1958).

In view of accused's testimony that he had not been tried on the afternoon of his arrest for speeding, and no affidavit therefor had been made, his contention of double jeopardy, under a later speeding conviction in the circuit court, would fail since the offense for which he was tried in the justice of peace court was not the same offense as involved in the appeal, and if no affidavit had been made, the conviction in the justice of peace court was void and no bar to a subsequent prosecution. Gangloff v. State, 232 Miss. 395, 99 So. 2d 461 (1958).

When a single unlawful act results in the killing of more than one person, each homicide constitutes a separate offense for which the defendant may be tried without being twice put in jeopardy for the same offense. Burton v. State, 226 Miss. 31, 79 So. 2d 242 (1955).

There is a distinction between an offense and the unlawful act out of which it arises and the test as to whether the accused has been put in double jeopardy is not whether the accused has been tried for the same act but whether he had been put in jeopardy for the same offense. Burton v. State, 226 Miss. 31, 79 So. 2d 242 (1955).

To entitle the accused to plead former jeopardy, the offenses charged in two prosecutions must be the same in law and in fact. Burton v. State, 226 Miss. 31, 79 So. 2d 242 (1955).

A conviction of accused for failure to support his family is not a bar to a prosecution for abandonment of wife and child. McRae v. State, 104 Miss. 861, 61 So. 977 (1913).

A conviction on Sunday bars a subsequent prosecution for the same offense. Cherry v. State, 103 Miss. 225, 60 So. 138 (1912).

A prosecution in the circuit court is barred by a former conviction by a justice of the peace of the same offense. Smith v. State, 101 Miss. 853, 58 So. 539 (1912).

A prosecution of an officer for converting certain funds to his own use is barred by a former conviction under a charge of failure to turn over money. McInnis v. State, 97 Miss. 280, 52 So. 634 (1910).

On the trial of a charge of unlawful sale of liquors several sales were established and the state elected to stand on one of which the accused was acquitted. He cannot again be tried on one of the sales proved in the first trial. King v. State, 99 Miss. 23, 54 So. 657 (1910); Williams v. State, 102 Miss. 274, 59 So. 87 (1912).

A prosecution on an indictment for embezzling a particular item of an account is barred by an acquittal under an indictment for embezzling a "balance of the account." State v. Caston, 96 Miss. 183, 50 So. 569 (1909).

The mere failure of a justice of the peace to properly sentence the defendant does not prevent his pleading former jeopardy on a trial under an indictment for the same offense found prior to the trial before the justice, where the defendant had not been arrested before the indictment. Smithey v. State, 93 Miss. 257, 46 So. 410 (1908).

A person convicted under a municipal ordinance prohibiting leaking water pipes for more than two days bars another prosecution for like offense on the same street committed any time prior to the affidavit in the original prosecution. Crumpler v. City of Vicksburg, 89 Miss. 214, 42 So. 673, 10 Am. Ann. Cas. 1098 (1907).

Section 1412 of the Code, providing that the conviction of a defendant by a justice of the peace for a misdemeanor shall not bar a prosecution for a felony in the same matter, is not violative of this section. Tate v. Board of Levee Comm'rs, 84 Miss. 388, 36 So. 395 (1904).

Under a charge of aiming and discharging firearms at another, an acquittal under an indictment for assault and battery with intent to kill and murder does not bar the prosecution. Richardson v. State, 79 Miss. 289, 30 So. 650 (1901).

The offenses must be identical. Chiles v. Gallagher, 67 Miss. 413, 7 So. 208 (1889).

A prosecution for assault and battery or a simple assault will be barred by a conviction or acquittal upon an indictment for assault and battery with intent to kill. Jones v. State, 66 Miss. 380, 6 So. 231, 14 Am. St. R. 570 (1889).

Where defendant was acquitted under an indictment charging an offense against a daughter does not bar a subsequent prosecution for the offense committed against a stepdaughter. Sims v. State, 66 Miss. 33, 5 So. 525 (1889).

A prosecution for disturbance of public worship by other means than drunkenness is not barred by a conviction on a charge of drunkenness at the time. Smith v. State, 67 Miss. 116, 7 So. 208 (1889); Ball v. State, 67 Miss. 358, 7 So. 353 (1889).

It is no bar to a prosecution for gaming that defendant was convicted of gaming at a date subsequent to the time laid in the indictment unless evidence of the former gaming was adduced in the trial. Pope v. State, 63 Miss. 53 (1885).

A plea of former jeopardy to an indictment for slander which sets out different words charged in the affidavit on which defendant was convicted to those charged in the indictment is bad. Seal v. State, 2 Miss. Dec. 450 (1883).

An acquittal under an indictment for murder which does not charge an assault and battery is not good in bar of a subsequent prosecution for the latter offense. Moore v. State, 59 Miss. 25 (1881).

A person in one difficulty may be subject to conviction for committing separate assaults upon two separate adversaries and a conviction for one will not bar a conviction for the other. Teat v. State, 53 Miss. 439 (1876).

15. — — Offenses against different governments, identity of offenses.

Bank robbery is a crime under both laws of the United States and of the State of Mississippi, and a defendant's conviction under the laws of the United States will be no bar to his subsequent prosecution and conviction under the laws of Mississippi for the commission of the identical act for which he had previously been convicted in the federal courts. Bankston v. State, 236 So. 2d 757 (Miss. 1970).

The legislature can constitutionally confer on municipalities the power by ordinance to punish as an offense against the municipality an act which constitutes a crime against the state. Town of Ocean Springs v. Green, 77 Miss. 472, 27 So. 743 (1900).

A conviction of an offense under a municipal ordinance is not a bar to a prosecution by the state for same act. Johnson v. State, 59 Miss. 543 (1882).

16. Sentence and punishment—In general.

Having failed to prove at trial that defendant was a habitual offender under Miss. Code Ann. § 99-19-81, the State could not attempt to prove his habitual-offender status on remand, as that would violate the prohibition against double jeopardy set forth in Miss. Const. art. III, § 22. Grayer v. State, — So. 3d —, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), opinion withdrawn by, substituted opinion at, remanded by 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).

Decision to revoke appellant's, an inmate's, probation was appropriate, but a remand to the trial court was necessary because the handwritten addendum to the revocation order caused the inmate's new sentence to exceed the five-year maximum sentence and the State conceded that the handwritten addendum imposing three years' post-release supervision, instead of two years, was a clerical error. Although the inmate claimed that the new sentence subjected him to cruel and unusual punishment and to double jeopardy, double jeopardy was only violated if the court attempted to administer a longer sentence than what was originally conferred upon the inmate. Whitaker v. State, 22 So. 3d 326 (Miss. Ct. App. 2009).

Inmate's claim that the use of the robbery aggravating factor during sentencing was inappropriate as it allowed the use of the underlying felony, which elevated the crime to capital murder, was without merit on double jeopardy grounds because there was no threat of multiple prosecutions for the same offense or for repeated punishment arising from the same conviction; the sentencing phase of a capital murder trial was one part of the whole trial which included the guilt phase, and the use of the underlying felony at sentencing did not expose the inmate to double jeopardy. Brawner v. State, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

Trial court sentenced defendant to criminal contempt for refusal to testify in co-defendant's trial; because his failure to testify constituted a material breach of the plea agreement, the State reinstated the kidnapping charge, for which defendant was subsequently convicted and sentenced to 25 years' imprisonment. Defendant contended that the kidnapping conviction and sentence constituted a second punishment for his refusal to testify, thus subjecting him to double jeopardy; however, defendant was punished once for his refusal to testify against his co-defendant and once for the separate and distinct crime of kidnapping the victims, and, thus, his right double jeopardy rights were not violated as he was not punished multiple times for the same crime. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

Petitioner's argument that he was sentenced twice for the same offense and was subjected to double jeopardy lacked merit because the petitioner was not given a second sentence, but instead, after learning that federal authorities would not allow the petitioner to serve his state and federal sentences concurrently, the circuit court simply corrected its sentencing order, which it had authority to do because the sentencing order was amended before the end of the circuit court term. Toney v. State, 906 So. 2d 28 (Miss. Ct. App. 2004).

By being subject to both a criminal prosecution and civil fines for tax evasion, defendant was not exposed to double criminal prosecutions in violation of the Double Jeopardy Clause. Also, the indictment was not multiplicitous. King v. State, 897 So. 2d 981 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 224 (Miss. 2005).

Because the offenses of possession under Miss. Code Ann. § 41-29-313 and conspiracy were considered separate criminal violations separately punishable, no double jeopardy principle was violated. Hunt v. State, 863 So. 2d 990 (Miss. Ct. App. 2004).

While it may be true that the language of Miss. Code Ann. § 41-29-313(1)(a)(i) regarding "any amount" of the prohibited substances was primarily intended to cover situations where lesser quantities of the suspect materials were discovered and, therefore, the showing of multiple items was required to strengthen the inference of wrongful intent, it is nevertheless true that "any amount" plainly means just that — any amount; therefore, the possession of 250 — or 250,000, for that matter — dosage units of pseudoephedrine simultaneously with the possession of any one of the other prohibited substances listed in the statute constitutes a consummated violation of § 41-29-313(1)(a)(i), and, if a defendant is charged, convicted, and sentenced for that violation, it would plainly constitute a double jeopardy violation to attempt to punish defendant a second time for the possession of the exact same supply of pills, simply on the basis that the quantity happened to exceed the permissible level under a separate criminal statute. Hunt v. State, 863 So. 2d 990 (Miss. Ct. App. 2004).

The double jeopardy clauses of the United States and Mississippi Constitutions do not preclude criminal prosecution for violation of § 63-11-30 subsequent to administrative license suspension pursuant to § 63-11-23(2). Keyes v. State, 708 So. 2d 540 (Miss. 1998).

Since Mississippi's capital sentencing procedure requires the jury to determine whether the State has proved its case for the death penalty, the double jeopardy clause will protect a defendant from any subsequent attempt to subject him or her to the death penalty after a jury has impliedly acquitted him or her of the death penalty by determining that only a life sentence was warranted. Lanier v. State, 635 So. 2d 813 (Miss. 1994).

The double jeopardy clause did not afford a capital murder defendant protection against further capital sentencing procedures where he was originally sentenced to death by a jury, the death sentence was subsequently reversed due to a confrontation clause problem but there was no finding that the State had failed to prove its case for the death penalty, and the defendant and the State then entered into a sentencing agreement which was found to be void; since there was no acquittal of the death penalty, the double jeopardy clause would not prohibit the State from seeking the death penalty at a subsequent sentencing hearing. Lanier v. State, 635 So. 2d 813 (Miss. 1994).

17. Addition of a condition to a suspended sentence.

Addition of the condition of house arrest to an inmate's suspended sentence was not an impermissible increase in the level of punishment to invoke constitutional concerns of double jeopardy under U.S. Const. Amend. V and Miss. Const. Art. 3, § 22. The inmate had not been actually acquitted or convicted in a former trial on the merits for which he was again sought to be convicted. Williams v. State, 4 So. 3d 388 (Miss. Ct. App. 2009).

18. — — Guilty pleas, sentence and punishment.

Where appellant pleaded guilty to possession of cocaine, he was sentenced to serve ten years concurrently with a sentence for a crime he committed in Tennessee. The trial court did not violate the double jeopardy clause by accepting his guilty plea on one date and then sentencing him during a separate hearing; defendant only received one criminal sentence. Brown v. State, 920 So. 2d 1037 (Miss. Ct. App. 2005).

Double jeopardy was not implicated where the defendant was tried for capital murder and for the same burglary that was necessary to support the capital murder offense, and he eventually pled guilty to the lesser included offense of murder and to burglary of an occupied dwelling. Pinkney v. State, 2000 Miss. LEXIS 95 (Miss. Apr. 20, 2000), opinion withdrawn by, substituted opinion at 757 So. 2d 297, 2000 Miss. LEXIS 173 (Miss. 2000).

Treble civil penalty of $84,460.60 for Medicaid fraud, and imposition of prison sentence after defendant failed to pay penalty, did not constitute double jeopardy when considered with other punishment received when defendant pleaded guilty, such as a fine for actual amount of fraud and two-year probation; all punishment was imposed in a single proceeding, and punishment was within statutory authority. Jennings v. State, 700 So. 2d 1326 (Miss. 1997).

A trial court erred in allowing a defendant to plead guilty to both capital murder and the underlying felony of burglary which elevated the murder to capital murder; sentencing the defendant separately for both felony murder and the underlying felony violated his right against double jeopardy. Fuselier v. State, 654 So. 2d 519 (Miss. 1995).

A trial court's imposition of a sentence of 49½ years imprisonment upon finding that the defendant had violated a plea agreement which provided that the charges against the defendant would be dismissed following restitution and 3 years of good behavior pursuant to § 99-15-26, in spite of the defendant's argument that the maximum sentence he should have received was 3 years since the plea bargain required him to "go straight" for only 3 years as a condition of dismissal, since the defendant had not been adjudged guilty or sentenced for the original charges until the date when the 49½ year sentence was imposed, and therefore the 3-year period of conditional good behavior did not amount to a sentencing ceiling for double jeopardy purposes. Wallace v. State, 607 So. 2d 1184 (Miss. 1992).

In § 99-15-26 proceedings, the trial court never accepts the guilty plea and never imposes a sentence if the defendant fulfills the court-imposed conditions; where a guilty plea is accepted and a suspended sentence is imposed, the court cannot later impose a period of incarceration exceeding the original suspended sentence where the defendant fails to maintain a standard of good behavior because to do so would expose the defendant to double jeopardy. Wallace v. State, 607 So. 2d 1184 (Miss. 1992).

19. — — Habitual offenders, sentence and punishment.

The use of the defendant's prior convictions for driving under the influence of alcohol (DUI) to obtain a conviction for felony DUI did not violate the double jeopardy clause. Smith v. State, 736 So. 2d 381 (Miss. Ct. App. 1999).

The prohibition against double jeopardy did not preclude the State at resentencing from enhancing a defendant's life sentence for murder with the habitual offender statute where the defendant was initially sentenced to death and therefore his status as an habitual offender was not determined until after the sentencing trial on remand; since the defendant's status as an habitual offender had not previously been determined, the finding of habitual offender status on resentencing was not barred by double jeopardy. Gray v. State, 605 So. 2d 791 (Miss. 1992).

The State would not be permitted a second chance to prove the habitual offender status of a defendant where the habitual offender portion of the sentence had been vacated due to the insufficiency of the evidence presented to prove the necessary prior convictions; Article 3, § 22 of the Mississippi Constitution would bar the State from perfecting its evidence through successive attempts. Cox v. State, 586 So. 2d 761 (Miss. 1991).

The holding of a hearing on the issue of habitual offender status, which resulted in a sentence of life without parole, following a bifurcated guilt and sentencing trial on a charge of capital murder, which resulted in a jury verdict of a life sentence, meaning life with parole, rather than death, did not violate the defendant's right against double jeopardy. At the capital murder sentencing hearing on the matter of whether the defendant should be sentenced to death, the defendant was not put in jeopardy on the issue of sentence enhancement based on recidivism. Hoover v. State, 552 So. 2d 834 (Miss. 1989).

A habitual offender's sentencing hearing, as a trial on the sentence, constitutes jeopardy for the purpose of the constitutional right against double jeopardy. Ellis v. State, 520 So. 2d 495 (Miss. 1988).

Remanding case for resentencing under habitual offender statute would offend double jeopardy clause because habitual offender sentencing is itself trial on eligibility for harsher sentence and therefore constitutes jeopardy. Young v. State, 507 So. 2d 48 (Miss. 1987).

Const Art 3 § 22, the Double Jeopardy Clause, precluded the state from having a second chance to establish defendant's habitual offender status under § 99-19-81, where no evidence had been admitted to support such a conviction apart from evidence erroneously admitted by the trial court. DeBussi v. State, 453 So. 2d 1030 (Miss. 1984).

20. — — Parole, probation, or suspended sentence, sentence and punishment.

Where appellant served four years of his six-year sentence for the sale of cocaine, he was released; upon the revocation of his suspended two-year sentence, the trial court violated appellant's protection against double jeopardy by imposing a three-year term of imprisonment. The trial court exposed him to a period of incarceration exceeding the original suspended sentence. Branch v. State, 996 So. 2d 829 (Miss. Ct. App. 2008).

Post-conviction relief was denied in a case where a portion of a suspended sentence was revoked under Miss. Code Ann. § 47-7-37 because there was no due process violation since the evidence relied upon was listed, there was no double jeopardy violation since the original sentence was reinstated, and counsel was not required since the case was not complex. Pruitt v. State, 953 So. 2d 302 (Miss. Ct. App. 2007).

Administrative proceedings did not invoke the double jeopardy clause, and as such defendant was not unconstitutionally subjected to double jeopardy where his removal from the intensive supervision program and reclassification into the general prison population, as well as the imposition of his original sentence, were administrative, not criminal proceedings; double jeopardy protections did not apply to suspension revocation hearings. Brown v. Miss. Dep't of Corr., 906 So. 2d 833 (Miss. Ct. App. 2004).

Because the inmate failed the urine test four months short of completing one year in the Intensive Supervision Program (ISP), there was no denial of due process or equal protection in denial of an evidentiary hearing, and no double jeopardy issue arose because the Mississippi Department of Corrections (MDOC) simply changed the inmate's statute as a prisoner by revoking the inmate from ISP and placing the inmate in an MDOC facility to serve the remainder of the inmate's sentence. McBride v. Sparkman, 860 So. 2d 1237 (Miss. Ct. App. 2003).

Defendant did not suffer a double jeopardy violation where the trial court's petition to revoke probation or to revoke suspension of a sentence was not a criminal case and not a trial on the merits of the case; there was no subsequent conviction and sentence, only an indictment, and defendant failed to show he was previously convicted of the crime of possession of cocaine when the trial judge revoked his bond, and defendant did not show that jeopardy attached at probation and bail revocation hearings. Thomas v. State, 845 So. 2d 751 (Miss. Ct. App. 2003).

It was a violation of the prohibition against double jeopardy for the court to resentence the defendant to a term of 30 years where (1) the defendant was originally sentenced to a term of 20 years, with five years suspended, on condition that he would later give testimony against "any unindicted person in the case," and (2) the defendant failed to fulfill the condition of his sentence. Johnson v. State, 753 So. 2d 449 (Miss. Ct. App. 1999).

Double jeopardy protection does not apply to a hearing to revoke a suspended sentence. Cooper v. State, 737 So. 2d 1042 (Miss. Ct. App. 1999).

Where a person, convicted of an offense less than felony, is required to enter into a bond to keep peace and to be of good behavior there is no violation of the constitution in placing him in double jeopardy for the same offense. Arnold v. State, 213 Miss. 667, 57 So. 2d 484 (1952).

It is not violative of the section for the court, upon a conviction of an offender, to suspend the sentence except as to costs, and at a future term to impose a fine, etc. Gibson v. State, 68 Miss. 241, 8 So. 329 (1890).

21. — — Attorney disciplinary proceedings, sentence and punishment.

An appeal by the Mississippi State Bar to enhance an attorney's punishment for his violation of disciplinary rules did not violate the attorney's constitutional right against double jeopardy. Mississippi State Bar v. Blackmon, 600 So. 2d 166 (Miss. 1992).

22. Motions to dismiss.

Where defendant was convicted of driving under the influence, and of open-container and improper stop offenses in municipal court, and he appealed to the circuit court, as to the city's cross-appeal, the circuit court's dismissal of the open-container and improper stop charges was, in effect, an acquittal. A reversal by the appellate court for a second trial on those two charges would have violated defendant's constitutional right to protection from double jeopardy. McDonald v. City of Aberdeen, 906 So. 2d 774 (Miss. Ct. App. 2004).

The Supreme Court was authorized to treat a circuit court's denial of a criminal defendant's motion to dismiss the indictment against him on double jeopardy grounds as a "final judgment" in a civil action under § 11-51-3, which authorizes an appeal from a final judgment, and § 9-3-9, which gives the Supreme Court jurisdiction of an appeal from any final judgment in the circuit court, since the double jeopardy claim went beyond the defendant's right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore denial of the claim was final and justified immediate determination. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art I § 9 of the United States Constitution and Art 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

23. Different elements, no double jeopardy.

Defendant's right against double-jeopardy was not violated because, while the counts for fondling, under Miss. Code Ann. § 97-5-23(1), and the attempted-sexual-battery, under Miss. Code. Ann. § 97-1-7, stemmed from the same encounter, the elements of the crimes were not the same as each count contained an element not contained in the other. Attempted sexual battery did not contain the element of gratification of lust, while fondling did not require the element of penetration. Moore v. State, 112 So. 3d 1084 (Miss. Ct. App. 2013).

As a conviction of possession of a firearm by a convicted felon (Miss. Code Ann. § 97-37-5) required proof of a prior felony, while conviction of carrying a concealed weapon (Miss. Code Ann. § 97-37-1) required proof that the weapon be concealed, each offense had an element not present in the other; therefore, defendant's conviction of both charges did not violate the double jeopardy ban. Wilson v. State, 95 So. 3d 1282 (Miss. Ct. App. 2012).

Defendant's argument that the application of Miss. Code Ann. § 97-37-37 constituted double jeopardy because it required proof of the same elements as the underlying crimes was procedurally barred because it was not raised at trial. Notwithstanding the procedural bar, the argument was without merit because the statute was clearly a sentence enhancement and did not set out separate elements of the underlying felony. Mayers v. State, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Crime of sexual abuse of a vulnerable adult under Miss. Code Ann. § 43-47-19 does not encompass the crime of sexual battery under Miss. Code Ann. § 97-3-95, and a conviction of both offenses does not implicate double jeopardy concerns because the crimes require additional and different elements of proof; specifically, the former offense does not require proof of penetration, while the latter offense does require this proof. Additionally, abuse of a vulnerable adult requires proof that defendant willfully inflicted physical pain or injury upon a vulnerable adult, while sexual battery has no such requirement; there are additional differences in that sexual battery does not require that the victim's abilities to provide for his or her protection from sexual contact be impaired by the infirmities of aging or that the victim be a patient or resident of a care facility, while the charge of abuse of a vulnerable adult does require this additional element. Simoneaux v. State, 29 So. 3d 26 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 115 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 151, 178 L. Ed. 2d 38, 2010 U.S. LEXIS 6093, 79 U.S.L.W. 3196 (U.S. 2010).

Defendant confessed to police that he choked the victim, duct taped a plastic bag around his head to suffocate the victim, placed the victim's body in the trunk of his car, and dumped the body in the woods; double jeopardy did not bar defendant's prosecution for both capital murder and kidnapping. The Supreme Court of Mississippi held that the crimes of capital murder and kidnapping each require proof of an element not necessary to the other. Nelson v. State, 10 So. 3d 898 (Miss. 2009).

Court properly denied defendant's motion for a directed verdict because the crime of statutory rape did not encompass the crime of gratification of lust. The crime of gratification of lust did not require any proof of sexual intercourse or proof of a laceration/tearing of the child's genitalia, and as such, statutory rape required proof of an additional element not required by gratification of lust, and there was no double jeopardy. Branch v. State, 998 So. 2d 411 (Miss. 2008).

Defendant was not subject to double jeopardy, even though defendant was issued a citation for resisting arrest and was later convicted of simple assault on a law enforcement officer, where a clear reading of the statutes established that the two offenses contained an element that was lacking from the other. Roncali v. State, 980 So. 2d 959 (Miss. Ct. App. 2008).

Defendant's motion for post-conviction relief was properly denied where defendant's convictions for conspiracy to commit capital murder, accessory before the fact of grand larceny, and accessory before the fact of burglary of a dwelling with intent to commit assault did not subject defendant to double jeopardy; defendant's crimes were completely different and required proving different sets of elements. Byrom v. State, 978 So. 2d 689 (Miss. Ct. App. 2008).

Defendant's argument that the State should not have been able to prosecute him for capital murder, while at the same time prosecute him for conspiracy to commit capital murder was without merit because the State was required to show that defendant offered two individuals money to murder the victims, which was independent of the two individuals' agreement with defendant that included assisting in the preparations for the man who actually did the killing. Vickers v. State, 994 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Defendant's prosecutions for both shooting into a vehicle under Miss. Code Ann. § 97-25-47 and murder under Miss. Code Ann. § 97-3-19(1)(a), did not subject him to double jeopardy since the crimes charged required additional facts separate from each other; murder, unlike shooting into a vehicle, required the deliberate killing of an individual and did not require defendant to have shot into a vehicle, while shooting into a vehicle required only that defendant willfully shot into or at a vehicle. Further, the facts were such that it was not clear whether defendant shot into the vehicle when he killed the victim, as there was testimony to the effect that the victim may have had all or part of his head outside the vehicle when he was shot; in essence, the facts were such that defendant could have been found guilty of murder and of shooting into a vehicle without any risk of exposure to double jeopardy. Peacock v. State, 970 So. 2d 197 (Miss. Ct. App. 2007).

ATTORNEY GENERAL OPINIONS

Revocation of probation or parole because a person has been charged with another crime, whether or not he is subsequently convicted of the charged offense, does not constitute double jeopardy. Smith, Apr. 6, 2001, A.G. Op. #01-0175.

RESEARCH REFERENCES

ALR. Plea of former jeopardy or of former conviction or acquittal where jury was not sworn. 12 A.L.R. 1006.

Plea of former jeopardy where jury discharged because of misconduct or disqualification of one or more of their number. 38 A.L.R. 706.

Constitutionality of statute relating to injunctions against crime or abatement of nuisance arising from violation of liquor law. 49 A.L.R. 635.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 A.L.R. 20; 82 A.L.R. 345; 116 A.L.R. 209; 132 A.L.R. 91; 139 A.L.R. 673.

Plea of double jeopardy where jury was discharged because of inability of the prosecution to present testimony. 74 A.L.R. 803.

Award of venire de novo or new trial after verdict of guilty as to one or more counts and acquittal to another as permitting retrial or conviction on latter count. 80 A.L.R. 1106.

Discharge on habeas corpus after conviction as affecting claim or plea of former jeopardy. 97 A.L.R. 160.

Necessity and sufficiency of pleading by prosecution to contest defendant's plea of former jeopardy. 113 A.L.R. 1146.

Right of court to accept verdict upon one or more counts of an indictment or information when jury is unable to reach a verdict on all counts or is silent as to part of counts, and effect of such acceptance. 114 A.L.R. 1406.

Former acquittal or conviction under indictment or other information for rape or other sexual offense which does not allege that female was under age of consent as bar to subsequent prosecution under indictment or information which alleges that she was under age of consent; and vice versa. 119 A.L.R. 1205.

Plea of former jeopardy where jury is discharged because of illness or insanity of juror. 125 A.L.R. 694.

Former jeopardy as ground for habeas corpus. 8 A.L.R.2d 285.

Conviction of lesser offense as bar to prosecution for greater on new trial. 61 A.L.R.2d 1141.

Propriety, and effect as double jeopardy, of court's grant of new trial in criminal case on its own motion. 85 A.L.R.2d 486.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense. 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy. 6 A.L.R.3d 905.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery committed of another person at the same time. 51 A.L.R.3d 693.

Propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prejudicial matter, or making prejudicial remarks in presence of, jury, 77 A.L.R.3d 1143.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial. 98 A.L.R.3d 997.

Applicability of double jeopardy to juvenile court proceedings. 5 A.L.R.4th 234.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts-modern view. 6 A.L.R.4th 802.

Retrial on greater offense following reversal of plea-based conviction of lesser offense. 14 A.L.R.4th 970.

Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of a mistrial-state cases. 40 A.L.R.4th 741.

Double jeopardy: various acts of weapons violations as separate or continuing offense. 80 A.L.R.4th 631.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts — Modern view. 97 A.L.R.5th 201.

Acquittal or conviction in state court as bar to federal prosecution based on same act or transaction. 18 A.L.R. Fed. 393.

Double jeopardy considerations in federal criminal cases — Supreme Court cases. 162 A.L.R. Fed. 415.

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Retrial de novo without any judicial determination of sufficiency of evidence at prior bench trial held not to violate double jeopardy clause. 80 L. Ed. 2d 311.

Double jeopardy clause held to prohibit state from sentencing defendant to death after life sentence he had initially received was set aside on appeal. 81 L. Ed. 2d 164.

Prosecution on charges of murder and aggravated robbery after guilty pleas to two lesser charges had been accepted by court over state's objection held not prohibited by double jeopardy clause. 81 L. Ed. 2d 425.

Double jeopardy clause held to bar state robbery conviction following prior state conviction for capital murder committed during robbery. 82 L. Ed. 2d 801.

Retrial of defendant held not barred by double jeopardy clause even through jury acquitted him of one count but was unable to agree as to other counts. 83 L. Ed. 2d 242.

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§ 23. Searches and seizures

The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

SOURCES: 1817 art I § 9; 1832 art I § 9; 1869 art I § 14.

JUDICIAL DECISIONS

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37. Arrest supported by probable cause.

1. Construction with Federal Constitution.

Roadblock set up by city police department was not conducted in violation of defendant's rights arising under Miss. Const. Art. 3, § 23; in view of the striking similarities between the Fourth Amendment and Miss. Const. Art. 3, § 23, and the lack of a history of differentiation between the two by the Mississippi Supreme Court, there was no tenable basis to accept defendant's contention that the roadblock was unconstitutional. Sasser v. City of Richland, 850 So. 2d 206 (Miss. Ct. App. 2003).

This section and the Fourth Amendment to the U. S. Constitution are identical in substance and purpose. Potter v. United States, 362 F.2d 493 (5th Cir. Fla. 1966).

2. Searches and seizures —In general.

Although defendant was not given an initial appearance until six days after his arrest, which violated Miss. Unif. Cir. & County Ct. Prac. R. 6.03, because defendant was not taken for his initial appearance within 48 hours of arrest, the failure to comply with Rule 6.03 did not violate defendant's U.S. Const. amend IV or Miss. Const. Art. 3, § 23, rights because a probable cause determination was made well within the required 48-hour period, when defendant was served with an arrest warrant on the day after his arrest. Lawrence v. State, 869 So. 2d 353 (Miss. 2003), writ of certiorari denied by 540 U.S. 1164, 124 S. Ct. 1178, 157 L. Ed. 2d 1211, 2004 U.S. LEXIS 892, 72 U.S.L.W. 3487 (2004).

Through Miss. Unif. Cir. & County Ct. Prac. R. 6.03, Mississippi has provided a procedure for a fair and reliable determination of probable cause by a judicial officer promptly after arrest. If the procedure of Rule 6.03 is followed, the U.S. Const. amend IV and Miss. Const. Art. 3, § 23, rights of the accused are protected; however, the converse does not necessarily follow, failure to follow the exact procedure of Rule 6.03 does not necessarily result in a Fourth Amendment or Article 3 violation. Lawrence v. State, 869 So. 2d 353 (Miss. 2003), writ of certiorari denied by 540 U.S. 1164, 124 S. Ct. 1178, 157 L. Ed. 2d 1211, 2004 U.S. LEXIS 892, 72 U.S.L.W. 3487 (2004).

A search and seizure question was preserved for review by the Supreme Court, even though the defendant did not use the term "Fourth Amendment" or "Section 23" at the initial suppression hearing, where there was no doubt that the defendant was seeking protection of his right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article 3, § 23 of the Mississippi Constitution. Longstreet v. State, 592 So. 2d 16 (Miss. 1991).

Law enforcement officers have no authority to search the person of an individual because they may suspect that he is violating the law or because they are desirous of physically searching the person of an individual to see if he has in his possession contraband so that he may be arrested and prosecuted. Keys v. State, 283 So. 2d 919 (Miss. 1973).

The provisions for search and seizure are strictly construed against the state and in favor of the citizen. Barker v. State, 241 So. 2d 355 (Miss. 1970).

Provisions for search and seizure are construed strictly against the state. Lacaze v. State, 254 Miss. 523, 183 So. 2d 176 (1966).

Provisions for search and seizure are construed strictly against the state. Adams v. State, 202 Miss. 68, 30 So. 2d 593 (1947).

Before proof can be made of facts discovered in a search by an officer the state must introduce the affidavit and search warrant authorizing the search or show their loss or destruction unless there has been a waiver of them at the time of the search. Cuevas v. Gulfport, 134 Miss. 644, 99 So. 503 (1924); Wells v. State, 135 Miss. 764, 100 So. 674 (1924); Nelson v. State, 137 Miss. 170, 102 So. 166 (1924).

The statutes authorizing searches and seizures are to be strictly construed against the state. Turner v. State, 133 Miss. 738, 98 So. 240 (1923); State v. Watson, 133 Miss. 796, 98 So. 241 (1923).

This section has application to searches and seizures made through governmental agencies of the state and has no application nor bearing on unauthorized acts of private persons. Hampton v. State, 132 Miss. 154, 96 So. 165 (1923); Smith v. State, 133 Miss. 730, 98 So. 344 (1923); Owens v. State, 133 Miss. 753, 98 So. 233 (1923); Taylor v. State, 134 Miss. 110, 98 So. 459 (1924); Rignall v. State, 134 Miss. 169, 98 So. 444 (1923); Spears v. State, 99 So. 361 (Miss. 1924); McCarthy v. Gulfport, 134 Miss. 632, 99 So. 501 (1924); Cuevas v. Gulfport, 134 Miss. 644, 99 So. 503 (1924); Wells v. State, 135 Miss. 764, 100 So. 674 (1924); Jordan v. State, 135 Miss. 785, 100 So. 384 (1924); Butler v. State, 135 Miss. 885, 101 So. 193 (1924); Morton v. State, 136 Miss. 284, 101 So. 379 (1924); Robinson v. State, 136 Miss. 850, 101 So. 706 (1925); Nicaise v. State, 141 Miss. 611, 106 So. 817 (1926); Brewer v. State, 142 Miss. 100, 107 So. 376 (1926); Canteberry v. State, 142 Miss. 462, 107 So. 672 (1926); Holliday v. State, 180 So. 800 (Miss. 1938).

3. — Excessive force, searches and seizures.

Trial court had not erred by finding that two police officers violated an individual's constitutional rights by using excessive force in arresting him. The officers continued to use force on the individual after he was subdued and handcuffed; as a result, their actions were grossly disproportionate to the lack of resistance the individual offered and malicious. City of Jackson v. Powell, 917 So. 2d 59 (Miss. 2005).

4. — — Expectation of privacy, searches and seizures.

Failing to suppress bag of cocaine was not in violation of defendant's due process rights or his rights under U.S. Const. Amend. IV because the action of the officers in having the bag of cocaine removed from defendant's mouth did not shock the conscience. Ellis v. State, 21 So. 3d 669 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 553 (Miss. 2009).

Defendant failed to establish that he had a reasonable expectation of privacy in a motel room where money from a bank robbery was found as the room was registered in the name of a third party; as defendant did not produce evidence that he had a reasonable expectation of privacy in the motel room, he lacked standing to contest the search and the admission of the evidence obtained as a result of the search. Lyons v. State, 942 So. 2d 247 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 269 (Miss. 2007).

Defendant had no standing to challenge under U.S. Const. Amend. IV, or Miss. Const. Art. III, § 23, evidence seized from the vehicle that he stole after killing a victim because defendant had not expectation of privacy in the stolen vehicle. Walker v. State, 913 So. 2d 198 (Miss. 2005), writ of certiorari denied by 546 U.S. 1038, 126 S. Ct. 743, 163 L. Ed. 2d 581, 2005 U.S. LEXIS 8688, 74 U.S.L.W. 3322 (2005), remanded by 2006 Miss. LEXIS 156 (Miss. Mar. 9, 2006).

A defendant's constitutional right to privacy was not violated by the State's taking the defendant to the health department for treatment of gonorrhea where the defendant was charged with capital rape of a child who was found to have gonorrhea, since the State's interest in operating a prison and providing for the health of inmates outweighed the privacy interests of the defendant. Ormond v. State, 599 So. 2d 951 (Miss. 1992).

Within the contemplation of § 23 of the Mississippi Constitution, students have a reasonable expectation of privacy in their school lockers. However, this expectation of privacy is considerably less than the student would have in the privacy of his or her home, or even, perhaps, in his or her automobile. Since that interest is less than in these other circumstances, and because it necessarily clashes with the broad discretionary authority and responsibility of school officials, a lesser showing is required before school officials may have the authority to search a student's locker. S.C. v. State, 583 So. 2d 188 (Miss. 1991).

5. — — Stops and detentions, searches and seizures.

Because the anonymous tip was suitably corroborated to provide reasonable suspicion for an investigatory stop, the officers were justified in making an investigatory stop to resolve the ambiguous situation; thus, defendant's conviction for misdemeanor driving under the influence was lawful. Cook v. Rankin County, — So. 3d —, 2013 Miss. App. LEXIS 831 (Miss. Ct. App. Dec. 3, 2013).

Defendant was legally stopped under the Fourth Amendment, U.S. Const. amend. IV, and Miss. Const. art. III, § 23 as: (1) he failed to use his turn signal and violated Miss. Code Ann. § 63-3-707, even though there was no imminent threat of a collision between his vehicle and an officer's vehicle that was traveling at a safe distance behind defendant's vehicle; (2) the subsequent searches of defendant and his vehicle were lawful; (3) defendant was arrested for driving with a suspended license; (4) the glass pipes were found in a search incident to defendant's arrest; and (5) the inventory search of defendant's vehicle, during which the methamphetamine was discovered, was conducted according to police department policy and was limited to the areas of the vehicle where defendant's property could reasonably be expected to be found.. Melton v. State, 118 So. 3d 605 (Miss. Ct. App. 2012), writ of certiorari denied by 117 So. 3d 330, 2013 Miss. LEXIS 375 (Miss. 2013).

Miss. Const. Art. 3, § 23, was not violated by detaining defendant briefly after a traffic stop; once he stopped defendant's vehicle, the deputy was required to ensure that defendant's temporary license plate was valid and that defendant had liability insurance, pursuant to Miss. Code Ann. § 63-15-4(3). Wade v. State, 33 So. 3d 498 (Miss. Ct. App. 2009).

Miss. Const. Art. 3, § 23, was not violated because the fact that defendant did not have a license plate that was "conspicuously displayed" on his rental car, as required by Miss. Code Ann. § 27-19-323, provided a reasonable basis to stop defendant's vehicle. The deputy had probable cause to believe that defendant had committed a traffic violation. Wade v. State, 33 So. 3d 498 (Miss. Ct. App. 2009).

Where an officer saw a vehicle speed out of an apartment complex, he called in the tag and dispatch notified him it was expired; as a result, the officer had reasonable suspicion to pull over the driver over for two traffic offenses. Cole v. State, 8 So. 3d 250 (Miss. Ct. App. 2008).

Motion to suppress evidence was properly denied in a drug case because a Terry stop did not violate U.S. Const. Amend. IV or Miss. Const. Art. III, § 23 where an officer had a reasonable suspicion that a vehicle had no tag in violation of Miss. Code Ann. § 27-19-323 and Miss. Code Ann. § 27-19-40, since the officer could not see a "special in-transit tag" on a tinted window. Gonzales v. State, 963 So. 2d 1138 (Miss. 2007).

An investigatory stop was proper and the investigation did not exceed the scope of the investigatory stop as to indicate a seizure where defendant evaded a road block then acted suspiciously upon the officers' inspection of the car in which he was a passenger, causing the officers to develop a reasonable suspicion that defendant was engaged in or soon to be engaged in criminal activity. Roberson v. State, 754 So. 2d 542 (Miss. Ct. App. 2000).

There are "degrees" of detainments which fall short of an arrest which requires probable cause; detainments which would become an arrest depending on the outcome of a pending investigation are permissible, though police officers do not have unlimited authority, and may not be clothed with the authority to detain where they are not diligently investigating in such a way which will resolve the matter. Haddox v. State, 636 So. 2d 1229 (Miss. 1994), modified on denial of rehearing, 1994 Miss. LEXIS 323 (Miss. June 16, 1994).

It was permissible for a police officer to stop an automobile and detain the occupants until a warrant to search the car was obtained where the officer had "staked out" the highway based on phone calls from a confidential informant who had given him reliable information in the past, the officer was familiar with the occupants of the car and the informant had given him their names, and the car make, license plate, and ownership of the car were confirmed by the officer before he pulled the car over. Haddox v. State, 636 So. 2d 1229 (Miss. 1994), modified on denial of rehearing, 1994 Miss. LEXIS 323 (Miss. June 16, 1994).

A police officer made a permissible Terry stop and pat-down search of a defendant where the defendant was seen by the officer running across a road at 1:30 a.m. in a commercial area which had been the scene of previous burglaries. Nathan v. State, 552 So. 2d 99 (Miss. 1989).

6. — — Speculative or threatened harm, searches and seizures.

Livestock owners cannot invoke aid of equity to enable them to disregard regulations for dipping stock merely because of threatening invasion of constitutional right. Moss v. Mississippi Live Stock San. Bd., 154 Miss. 765, 122 So. 776 (1929).

7. — — Validity of statutes, searches and seizures.

Gambling statute, in so far as it authorizes arrest without warrant for misdemeanor not committed in presence of officer making arrest, held to violate Constitution. Polk v. State, 167 Miss. 506, 142 So. 480 (1932).

Provisions of gambling statute authorizing breaking into place for purpose of searching and making arrest without search warrant held to violate constitutional provision prohibiting unreasonable searches and seizures. Polk v. State, 167 Miss. 506, 142 So. 480 (1932).

Chapter 244, Laws of 1924, § 1, providing that a search warrant might issue upon the affidavit of any credible person that he has reason to believe and does believe certain facts, does not violate this section. Winters v. State, 142 Miss. 71, 107 So. 281 (1926).

Chapter 115, Laws of 1908 and c 134, Laws of 1910, relating to the unlawful possession and sale of intoxicating liquors, are constitutional. State ex rel. Att'y Gen. v. Marshall, 100 Miss. 626, 56 So. 792 (1911); Loeb v. State, 133 Miss. 883, 98 So. 449 (1923); Bufkin v. State, 134 Miss. 1, 98 So. 452 (1923).

8. — — Vehicular searches, searches and seizures.

Miss. Const. Art. 3, § 23, was not violated by detaining defendant after a traffic stop; defendant's behavior and contradictory and unlikely answers aroused the deputy's suspicions. Further, it took only three minutes for another officer to arrive with a dog who alerted for the presence of drugs in defendant's vehicle. Wade v. State, 33 So. 3d 498 (Miss. Ct. App. 2009).

Search of a vehicle was a valid inventory search where defendant was legally arrested, there was no one available to remove defendant's vehicle from the roadside, and under such circumstances, the standard procedure was to call a wrecker to impound the vehicle and conduct an inventory search. Garrison v. State, 918 So. 2d 846 (Miss. Ct. App. 2005).

Seizure of defendant for driving under the influence following a stop at a routine police roadblock being conducted to check vehicles for compliance with traffic laws relating to registration and licensing requirements did not violate defendant's rights under either Miss. Const. Art 3, § 23 or the Fourth Amendment to the Constitution of the United States, and the trial court properly admitted a test result showing defendant's blood alcohol content as .152. Dixon v. State, 828 So. 2d 844 (Miss. Ct. App. 2002).

A roadblock set up to check licenses and to check outstanding warrants was constitutional as the degree of intrusion into the defendant's liberty caused by the roadblock was minimal where the defendant was treated the same way as any other driver who approached this roadblock and the roadblock did not involve drug dogs or mandatory searches of automobiles. Dale v. State, 785 So. 2d 1102 (Miss. Ct. App. 2001).

The trial court did not err in not suppressing evidence seized from the defendant's car without a warrant pursuant to the automobile exception where (1) the defendant arrived at a hospital emergency room with a coperpetrator who had been shot, removed the coperpetrator from his car and attempted to leave, (2) the defendant's car, however, stalled and an officer detained the defendant and transported him to the emergency room, (3) the officer returned to the defendant's vehicle where he noticed that the trunk was partially open and he saw bloody money in it, (4) the officer then looked into the passenger compartment and observed the handle of a firearm protruding from under the driver's seat, and (5) the officer then, without first obtaining a warrant, removed the gun from the car. Moore v. State, — So. 2d —, 2000 Miss. LEXIS 264 (Miss. Dec. 21, 2000), opinion withdrawn by, substituted opinion at 787 So. 2d 1282, 2001 Miss. LEXIS 164 (Miss. 2001).

Police officers were authorized to make an inventory of the contents of an automobile in custody after it had been lawfully seized for failure to display a license tag, so that marijuana discovered in the course of the inventory was not the product of an unlawful search; the inventory of property lawfully seized is in a different legal category from that of a search of an automobile incident to a lawful arrest, or the search of a movable vehicle on probable cause that the vehicle is being used to convey contraband. Moore v. State, 261 So. 2d 126 (Miss. 1972).

The defendant was not materially prejudiced by a search of his automobile which resulted in the discovery of items which were sent to the Federal Bureau of Investigation laboratories during a homicide investigation, where a special agent of the FBI, called as a witness for the defendant, testified that none of the items could in any way establish a connection between the defendant and the homicide victim. Taylor v. State, 254 So. 2d 728 (Miss. 1971).

In view of the statute requiring police officers to remove a vehicle from the highway when it is a danger to the traveling public, the partial unloading of a rental truck which was so heavily loaded that it could not be moved without being partially unloaded, and the removal of the truck to the courthouse, was not an illegal search, where at the time the officers moved the truck, they did not search it or seize any of its contents, and did not know that a crime had been committed. Williamson v. State, 248 So. 2d 634 (Miss. 1971).

It was neither a trespass nor an unlawful search, nor was it illegal for a deputy sheriff to look into a station wagon recently occupied by three persons subsequently charged with burglary, and through the windows of the vehicle to observe and consider marks and other indicia that tended to establish that the vehicle had been used for the transportation of property allegedly stolen. Wilson v. State, 186 So. 2d 208 (Miss. 1966).

The search of an automobile begins when its pursuit begins. Terry v. State, 252 Miss. 479, 173 So. 2d 889 (1965).

The search of a vehicle without authority of law must be based upon probable cause, supported by information from a credible person, and the facts upon which the officer acts must be sufficient to constitute probable cause, and this is a judicial question for the decision of the court. Terry v. State, 252 Miss. 479, 173 So. 2d 889 (1965).

Constitutional rights of defendant in prosecution for assault and battery with intent to kill were violated warranting reversal of conviction where proof of state failed to show any authority for seizure of defendant's automobile, the search of his premises and seizure of his coat and pistol, the examination of the person of defendant for a bullet wound and a photograph thereof, the sheriff's comparison of a tire on the automobile with the dim track which he had observed at the scene, and on cross-examination of defendant the state was permitted to ask questions showing guilt of another crime, notwithstanding that record failed to show any objections thereto or that a motion for new trial was made. Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

Belief by an officer based on information from a credible person that intoxicating liquor is being transported in an automobile, is sufficient probable cause to authorize a search by him of the automobile without a warrant. Moore v. State, 138 Miss. 116, 103 So. 483 (1925).

9. — — Chemical tests, searches and seizures.

Defendant's conviction for DUI maiming was proper because he consented to a blood sample, he never objected to the introduction of the blood-analysis evidence during the course of the testimony by a witness with the Mississippi Crime Laboratory, defendant did not object to the admission of testimony by a doctor regarding the amount of other substances found in the blood sample and the impairing effects of the other substances, defendant's objection made at trial did not state with requisite specificity the basis for the objection to the admission of the testimony, and a deputy was permitted to testify as to what he personally observed concerning defendant's written consent to the blood test. Irby v. State, — So. 3d —, 2010 Miss. LEXIS 423 (Miss. Aug. 12, 2010), opinion withdrawn by 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), substituted opinion at 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

There was no constitutional violation where the state crime laboratory requested and obtained a second blood sample from the defendant in a murder prosecution after it found a discrepancy between the identification numbers of the vials of blood and the numbers listed on the submission form with regard to the original sample. Morris v. State, 777 So. 2d 16 (Miss. 2000).

Section 63-11-8, which mandates that blood be taken from any driver involved in a fatal accident regardless of the existence of probable cause to believe that alcohol or drugs were involved, is unconstitutional because it requires search and seizure absent probable cause. McDuff v. State, 763 So. 2d 850 (Miss. 2000).

An officer's failure to inform the defendant that he had a right to refuse the officer's request for a blood sample did not render the test results inadmissable in a manslaughter prosecution against the defendant where the officer had probable cause to obtain the blood sample in that the officer knew that the defendant was the driver of an automobile which had collided head on with another vehicle, the collision occurred on a straight and level highway when the road condition was dry, the officer knew that at least two people were dead in the vehicle which the defendant hit, the officer had observed a beer in the defendant's vehicle, and the defendant had slurred speech and dilated pupils. For a search which would otherwise be illegal, absent consent, knowledgeable waiver of one's constitutional right not to be searched is guaranteed by Article 3, § 23 of the Mississippi Constitution. However, blood searches which are based upon probable cause are not illegal, and, therefore, the question of the defendant's knowledgeable waiver was not relevant. Longstreet v. State, 592 So. 2d 16 (Miss. 1991).

There was no constitutional violation in obtaining hair and blood samples from a defendant where he was under lawful arrest, the blood was removed in a reasonable manner by a physician at a hospital, the hair samples were taken by a registered nurse, and the officers "had good reason to examine" the defendant's hair. Bevill v. State, 556 So. 2d 699 (Miss. 1990).

Where defendant was in lawful custody, his right to be secure from an unreasonable search was not violated by police officers who administered a photoelectric intoximeter test, which tests the breath of a person without intrusion into the body. Jackson v. State, 310 So. 2d 898 (Miss. 1975).

10. — — Inspections, searches and seizures.

Warrantless search of automobile junkyard, conducted pursuant to state administrative inspection statute, does not violate junkyard owner's Fourth Amendment rights because the operation of the junkyard, part of which was devoted to vehicle dismantling, was a closely regulated business, resulting in junkyard operator having reduced expectation of privacy in business property. New York v. Burger, 482 U.S. 6911, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

Guaranties against unreasonable searches and seizures do not apply to routine inspections by sanitary officers, nor does it apply to inspections made pursuant to advance information that the health laws have been, or are about to be, violated. Grillis v. State, 196 Miss. 576, 17 So. 2d 525 (1944).

No search warrant is necessary in entering premises for sanitary inspections and to investigate conditions detrimental to health so long as no resort to force even of the mildest nature is required, and this is especially true with respect to a restaurant business. Grillis v. State, 196 Miss. 576, 17 So. 2d 525 (1944).

11. — — Property or premises protected, searches and seizures.

Possession of stolen property is illegal per se, and the seizure of such is not within the constitutional guaranty. Williams v. State, 216 Miss. 158, 61 So. 2d 793 (1953).

Where two officers went upon the premises of the defendant without a search warrant and purchased intoxicating liquor, this evidence was not obtained by illegal search and was not excludable on the ground of unlawful search and seizure because no search was involved. Peebles v. State, 57 So. 2d 263 (Miss. 1952).

12. — — Persons entitled to object, searches and seizures.

Where firefighters discovered a locked metal box in defendant's home after they extinguished a fire and turned the box over to the police, defendant lacked standing to challenge the search of the box as unlawful because he denied ownership of the box when questioned by the police. King v. State, 987 So. 2d 490 (Miss. Ct. App. 2008).

Where the proof shows that a portion of a residence is in the sole, separate, and exclusive possession of an individual other than the one named by the search warrant, that individual has a reasonable expectation of privacy in his or her solely occupied portion. Graves v. State, 708 So. 2d 858 (Miss. 1997).

Citizens may challenge governmental actions contrary to law where the action would otherwise escape challenge. Fordice v. Thomas, 649 So. 2d 835 (Miss. 1995), but see USPCI of Miss., Inc. v. State ex rel. McGowan, 688 So. 2d 783 (Miss. 1997).

A defendant did not have standing to object to a search of his sister's residence and subsequent seizure of cocaine where the defendant resided elsewhere, did not possess a key to the house, did not have permission to "have the run of the place," and, aside from the familial relationship, was "little more than a babysitter." Hopson v. State, 625 So. 2d 395 (Miss. 1993).

A defendant did not have standing to object to the search of his friend's apartment, in which he was an occasional overnight guest, where he had no key to the apartment, exercised no control over it, and was there on occasion only by the friend's permission. Thus, stolen items which were found during a search of the apartment were admissible in the defendant's burglary trial. White v. State, 571 So. 2d 956 (Miss. 1990).

A defendant did not have standing to object to the search of a trailer where the true owner of the trailer consented to the search and, when the defendant was arrested, he denied ownership of the trailer. Waldrop v. State, 544 So. 2d 834 (Miss. 1989).

Where marijuana plants that were seized were not actually situated upon defendant's property, but instead were removed from neighboring land, the defendant was not in a position to complain of any irregularity or defect, if any, in the search warrant since the fruit of the search came from a search of property other than his own. Freeland v. State, 285 So. 2d 895 (Miss. 1973).

As to the occupant of an automobile who was neither its owner nor driver, any search of the vehicle was not unlawful although the search was made without a warrant, and such person could not object to the admission in evidence at his trial on a charge of burglary of articles which the searching officers had discovered. Bradshaw v. State, 192 So. 2d 387 (Miss. 1966), cert. denied, 389 U.S. 941, 88 S. Ct. 299, 19 L. Ed. 2d 293 (1967).

No constitutional right of an accused against unreasonable search and seizure is violated hereunder, unless the houses and possessions searched are the property of the person complaining or unless he is entitled to or is exercising possession thereof under such circumstances as to make him the owner for the time being. Brown v. State, 192 Miss. 314, 5 So. 2d 426 (1942).

Where officers had a search warrant for the search of lands, premises and possessions of a defendant charged with unlawful possession of intoxicating liquors, defendant could not complain of violation of this section because the liquors were found on adjoining premises as to which the officers had no search warrant and in which defendant had no right of possession as would make him the owner thereof for the time being. Brown v. State, 192 Miss. 314, 5 So. 2d 426 (1942).

13. Search warrants—In general.

After an appellate court reversed defendant's drug possession conviction by finding that the trial court should have granted defendant's suppression motion because the magistrate who issued the search warrant lacked a substantial basis for concluding that probable cause existed and because the probable cause determination was base upon false and/or omitted information, the state supreme court held that there there was no showing that the investigator intentionally misrepresented facts or made them in reckless disregard for the truth; the investigator described the confidential informant (CI) who provided information about defendant's activities as reliable in the past because he knew him to be a reliable CI used by the police department on occasion, and he was able to independently corroborate the CI's reliability when a controlled buy resulted in defendant selling cocaine to the CI. The investigator's omission of the fact that there was a controlled buy the day before did not constitute a reckless disregard for the truth, and the omission was adequately explained by the investigator, who testified that he was protecting the identity of the CI; as such, the warrant was supported by adequate probable cause. Roach v. State, 7 So. 3d 911 (Miss. 2009), writ of certiorari denied by 558 U.S. 949, 130 S. Ct. 399, 175 L. Ed. 2d 274, 2009 U.S. LEXIS 7474, 78 U.S.L.W. 3206 (2009).

Though a "telephonic search warrant" was not recognized in Mississippi, under the Leon good faith exception to warrantless searches, police officers' good faith belief that a telephonic warrant was valid justified admission of drugs found in a search of a defendant's apartment. White v. State, 842 So. 2d 565 (Miss. 2003).

A narcotics agent's failure to hand the defendant a copy of the search warrant for her residence did not require reversal even though the defendant should have received a copy of the warrant pursuant to § 41-29-157; failure to follow this ministerial provision does not void an otherwise valid search. Williams v. State, 583 So. 2d 620 (Miss. 1991).

Search warrants are in the nature of criminal process and may be invoked only in furtherance of public prosecutions, and statutes providing for their issuance and execution are sustained, under constitutional provisions forbidding unreasonable search and seizure, only as a necessary means in suppression of crime and detection and punishment of criminals. Brooks v. Wynn, 209 Miss. 156, 46 So. 2d 97 (1950).

Search warrant issued in connection with a prosecution for violation of liquor laws with no return day named therein is void and cannot be amended. Buxton v. State, 205 Miss. 692, 39 So. 2d 310 (1949).

Search warrant on which search of premises has been made, evidence obtained, and defendant convicted, is functus officio; that is, it has fulfilled purpose of its creation and is of no further virtue or effect. Riley v. State, 204 Miss. 562, 37 So. 2d 768 (1948).

In the absence of a provision to the contrary, a justice of the peace of one judicial district of the county may issue a search warrant to be served in another judicial district of the county. Goffredo v. State, 145 Miss. 66, 111 So. 131 (1927).

A warrant cannot be issued to search a person and such warrant is to such extent void. Comby v. State, 141 Miss. 561, 106 So. 827 (1926); Duckworth v. Town of Taylorsville, 142 Miss. 440, 107 So. 666 (1926); Robinson v. State, 143 Miss. 247, 108 So. 903 (1926).

A search warrant must be returnable within a reasonable time after its issuance and the time within which it is to be executed fixed in the warrant, and after the return date of the warrant it becomes functus officio and cannot be executed. Taylor v. State, 137 Miss. 217, 102 So. 267 (1924).

A search warrant directed to the wrong officer is not necessarily void but may be amended. Matthews v. State, 134 Miss. 807, 100 So. 18 (1924).

14. — — Affidavits, search warrants.

Where defendant was taken to a hospital after a two-car collision, the search warrant for a blood draw was invalid because: (1) the officer who requested the search warrant falsely stated in his affidavit that defendant had (a) refused to submit to an "analysis of his breath" after having been offered an opportunity to submit, and (b) been placed under arrest for driving while under the influence, although at that time he had not yet been arrested; and (2) there were no exigent circumstances present at the hospital that would have justified a blood test since defendant was not fleeing, and the officer obviously had time to secure a warrant, albeit an invalid one. As to the admissibility of defendant's statements about having consumed several beers, made to police at the scene of the accident, defendant did not claim that he was in custody at the time, and his statements clearly had probative value, thus the trial court did not abuse its discretion in allowing the statements to be admitted into evidence despite the defendant's argument that he was disoriented, confused, and suffering from shock and retrograde amnesia when he made the statements and they were therefore not reliable. Shaw v. State, 938 So. 2d 853 (Miss. Ct. App. 2005), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 602 (Miss. 2006).

An affidavit offered by a police officer for the purpose of getting a warrant can be based on hearsay. Donerson v. State, 812 So. 2d 1081 (Miss. Ct. App. 2001).

When defendant asserts that information contained in affidavit supporting application for search warrant constitutes false swearing, then reviewing court must determine, with false material set aside, whether affidavit's remaining content, together with sworn oral testimony presented to issuing magistrate, is sufficient to establish probable cause. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Even though underlying facts stated in affidavit for search warrant, considered alone, may not be sufficient to confer probable cause for issuance of warrant, oral testimony adduced before issuing magistrate, when taken together with affidavit, may sufficiently establish probable cause for issuance of search warrant under totality of circumstances test. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Under totality of circumstances test, written affidavit supplemented by oral testimony of police officers can, as combined, establish substantial basis for magistrate's determination that probable cause existed for issuance of search warrant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Under totality of circumstances test, affidavit in which affiant relates substance of interview with eyewitness who observed suspect shooting into occupied building, gave description which fit that of suspect and identified automobile in presence of affiant is sufficient to enable magistrate requested to issue warrant for search of suspect's home to make practical decision that there is fair probability that evidence of crime will be found at suspect's residence. Walker v. State, 473 So. 2d 435 (Miss. 1985).

Under totality of circumstances analysis, affiant may establish probable cause for issuance of search warrant on basis of information obtained by affiant from confidential informant where affidavit establishes that confidential informant has demonstrated both personal knowledge of location of evidence and declaration against informant's interest and where affiant swears that informant has given reliable information on activity being investigated in past. Breckenridge v. State, 472 So. 2d 373 (Miss. 1985).

Trial court may allow state opportunity at trial to amend proof and present original affidavit containing judge's jurat as opposed to defective copy of affidavit presented at suppression hearing. McCommon v. State, 467 So. 2d 940 (Miss. 1985), cert. denied, 474 U.S. 984, 106 S. Ct. 393, 88 L. Ed. 2d 345 (1985).

In a prosecution for marijuana possession, the failure of the justice court judge to sign the jurat of the affidavit did not render the search warrant fatally defective where the sworn statement of the police officer affiant, which is the most critical aspect of the validity of the affidavit, was properly taken and where defendant did not challenge the validity of the finding of probable cause. Powell v. State, 355 So. 2d 1378 (Miss. 1978).

Evidence obtained during a search under a warrant was inadmissible in a prosecution for unlawful possession of intoxicating liquor, where the warrant was issued upon an affidavit which stated that the affiant had information from reliable informants that an illegal whisky distillery was concealed on the defendant's property and that the whisky was being stored for purposes of sale, such affidavit not stating facts upon which the justice could judicially determine probable cause. Routh v. State, 230 So. 2d 562 (Miss. 1970).

Affidavit form, signed by sheriff, for search warrant in intoxicating liquor case, presented to justice of the peace by deputy sheriff, did not comply with the requirement of this section that search warrant be supported by oath or affirmation, where sheriff did not personally appear before the justice of the peace; and, accordingly, evidence obtained under the search warrant so issued was illegally obtained and inadmissible. Boyd v. State, 206 Miss. 573, 40 So. 2d 303 (1949).

Issuance of search warrants in case involving possession of intoxicating liquors upon the statutory affidavit, that the affiant "has reason to believe and does believe," etc., does not violate Constitution. Armstrong v. State, 195 Miss. 300, 15 So. 2d 438 (1943).

A search warrant, issued in case involving possession of intoxicating liquors upon the statutory affidavit that the affiant "has reason to believe and does believe," was not invalid as a violation of the Fourth Amendment to the Federal Constitution, since such amendment applies only to the exercise of Federal authority and has no application to state action. Armstrong v. State, 195 Miss. 300, 15 So. 2d 438 (1943).

Where proceedings for the abatement of the nuisances of selling intoxicating liquors and carrying on gambling on certain premises were instituted by a bill in chancery sworn to by a private citizen, particularly describing the place, and the character of appliances or property used in connection with such business, the seizure of the property in question was made upon an affidavit substantially in accord with the requirements of this section although not in name a search warrant. Caravella v. State ex rel. Holcomb, 185 Miss. 1, 186 So. 653 (1939).

Under statute setting forth form of search warrant for stolen property, there must be an allegation both that the affiant has reason to believe and that he does believe that such stolen articles are concealed on premises, to constitute probable cause required for search of a person's premises for stolen goods, and mere suspicion, however strong, is not sufficient. Jones v. State, 180 Miss. 210, 177 So. 35 (1937).

An affidavit for search warrant, stating that affiant had suspicion that stolen hog was concealed on premises of accused and omitting words "and affiant has reason to believe and does believe" that stolen hog was on premises of accused, was insufficient to support valid search warrant. Jones v. State, 180 Miss. 210, 177 So. 35 (1937).

Affidavit for search warrant stating that affiant had suspicion that stolen goods were concealed on premises of accused, instead of stating in statutory words that affiant "had reason to believe and does believe" that stolen goods were on premises of accused, was insufficient to support valid search warrant, since under Constitution suspicion is not sufficient foundation for issuance of search warrant. Bouchillon v. State, 179 Miss. 791, 177 So. 34 (1937).

Signing affidavit by affiant in presence of justice affixing jurat thereto held to constitute necessary "oath" for affidavit for search warrant. Atwood v. State, 146 Miss. 662, 111 So. 865 (1927).

The affidavit must be made for a search warrant, but the mere failure of affiant to sign the affidavit does not render the warrant void. Winters v. State, 142 Miss. 71, 107 So. 281 (1926).

If search warrant and affidavit have been lost, copies thereof are admissible in evidence on defendant's demand. Mitchell v. State, 139 Miss. 108, 103 So. 815 (1925).

The affidavit for a search warrant must allege in substance that the officer has reason to believe and "does believe" before a valid warrant can issue thereon for search and seizure. Porter v. State, 135 Miss. 789, 100 So. 377 (1924); Morrison v. State, 140 Miss. 221, 105 So. 497 (1925).

A material deficiency in the affidavit or warrant will render the warrant void. Turner v. State, 133 Miss. 738, 98 So. 240 (1923); State v. Watson, 133 Miss. 796, 98 So. 241 (1923).

The affidavit for the search warrant may be made on information and belief. Loeb v. State, 133 Miss. 883, 98 So. 449 (1923).

15. — — Description in affidavit or warrant, search warrants.

There was no error in the denial of a motion to suppress a black box taken from the floorboard of a truck, or the data contained therein, because removal of the black box was within the scope of the search warrant, which specifically stated that the resulting search was to include items inside the vehicle that tended to demonstrate that defendant was intoxicated at the time of an accident. Taylor v. State, 94 So. 3d 298 (Miss. Ct. App. 2011), writ of certiorari denied by 96 So. 3d 732, 2012 Miss. LEXIS 371 (Miss. 2012).

A general search warrant for "documents relating to a chop shop" was not sufficiently stated with particularity. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), reversed by 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

A search warrant was not defective because it erroneously named the defendant as the owner of the property to be searched. The Fourth Amendment does not require that either the affidavit or the warrant give the name of the owner of the property to be searched; identifying the owner of the premises is relevant only to assist and aid in particularizing the place to be searched. Williams v. State, 583 So. 2d 620 (Miss. 1991).

An affidavit for a search warrant was not fatally defective merely because the attached page containing a description of the residence to be searched was not signed by the affiants, where other pages of the affidavit were signed, and the narcotics agent who was the author of the warrant and application swore that the description was not substituted. Williams v. State, 583 So. 2d 620 (Miss. 1991).

The search of a one-story building, pursuant to an affidavit and search warrant for a 2-story dwelling, did not violate the defendant's constitutional rights where the officer who made the affidavit for the search warrant had driven by the defendant's property in a rural area and thought that there was only one building-the 2-story building-on the property, the defendant owned all the property but resided in the one-story building, the officers went to the unoccupied 2-story building when they arrived on the property but received no answer, the defendant came to the front door of the one-story building and the officers went there and served him with the warrant, and the officers searched the one-story building and found marijuana in that building. The affidavit and search warrant sufficiently directed the officers to the defendant's premises where they found him in his residence, executed the warrant and discovered marijuana, and therefore the trial court was not in error when it denied the defendant's motion to suppress the evidence found in the search. Hamilton v. State, 556 So. 2d 685 (Miss. 1990), cert. denied, 497 U.S. 1024, 110 S. Ct. 3271, 111 L. Ed. 2d 781 (1990).

A storm shed was within the "curtilage" of a residence and, therefore, within the scope of a search warrant that permitted a search of the residence, where the shed was approximately 150 to 175 feet from the house, the shed was the type of building used in connection with a residence, there were only a few trees separating the house and shed, and, most importantly, the house and shed were on the same side of the fence and not separated by it. Arnett v. State, 532 So. 2d 1003 (Miss. 1988).

Search warrant providing that searching officers were to search for guns used in murder authorized officers to take reasonable actions such as looking behind wall plaque and credit cards found there were therefore lawfully seized. Lockett v. State,

517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Although only two items taken in a particular burglary were named in a search warrant, stolen property taken in a number of other burglaries was lawfully seized by the officers, where the officers were lawfully in the house, the property was in open view and most of it was recognized as stolen property. Bounds v. Hardy, 261 So. 2d 119 (Miss. 1972).

Although only two items taken in a particular burglary were named in the search warrant, stolen property taken in a number of other burglaries was lawfully seized by the officers, where the officers were lawfully in the house, the property was in open view, and much of it was recognized as stolen property, and where, if the officers had to leave and secure a warrant describing each piece of property, an intolerable burden would be placed on them, and a premium would be bestowed upon the criminal because of a multitude of burglaries. Bounds v. Hardy, 261 So. 2d 119 (Miss. 1972).

The description of property to be seized under a search warrant as "stolen property" is no description and utterly void, for the thing or things to be seized, other than contraband, must be described with particularity. Conn v. State, 251 Miss. 488, 170 So. 2d 20 (1964).

Where a search warrant authorizes search of the residence and outhouses of the unknown owner of the 80 acre tract of land described as "all of SW ¼ of § 28, township 5 north, range 2 east, lying north of Pearson and Whitfield Road in Rankin County, Mississippi," this search warrant contained sufficient description of property. Watkins v. State, 67 So. 2d 292 (Miss. 1953).

Any description of places or things to be searched, which is sufficient to enable officer to locate them with reasonable certainty, is in compliance with this constitutional requirement. Serio v. City of Brookhaven, 208 Miss. 620, 45 So. 2d 257 (1950).

Description of premises of defendant in affidavit and search warrant as "located at 97 feet on First Street by 148 feet on Warran Avenue, Lot A, Block 4, Swalm Subdivision," and authorizing search of buildings and vehicles owned or used by defendant located as stated, is sufficient description of lot used by defendant, 50 feet by 60 feet, on corner, being portion of described property which was owned by defendant's family, since description was sufficient to enable officer to locate with reasonable certainty place to be searched, and officer did locate it by means of such description without difficulty. Serio v. City of Brookhaven, 208 Miss. 620, 45 So. 2d 257 (1950).

Search warrant authorizes search of locked metal box or locker in outhouse in backyard of lot on which defendant's resident is situated when property to be searched, as described in both affidavit and warrant, includes residence and outhouses on premises. Outlaw v. State, 208 Miss. 13, 43 So. 2d 661 (1949).

Descriptions in search warrants need not be positively specific and definite, but are sufficient if the places and things to be searched are designated in such manner that the officer making the search may locate them with reasonable certainty. West v. State, 42 So. 2d 751 (Miss. 1949).

Description in search warrant of defendant's residence as being located on named road 1 ½ miles from specified city was not insufficient merely because it did not state in which direction from the city limits the premises to be searched was located. West v. State, 42 So. 2d 751 (Miss. 1949).

A warrant which describes the place to be searched as "in the residence" and the outhouses and grounds "near the residence" of a specified person does not authorize a search of the residence of another 150 yards away, even though the residence of such other person is owned by the person specified in the warrant and is located on the same tract of land. Cox v. State, 201 Miss. 568, 29 So. 2d 661 (1947).

A search warrant describing location to be searched as in the dwelling house, outhouses on the premises used or occupied by a named individual on the place of another named individual "on cross roads 2 miles south of Soreby's Store in 2nd house on left side of road," was sufficiently definite so as to be valid where the officer located the place to be searched from such description. Williams v. State, 198 Miss. 848, 23 So. 2d 692 (1945).

Evidence obtained under valid search warrant was admissible in prosecution for possessing integral parts of a distillery, where parts of the distillery were in possession of defendant at the place described in the search warrant. Williams v. State, 198 Miss. 848, 23 So. 2d 692 (1945).

Seizure of shotgun shells, while searching defendant's home under liquor search warrant not describing shells, held unlawful, since possession of shells was not unlawful per se. Cofer v. State, 152 Miss. 761, 118 So. 613 (1928).

Affidavit for search warrant, describing place as estate of deceased person, is not sufficient. Parkinson v. State, 145 Miss. 237, 110 So. 513 (1926).

The warrant and affidavit must give the name of the person in possession of the premises to be searched. Brewer v. State, 142 Miss. 100, 107 So. 376 (1926).

Officers lawfully on the premises may testify to facts discovered by them and may seize a still kept in violation of law and give evidence of such facts although such officer held search warrant for discovery of intoxicating liquor only. Reynolds v. State, 136 Miss. 329, 101 So. 485 (1924).

A search warrant to search one automobile is not good to search a different automobile. Vaugh v. State, 136 Miss. 314, 101 So. 439 (1924), citing Tucker v. State, 128 Miss. 211, 90 So. 845, 24 A.L.R. 1377 (1922); Butler v. State, 129 Miss. 778, 93 So. 3 (1922); Owens v. State, 133 Miss. 753, 98 So. 233 (1923).

The affidavit and the search warrant must specifically designate the place of places to be searched and the person or thing to be seized. Miller v. State, 129 Miss. 774, 93 So. 2 (1922); Smith v. State, 133 Miss. 730, 98 So. 344 (1923); Owens v. State, 133 Miss. 753, 98 So. 233 (1923); State v. Watson, 133 Miss. 796, 98 So. 241 (1923); Loeb v. State, 133 Miss. 883, 98 So. 449 (1923); Fatimo v. State, 134 Miss. 175, 98 So. 537 (1924); Falkner v. State, 134 Miss. 253, 98 So. 691 (1924); Spears v. State, 99 So. 361 (Miss. 1924); Butler v. State, 135 Miss. 885, 101 So. 193 (1924); Sanders v. State, 141 Miss. 615, 106 So. 822 (1926); Webb v. Sardis, 143 Miss. 92, 108 So. 442 (1926).

16. — — Showing of probable cause, search warrants.

Trial court did not err by finding that there was a substantial basis for a finding of probable cause to issue a search warrants for defendant's person and vehicle because the oral testimony of the officer who requested the search warrant raised a fair probability that evidence of the crime would be found on defendant's person and in defendant's vehicle. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Defendant's conviction for the possession of child pornography was appropriate because there was a substantial basis for the issuance of the search warrant. The probable cause for the search warrant was not rendered stale simply because an investigator first discovered the allegations 9 or 10 months after the alleged incident occurred and that was especially true in the context of allegations by small children, who might be too ashamed or frightened to inform others that something inappropriate might have occurred because they were expressly ordered or threatened to remain silent. Renfrow v. State, 34 So. 3d 617 (Miss. Ct. App. 2009), writ of certiorari dismissed by 31 So. 3d 1217, 2010 Miss. LEXIS 213 (Miss. 2010).

Search warrant was supported by probable cause because an officer personally observed a drug transaction and subsequently took a statement that the buyer regularly purchased cocaine from the pool hall; that information supported the prior anonymous statements that defendant kept and sold cocaine at the pool hall. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

Search warrant affidavit was detailed, the confidential informant was an eyewitness to illegal acts and had a reliable track record, and the magistrate proceeded on more than mere suspicion in issuing the warrant; there was no merit to defendant's argument that under the given facts the warrant was fatally defective because of inadequate probable cause, and the trial court did not err in admitting the evidence obtained from the search of defendant's residence. Flake v. State, 948 So. 2d 493 (Miss. Ct. App. 2007).

When a magistrate issuing a search warrant is given false facts which are indispensable to a probable cause determination, probable cause cannot exist, and the fruits of the search must be suppressed, even if the search warrant was properly issued based on the false facts which were presented to the magistrate; the appellate court reversed and remanded defendant's case to the trial court to consider whether a police officer knowingly and intentionally gave false and misleading information to the magistrate judge issuing the search warrant. Turner v. State, 945 So. 2d 992 (Miss. Ct. App. 2007).

Motion to suppress evidence was denied in a case involving church burglaries because there was probable cause to issue a warrant to search defendant's residence based on statements from a witness that saw defendant and his friend near the church in the middle of the night, a witness that saw defendant carve a certain phrase found at the church on another wall, a neighbor who saw defendant exit a vehicle with the lights off, and another party who saw defendant in possession of property matching the description of some taken from the church. Dimaio v. State, 951 So. 2d 581 (Miss. Ct. App. 2006).

Where defendant was charged with and found guilty of felony driving under the influence of alcohol, the trial court did not err in denying defense counsel's motion to suppress evidence of defendant's blood alcohol results, because the warrant authorizing the blood alcohol test was valid and defendant's constitutional rights had not been violated. Inter alia, the officer observed defendant's slurred speech and staggered walk, and he noted that defendant's breath smelled of alcohol and defendant actually admitted to having drunk four beers that morning and was unable to recite the alphabet. Dove v. State, 912 So. 2d 1091 (Miss. Ct. App. 2005).

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit had not erred in not granting his pretrial motion to suppress evidence obtained by a search warrant based on the statements of the child victim, because she specifically stated that defendant had showed her pictures of nude people on his computer screen doing things she described as "gross." She used language to describe acts performed on her and by her in relation to defendant in such sexually explicit terms that veracity could easily be inferred. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Although defendant's motion to suppress items found in his house should have been granted because the issuing justice had not been presented with a basis of reliability for the informer's statement on which the officers relied, the Miss. Code Ann. § 41-29-313(1)(a)(i) conviction was not reversed because the evidence that ended in defendant's conviction did not come from defendant's house but from the search of other property on which a clandestine methamphetamine lab was found and the search of that property was not dependent on the search warrant issued for defendant's house. Roebuck v. State, — So. 2d —, 2005 Miss. App. LEXIS 167 (Miss. Ct. App. Mar. 8, 2005), substituted opinion at, opinion withdrawn by 915 So. 2d 1132, 2005 Miss. App. LEXIS 1006 (Miss. Ct. App. 2005).

Where appellate court held that motion to suppress should have been granted, it did not find fault due to the lack of the word "reliable" in the affidavit or to underlying facts and circumstances but found it because nothing in the record suggested that the officers had presented the justice with any basis of reliability on the informer's statement. Roebuck v. State, — So. 2d

—, 2005 Miss. App. LEXIS 167 (Miss. Ct. App. Mar. 8, 2005), substituted opinion at, opinion withdrawn by 915 So. 2d 1132, 2005 Miss. App. LEXIS 1006 (Miss. Ct. App. 2005).

In a drug case, there was sufficient probable cause for the issuance of a search warrant under the "totality of the circumstances" test where the evidence showed that police had received tips about a methamphetamine laboratory hidden behind a tarp underneath a trailer; the informant was well known to police, and the information presented to the magistrate contained specific details. Kerns v. State, 923 So. 2d 210 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 923 So. 2d 196, 2005 Miss. LEXIS 799 (Miss. 2005).

Though the search warrant was not accompanied by the "underlying facts and circumstances" sheet, which was to contain facts supporting issuance of same, that fact alone did not render the search warrant fatally flawed where the officer's sworn testimony was that the eyewitness (an arrested person), had given detailed information regarding the location of the residence where the drugs were being manufactured and had also stated that he had bought and supplied defendants with precursor elements; said information was furnished by an eyewitness as opposed to an informant, a credibility determination was not required, and there was probable cause to support issuance of the search warrant. Pittman v. State, 904 So. 2d 1185 (Miss. Ct. App. 2004).

Probable cause under Mississippi Constitution Art. 3, § 23 did not exist for the issuance of a search warrant because the information given to police by a confidential informant (CI) was not independently corroborated, she was unknown to the police, and no indicia of reliability were either included in the affidavit or presented orally to the issuing judge. State v. Woods, 866 So. 2d 422 (Miss. 2003).

Affidavit in support of the warrant to search defendant's apartment lacked veracity or reliability as it was completely devoid of corroborating information to support confidential informant's claims that she had seen crack cocaine in the apartment; the trial court properly granted defendant's motion to suppress his confession and the seized cocaine as fruit of the poisonous tree. State v. Woods, — So. 2d —, 2002 Miss. LEXIS 402 (Miss. Dec. 5, 2002), opinion withdrawn by, substituted opinion at 866 So. 2d 422, 2003 Miss. LEXIS 531 (Miss. 2003).

Probable cause for the issuance of a warrant to search the defendant's residence was established where (1) the magistrate was informed by the police that an undercover drug operation had occurred that day and that the defendant had been arrested for the sale of $ 220 worth of cocaine, (2) an informant had set up the buy by calling the defendant at his residence, and the police suspected the origin of the cocaine was indeed his residence, and (3) the residence had been under surveillance as a drug distribution center due to complaints of anonymous neighbors. Donerson v. State, 812 So. 2d 1081 (Miss. Ct. App. 2001).

Task of court reviewing whether search warrant was issued upon probable cause is to insure that issuing magistrate had substantial basis for concluding that probable cause existed for issuance of search warrant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Information necessary to establish probable cause must be information reasonably leading officer to believe that, then and there, contraband or evidence material to criminal investigation would be found. Petti v. State, 666 So. 2d 754 (Miss. 1995).

In determining question of probable cause for issuance of warrant, oral testimony is admissible before officer who is required to issue search warrant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

In making its review of whether search warrant was issued upon probable cause, reviewing court looks both to facts and circumstances set forth in affidavit for search warrant and as well, sworn oral testimony presented to issuing magistrate. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Affidavit supporting application for warrant to search defendant's motel room, when excised of false information, was not by itself sufficient to establish probable cause for issuance of warrant, where affidavit provided merely that officer who was executing other warrant found defendant in possession of large quantity of currency and motel room key, and motel manager verified that motel room was registered to defendant. Petti v. State, 666 So. 2d 754 (Miss. 1995).

Probable cause did not exist for issuance of warrant to search defendant's motel room based on information that defendant was present, with others, when drugs were purchased by confidential source, that defendant was present when police officers executed other warrant which yielded 4 grams of cocaine, and that officers found on defendant's person large amount of money and motel room key. Petti v. State, 666 So. 2d 754 (Miss. 1995).

A warrant to search a murder suspect's trailer was supported by sufficient probable cause, in spite of his argument that no facts were provided to the judge to support an inference that evidence of the crime would be in the trailer, where the crime involved the theft of cash, clothing, guns and other items likely to be kept at a suspect's residence. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

Probable cause existed for the issuance of a search warrant for a defendant's residence, in spite of the defendants' argument that an informant's personal observation of marijuana at the residence 2 weeks earlier was stale and too remote, where 2 narcotics agents saw a sale of marijuana, which came from one of the defendants and from the house in question on the day of the search. Williams v. State, 583 So. 2d 620 (Miss. 1991).

Detailed underlying facts supporting the affidavits for 2 search warrants furnished the judge with probable cause for issuing the search warrants, even though the criminal investigator who executed the affidavits erred in some of the statements set forth in the underlying facts, where the investigator was cross-examined at the suppression hearing at great length by the defendant's attorney, there was no showing that the investigator intentionally misrepresented those facts or made them in reckless disregard for the truth, and the remaining underlying facts clearly constituted probable cause for the issuance of the search warrants. Bevill v. State, 556 So. 2d 699 (Miss. 1990).

In determining whether probable cause existed for a particular search or search warrant, judges must scrupulously examine the facts in each case, make a careful evaluation, and make a determination in their own best judgment. Probable cause is not what some officer thought, and not some conduct that was simply unusual or that simply roused the suspicion that illegal activity could be afoot, when there was at the same time just as likely a possibility that nothing at all illegal was transpiring. Rather, it must be information reasonably leading an officer to believe that, then and there, contraband or evidence material to a criminal investigation would be found. Rooks v. State, 529 So. 2d 546 (Miss. 1988).

Where available information shows only that a crime has been committed and that a particular person has committed it, there is probable cause only for the issuance of an arrest warrant. The mere fact that a person committed a crime does not necessarily mean that there is probable cause to search that person's dwelling for evidence of that crime. Carney v. State, 525 So. 2d 776 (Miss. 1988).

Affidavit and facts established substantial basis for judge's determination that probable cause to issue warrant existed where judge testified that after swearing in officers, he based his probable cause determination on written affidavit and officers and investigator testified that they were sworn in by judge and provided him with oral statements in addition to written affidavit. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Probable cause did exist to obtain search warrant for defendant's residence where officer who served as affiant for warrants testified that state had composite drawing of man who used victim's credit cards, number of truck license tag registered to defendant was listed on credit card purchase receipt, authorities had observed truck in defendant's yard whose tag number was used in purchase, and officer who identified defendant from composite prepared photographic lineup from which merchant identified defendant as man using victim's credit card to make purchases day following victim's murder. Lutes v. State, 517 So. 2d 541 (Miss. 1987).

Totality of circumstances was sufficient to establish probable cause to issue search warrant for automobile and home, although underlying facts stated in affidavit for search warrant considered alone may not have been sufficient, where oral testimony was adduced before magistrate which, taken together with affidavit, sufficiently established that probable cause existed. Hickson v. State, 512 So. 2d 1 (Miss. 1987).

Defendant was not entitled to have evidence suppressed where the affidavit for the warrant under which the search was conducted supplied the issuing magistrate with a substantial basis to conclude that there was a fair probability that contraband could be found in the vehicle to be searched. Harper v. State, 485 So. 2d 1064 (Miss. 1986).

Showing that suspect departed bar with murder victim shortly prior to time of victim's death and returned to bar shortly thereafter in disheveled condition and in hurry to get friends to leave is sufficient to establish probable cause for search of suspect's home. Hester v. State, 463 So. 2d 1087 (Miss. 1985).

Although officers who executed the affidavit for a search warrant had not been previously acquainted, either personally or officially, with defendant's neighbor who supplied the information as to marijuana plants growing on defendant's property, and had no previous experience as to his reliability based on former tips, or otherwise, inasmuch as the informant was an eyewitness to the growing of the marijuana, which he had observed simply by looking across the imaginary line separating his property from defendant's property, and inasmuch as his statements with respect to it were supported and borne out when he took several other plants to the police where it was identified by them as being marijuana, the information in the hands of the officers was ample, and was sufficiently set out in detail in the affidavit, to justify a finding of probable cause and the issuance of a warrant. Wolf v. State, 281 So. 2d 445 (Miss. 1973).

An affidavit stating that a reliable informer told the police officer affiant that he had observed narcotics in the apartment and had purchased narcotics from someone in the house on past occasions, and that there had been a two-week continual surveillance of the house revealing that people left the house in an intoxicated condition, was sufficient to allow the magistrate to determine the existence of probable cause for search of the house. Holland v. State, 263 So. 2d 566 (Miss. 1972).

An affidavit which stated not only that the informant had seen marijuana in the place to be searched, but that the informant had actually furnished the officer a sample of the drug, that the officer had personally observed known users of marijuana go to and from the place sought to be searched, the actual known facts plus the surrounding circumstances were such as to lead a reasonably prudent and cautious man to believe that the law was being violated and that contraband was being kept in the residence of the defendant at the time the warrant was issued, and the facts stated in the affidavit were sufficient to establish probable cause, resulting in the proper issuance of the search warrant involved. Boring v. State, 253 So. 2d 251 (Miss. 1971), cert. denied, 405 U.S. 1040, 92 S. Ct. 1310, 31 L. Ed. 2d 581 (1972).

It is no longer the law of Mississippi that the issuance of a search warrant is a conclusive judicial finding of the magistrate of the existence of probable cause; inquiry may now be made at the trial as to whether probable cause existed before the issuance of the warrant. Barker v. State, 241 So. 2d 355 (Miss. 1970).

An affidavit stating that the defendant had come to the informant's home with three marijuana cigarettes which he gave to the informant's wife at a time when the informant was not home, some two weeks prior to the issuance of a search warrant, was not based on the personal knowledge of the informant and contained no information that an offense was being committed on the premises to be searched, and was not sufficient for a reasonable finding that probable cause existed for a search of the defendant's residence. Barker v. State, 241 So. 2d 355 (Miss. 1970).

In determining whether probable cause existed for the issuance of a search warrant based upon information received by officers from an informant, a two-part test is applicable; part one requires that the magistrate have been informed of some of the underlying circumstances from which the informer reached his conclusions-that is the magistrate must have been reasonably satisfied that the informer acquired his knowledge by personal observation or in some other dependable manner, while part two requires that the magistrate have known some of the underlying circumstances from which the officers concluded that the informer was credible or his information reliable. Barker v. State, 241 So. 2d 355 (Miss. 1970).

Where there was nothing in the affidavit upon which to base a finding of probable cause, and it was incapable of being aided by the unsworn statement of the affiant to the magistrate that he had bought a half pint of whisky at the premises to be searched, the search warrant was improperly issued. Northcutt v. State, 206 So. 2d 824 (Miss. 1967).

Information obtained from an anonymous telephone informer that the defendant would be transporting whisky in a certain automobile at a certain place and time does not constitute probable cause for the search of the defendant's automobile and the seizure of liquor found there. Terry v. State, 252 Miss. 479, 173 So. 2d 889 (1965).

A judicial finding of the officer issuing the search warrant, of the existence of probable cause therefor, is conclusive and cannot be inquired into. Armstrong v. State, 195 Miss. 300, 15 So. 2d 438 (1943).

Under statute providing for issuance of search warrant where person has reason to believe and does believe that stolen articles are concealed on person's premises, information upon which he has reason to believe and does believe must be such as would lead a reasonably prudent person to believe facts which, if established, would be sufficient to amount to a probability. Jones v. State, 180 Miss. 210, 177 So. 35 (1937).

17. — — Execution of incorrect or invalid warrant, search warrants.

Trial court did not err by admitting evidence found during the execution of a search warrant based on a clerical error requiring officers to knock and announce; even though officers merely entered after pulling open a chain, the evidence showed they specifically requested a warrant not requiring a knock and announce. Caldwell v. State, 938 So. 2d 317 (Miss. Ct. App. 2006).

Where defendant was arrested for speeding and reckless driving, defendant was subjected to a pat-down search at the time of the arrest, and also to a warrantless search at the place of detention, where cocaine was discovered in defendant's shoe, these searches being exceptions to the warrant requirement. Jackson v. State, 856 So. 2d 412 (Miss. Ct. App. 2003).

Return on gun warrant clearly indicating warrant was served coupled with officers' testimony refuted testimony that marijuana warrant instead of gun warrant was served prior to its execution. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Search, under invalid warrant, of defendant's automobile while defendant was in jail for burglary, violated Constitution; automobile being "possession" of defendant. Millette v. State, 167 Miss. 172, 148 So. 788 (1933).

18. — — Magistrates issuing warrant, search warrants.

There was no merit to a defendant's claim that the judge who issued 2 search warrants was not neutral and detached on the basis that the judge who went to the scene of the crime and saw the body also issued the search warrants, where there was no showing as to how this, in and of itself, created any prejudice or bias towards the defendant. Bevill v. State, 556 So. 2d 699 (Miss. 1990).

A judge who issues a search warrant is not required to confer on the searching officer the full range of authority allowed by law. The judge is within his prerogatives to limit the officer's authority, either by use of a pre-printed form or by interlined language. Strange v. State, 530 So. 2d 1336 (Miss. 1988).

Justice Court Judge who issued search warrant was neutral and detached magistrate where nothing in record indicated that judge acted in biased manner when he issued search warrant; central requirement for valid search warrant is that it must be issued by neutral and detached magistrate, and substantial involvement in search is forbidden; however, magistrate who goes to scene, issues warrant, and remains there for some time does not abdicate his proper position. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Fact that magistrate primarily relies on fact that sworn police officers are asking for search warrant rather than on anything in particular in affidavit of underlying facts and circumstances does not mean that magistrate is not acting in neutral and detached manner in issuing warrant where judge issues warrant only if judge feels that it is warranted. McCommon v. State, 467 So. 2d 940 (Miss. 1985), cert. denied, 474 U.S. 984, 106 S. Ct. 393, 88 L. Ed. 2d 345 (1985).

A justice of the peace has jurisdiction to issue a search warrant on proper affidavit made before him, to be executed in any part of the county and may be made returnable to the proper court, but an error in making it returnable to himself in the wrong district does not render the warrant void. Reynolds v. State, 136 Miss. 329, 101 So. 485 (1924).

A search warrant issued by a city clerk is void. Robinson v. State, 135 Miss. 774, 100 So. 377 (1924).

The mayor of a municipal corporation who is ex officio justice of the peace may issue a search warrant to be served anywhere within the limits of his county the same as other justices of the peace of the county. Falkner v. State, 98 So. 345 (Miss. 1923).

19. — — Persons authorized to serve warrant, search warrants.

An agent of the alcoholic beverage control division did not have authority to serve a search warrant issued for the purpose of making a search for illegal gambling equipment, since such agents have no police powers other than those expressly granted by the provisions of this section or by the provisions of the local option alcoholic beverage control law. Presley v. State, 229 So. 2d 830 (Miss. 1969).

Warrant directing search for and seizure of intoxicating liquor, issued merely to any lawful officer of the county, constitutes a legal search warrant, but the coroner, unless the sheriff is disqualified under Code 1942 § 3906, cannot lawfully serve it. Millwood v. State, 198 Miss. 485, 23 So. 2d 496 (1945).

Warrant issued by justice of the peace addressed and delivered to the coroner as such directing him to search for and seize intoxicating liquor although the sheriff suffered no disqualification within the purview of Code 1942 § 3906, and which was served as directed by the coroner while acting as such officer, was illegal and evidence obtained under authority of the search warrant was inadmissible, notwithstanding that the warrant was also addressed to any lawful officer of the county. Millwood v. State, 198 Miss. 485, 23 So. 2d 496 (1945).

20. — — Persons authorized to execute warrant, search warrants.

An unreasonable search characterized a search for liquor, over objection of the owner of the premises, by a district attorney with the original search warrant in his pocket before a deputy sheriff arrived in the house and laid a copy of the warrant on a table. Adams v. State, 202 Miss. 68, 30 So. 2d 593 (1947).

21. — — Time specified, search warrants.

A search conducted at 11:30 p.m. exceeded the officer's authority under the search warrant where the warrant authorized searches only "in the daytime"; thus, the fruits of the search were inadmissible at trial. Strange v. State, 530 So. 2d 1336 (Miss. 1988).

22. Return, search warrants.

In a drug case, a trial court did not err in admitting items into evidence that were not on an original search warrant inventory, but were included on the return, because any error resulting from the ministerial act of the return did not invalidate the properly issued search warrant. Kerns v. State, 923 So. 2d 210 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 923 So. 2d 196, 2005 Miss. LEXIS 799 (Miss. 2005).

23. Warrantless searches and seizures — In general.

Officer stopped defendant for failure to have a tag light, smelled alcohol, and then asked defendant to get in his squad car where he gave her a breath test, which she passed. Nevertheless, he kept her in his patrol car for 20 minutes until she consented to a search of her car, and the officer then conducted a pat-down search, sticking his hands in her pockets; the officer testified that defendant was nervous, that he was fearful, and that he had no cage for defendant in his patrol car, and consequently, the Mississippi Court of Appeals held the trial court erred in concluding the officer did not have a reasonable suspicion of criminal activity, or a reasonable fear for his safety to have allowed for the pat-down search which revealed cocaine. State v. White, 918 So. 2d 763 (Miss. Ct. App. 2005).

With regard to defendant's contention that the State conducted illegal surveillance of his telephone calls by placing a digital tape recorder on his telephone, the court found that defendant was not entitled to relief because he had waived the right to challenge the State's evidence by entering a valid guilty plea to the offense of conspiracy to manufacture methamphetamine. Sweat v. State, 910 So. 2d 12 (Miss. Ct. App. 2004), affirmed in part and reversed in part by 912 So. 2d 458, 2005 Miss. LEXIS 661 (Miss. 2005).

In a possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance case, after a drug store clerk informed the police that two suspects purchased large amounts of ephedrine/pseudoephedrine contained in over-the-counter cold medications and described their car, a be on the lookout announcement was made and the officers investigatory stop of the driver's car, in which defendant was a passenger, was entirely proper and the driver's consent to search the car relieved the officer of any need for a search warrant; thus, the admission of the evidence of the pills found was proper and did not violate defendant's federal and state constitutional rights under U.S. Const. amend. IV and Miss. Const. Art. 3, § 23. Burchfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 660 (Miss. Ct. App. July 22, 2003), opinion withdrawn by, substituted opinion at 892 So. 2d 248, 2004 Miss. App. LEXIS 538 (Miss. Ct. App. 2004).

Photographing a defendant's injured hand, which was within the plain view of police officers and was incident to a lawful arrest, was not an improper search, as defendant had no more of a reasonable expectation of privacy with respect to his hand than he would have had with his handwriting. Jones v. State, 841 So. 2d 115 (Miss. 2003).

Though a "telephonic search warrant" was not recognized in Mississippi, under the Leon good faith exception to warrantless searches, police officers' good faith belief that a telephonic warrant was valid justified admission of drugs found in a search of a defendant's apartment. White v. State, 842 So. 2d 565 (Miss. 2003).

Officers had probable cause to believe that defendant was dealing marijuana, they were attempting to prevent the destruction of evidence instead of effectuating arrest and seizure, and they reasonably believed in good faith they had a valid telephonic search warrant and were acting reasonably in the midst of exigent circumstances; thus, the trial court, even in the absence of a state statute allowing telephonic search warrants, properly upheld the search as a reasonable warrantless search. White v. State, — So. 2d —, 2002 Miss. LEXIS 311 (Miss. Oct. 24, 2002), opinion withdrawn by, substituted opinion at 2003 Miss. LEXIS 208 (Miss. Apr. 10, 2003).

Mississippi Supreme Court adopts the Leon good faith exception to warrantless searches. White v. State, — So. 2d —, 2002 Miss. LEXIS 311 (Miss. Oct. 24, 2002), opinion withdrawn by, substituted opinion at 2003 Miss. LEXIS 208 (Miss. Apr. 10, 2003).

An officer cannot obviate the necessity of obtaining a search warrant before invading the private premises of a citizen merely by carrying with him other persons who are not officers to make the search. Holder v. State, 230 Miss. 792, 93 So. 2d 841 (1957).

Sheriff had no right to search trunk on premises, while investigating murder, without a search warrant. Page v. State, 208 Miss. 347, 44 So. 2d 459 (1950).

To establish probable cause founded upon information received from someone warranting a search by a law enforcement officer without a search warrant, the law requires that the information upon which the law enforcement officer acts, when not his personal information, must be given by a credible person-credible in the legal sense, as being a person whose known standing or reputation in the community for veracity and reliability entitled him to belief by a reasonably prudent person, and the facts must be shown to be within the knowledge of the informant, it not being sufficient merely to show that the officer actually believed the information to be true; and accordingly, a search of a defendant's automobile, leading to a prosecution for the unlawful possession of intoxicating liquors, based upon information obtained by the searching officer from a negro who had been before the court a number of times for violation of the liquor laws and not shown to be within the personal knowledge of the informant, was illegal. McGowan v. State, 184 Miss. 96, 185 So. 826 (1939).

Where circuit judge directed deputy sheriff to obtain wine and deputy went to defendant's place of business and informed defendant that he desired to purchase wine for circuit judge, and defendant told deputy that if judge wanted it to take it without paying for it, manner in which wine was secured did not violate unreasonable search or seizure provision of Constitution. Sacco v. Sacco, 174 So. 248 (Miss. 1937).

24. — — Admissibility of evidence, warrantless searches and seizures.

In a case in which defendant appealed his conviction and sentence for felony driving under the influence (DUI) as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, he argued unsuccessfully that the trial court erred in failing to grant his pretrial motion to suppress evidence because: (1) the police chief had no authority to stop or arrest him, (2) he never committed any offense in the chief's jurisdiction, (3) his arrest occurred when the pursuit to make the arrest began, and (4) he had not committed any felony at that time. When the police chief began his pursuit, it was not a pursuit for the purpose of making an arrest, rather, it was a pursuit to give a courtesy warning; at the time defendant was arrested at his home, he had committed the crime of felony DUI, as well as the crime of driving with a suspended license. Delker v. State, 50 So. 3d 309 (Miss. Ct. App. 2009), affirmed by

50 So. 3d 300, 2010 Miss. LEXIS 529 (Miss. 2010).

Motion to suppress evidence was denied in a drug case because, even though there was an anonymous tip, deputies had sufficient evidence to warrant a further investigation; the caller gave fresh information, deputies were escorted to defendant's trailer by his mother, and a search warrant was obtained due to other suspicious circumstances that occurred while the deputies were on the property. Four people were seen running from defendant's trailer, and deputies thought that the trailer was on fire due to smoke. Baker v. State, 991 So. 2d 185 (Miss. Ct. App. 2008).

Motion to suppress evidence was denied in an armed robbery case because police had a reasonable suspicion for stopping defendant while investigating the crime; defendant was observed near the robbery about 15 minutes later, and he and the other people with him fit the description of the perpetrators. Carter v. State, 965 So. 2d 705 (Miss. Ct. App. 2007).

There was adequate support for the trial judge to deny defendant's motion to suppress the evidence under the Fourth Amendment and Miss. Const. Art. 3, § 23 because: (1) the initial encounter with defendant could be properly characterized as a voluntary conversation; (2) there was no illegal detention of defendant; and (3) defendant's initial consent and then the withdrawal of his consent after suspicious items were found gave the officers probable cause to believe that more evidence of the manufacture and use of methamphetamine was located on defendant's property, and they obtained a search warrant and uncovered more items. Melton v. State, 950 So. 2d 1067 (Miss. Ct. App. 2007).

Consent alone is sufficient to permit the taking of a blood sample, and there is no need for a search warrant or exigent circumstances; where a defendant wishes for the trial court to consider whether diminished capacity made his consent ineffective, he has the burden of introducing evidence to raise that issue. Sumrall v. State, 955 So. 2d 332 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 137 (Miss. 2007).

Although rape defendant's consent to procurement of pubic hairs was improperly obtained after defendant had invoked the right to counsel, the error was harmless, as the evidence was of a scientific nature, and not of a communicative nature, and the evidence was not protected by the right against self-incrimination; additionally, the evidence obtained was subject to a search warrant, for which probable cause clearly existed. Forrest v. State, — So. 2d —, 2003 Miss. App. LEXIS 706 (Miss. Ct. App. Aug. 12, 2003), opinion withdrawn by 2004 Miss. App. LEXIS 112 (Miss. Ct. App. Aug. 12, 2003), opinion withdrawn by, substituted opinion at, modified en banc by 863 So. 2d 1056, 2003 Miss. App. LEXIS 1255 (Miss. Ct. App. 2003).

Mississippi Supreme Court adopts the U.S. Supreme Court's Leon good faith exception to warrantless searches. White v. State, 842 So. 2d 565 (Miss. 2003).

In a prosecution for possession of a controlled substance, cocaine which had been discarded by the defendant was not the fruit of an illegal search and seizure, and was therefore properly admitted into evidence, since the defendant was not "seized or arrested" when he discarded the drugs where the defendant did not stop when police officers ordered him to do so for the purpose of checking his identification, and he threw down the cocaine while he was walking away from the officers; the defendant was not restrained or stopped at the time he discarded the cocaine, and therefore the cocaine was abandoned and not the fruit of an unlawful seizure or arrest. Harper v. State, 635 So. 2d 864 (Miss. 1994).

Marijuana seized from a bundle of clothes which the defendant was carrying from her motel room constituted "fruit of the poisonous tree" and was therefore inadmissible, where an unlawful warrantless search of the motel room lead officers to set up a surveillance, during which the defendant exited the motel room with bundles of clothing from which the marijuana was seized. Marshall v. State, 584 So. 2d 437 (Miss. 1991).

Testimony of police officers as to a conversation in defendant's home between the defendant and a confidential informer, who was invited into the home, which was electronically transmitted to the officers by a transmitter concealed on the informer, was admissible in defendant's trial for illegal sale and possession of a controlled substance, notwithstanding that no search warrant had been issued. Lee v. State, 489 So. 2d 1382 (Miss. 1986).

Warrantless arrest of murder suspect is based upon probable cause where suspect admits having passed marked $2 bill which was stolen during murder-robbery and suspect matches description of person who passed bill; even if arrest were illegal, statement given by suspect following arrest is admissible at trial where intervening circumstances and nonexistence of flagrant violation by police indicate that statement is voluntarily given. Swanier v. State, 473 So. 2d 180 (Miss. 1985).

Where police officer who had obtained a search warrant allowing a search of defendant's apartment, saw defendant and 2 other people driving away from the house in defendant's car, and police officer testified that he stopped defendant to serve warrant and ordered the occupant out of the car, and during a "patdown" of defendant, police officer found 3 boxes containing marijuana and upon a search of the automobile 3 additional boxes of marijuana were found, the search of the defendant was an illegal search, and the contraband obtained as a result was inadmissible in evidence. Keys v. State, 283 So. 2d 919 (Miss. 1973).

Defendant does not waive his objection to illegally obtained evidence by testifying in his own behalf, although he admits having the contraband in his possession. Keys v. State, 283 So. 2d 919 (Miss. 1973).

Where the driver of a rental truck had been in jail all night after an arrest on an invalid driver's license charge, a warrantless and detailed inspection the next day of the contents of the truck by officers who did not then know that a crime involving the contents of the truck had been committed, was not incident to a lawful arrest; and the search, which revealed that a crime involving stolen property had been committed, was illegal and evidence obtained by it was inadmissible. Williamson v. State, 248 So. 2d 634 (Miss. 1971).

Where an automobile was used in a crime and provided one of the means by which the defendants were apprehended and identified, it became evidence to be used in the prosecution, and it was the duty of officers not only to seize the automobile but to preserve it as evidence, and a search of the vehicle even though not incident to the arrest, was reasonable. Dorsey v. State, 243 So. 2d 550 (Miss. 1971).

Where defendant's automobile was impounded upon his arrest for driving his automobile without a license tag, it was proper police practice for the arresting officers, being responsible for the contents of the car, to inventory the same in the presence of the defendant, and a substance alleged to be marijuana, found during such inventory, was not inadmissible in a subsequent prosecution as the product of an illegal search and seizure. Jackson v. State, 243 So. 2d 396 (Miss. 1970).

Where the defendant was arrested in his automobile by city police outside the city limits, on a misdemeanor charge of switching automobile tags, and later, while defendant was incarcerated, the police conducted searches of the defendant's automobile without having obtained a search warrant, the searches were unlawful, and evidence seized in such searches was inadmissible in a prosecution of the defendant on a charge of felonious possession of narcotic drugs. Mellen v. Mellen, 230 So. 2d 209 (Miss. 1970).

Obtaining fingerprint evidence violates the Fourth and Fourteenth Amendments to the federal constitution, so as to make such evidence inadmissible in a state criminal trial, where (1) the fingerprints were obtained while the accused was detained at police headquarters without probable cause for his arrest, (2) the detention at police headquarters of the accused was not authorized by a judicial officer, (3) the accused was unnecessarily required to undergo two fingerprinting sessions, and (4) the accused was not merely fingerprinted during the first of the two sessions, but was also subjected to interrogation. Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969).

A defendant who was not present at the time and place where a search and seizure took place is without standing to attack its legality, and cannot object to the introduction in evidence of the fruits of the seizure. Robinson v. State, 219 So. 2d 916 (Miss. 1969).

An officer who boarded a truck without probable cause to believe that the law was being violated may not testify as to the illegal contents of the truck or the reckless manner in which it was driven. Barnes v. State, 249 Miss. 482, 162 So. 2d 865 (1964).

A pistol seen under a leg of a motorist and removed by a patrolman who had halted the car to check the driver's license is not obtained by an unlawful search and seizure so as to be inadmissible in a prosecution for carrying a concealed weapon. Morgan v. Town of Heidelberg, 246 Miss. 481, 150 So. 2d 512 (1963).

In a prosecution for the unlawful possession of intoxicating liquor, State's evidence obtained in a search of the defendant's premises pursuant to search warrant was inadmissible where the affidavit and search warrant were not produced on the trial, and the proof was insufficient to show their loss. Harvey v. State, 232 Miss. 294, 98 So. 2d 764 (1957).

Where the sheriff, who was without a search warrant, after investigating the scene of the theft, together with the owner of the stolen property went upon the defendant's premises and, without consent of the defendant or his wife, searched the defendant's premises and found the stolen property, the testimony of the sheriff and the property owner was incompetent as to anything found upon the defendant's premises. Holder v. State, 230 Miss. 792, 93 So. 2d 841 (1957).

Where sheriff who had lawfully arrested accused at his home and on the following day without search warrant, while accused in jail, found some empty shells, it was error to admit in homicide prosecution the testimony of sheriff concerning the empty shells and also to admit the shells in evidence. Martin v. State, 217 Miss. 506, 64 So. 2d 629 (1953).

Where a warrant was issued to search certain rural store premises and officers while searching premises noticed man other than owner leaving with a suitcase, and seized the suitcase in possession of the accused, who was not committing any misdemeanor at the time the chase was commenced, the search and seizure was not authorized and following the federal rule evidence obtained thereby was inadmissible in prosecution for unlawful possession of intoxicating liquors. Jones v. State, 216 Miss. 263, 62 So. 2d 334 (1953).

Where officers who were lawfully upon premises under a warrant based on probable cause to search for intoxicating liquors found and recognized some stolen property, this property was of contraband nature subject to seizure though it was not one of the designated objects of search, and the evidence of this stolen property obtained by such seizure was admissible in prosecution for theft of the property. Williams v. State, 216 Miss. 158, 61 So. 2d 793 (1953).

Where a warrant entitled the officer to search outhouse of owner and a defendant lived in the block house and ran a cafe on the land of the owner, also paid taxes and this house was between 100 and 200 yards away from house in which owner resided and operated the store, the house used by the defendant was not an outhouse, and the search of the premises, where whisky was found was illegal and the evidence was inadmissible. Thompson v. State, 213 Miss. 325, 56 So. 2d 808 (1952).

Acts of officer, who had no warrant, in commanding a girl to set a jug down, and in reaching into her room and removing the jug, constituted an unlawful invasion of her place of abode and the evidence thus obtained could not be used legally against the girl on her trial of a charge of possessing intoxicating liquor since the officer did not know that it was whisky until after he opened the glass jug at the police station. Davis v. City of Columbus, 212 Miss. 181, 54 So. 2d 275 (1951).

Where officer had no knowledge or information of any kind that a hardware store was burglarized and he proceeded to search the defendant, the evidence obtained by the officer under such circumstances was inadmissible on the trial of the burglary charge. Acuna v. State, 54 So. 2d 256 (Miss. 1951).

Testimony based upon knowledge acquired in searching defendant's premises without a search warrant, in violation of the constitution, was inadmissible in the trial of the defendant whose premises had been unlawfully searched. Acuna v. State, 54 So. 2d 256 (Miss. 1951).

A sheriff entering a private backyard without a warrant and arresting owner for possession of intoxicating liquors was a trespasser making an unlawful arrest and no evidence there obtained was competent. Hartfield v. State, 209 Miss. 787, 48 So. 2d 507 (1950).

Where sheriff hid himself near spot which he believed was being used to keep whisky but without suspecting that defendant rather than someone else would appear, and shortly thereafter defendant appeared with something in his hand and sheriff, after arresting him, discovered whisky in the bottle, arrest was unlawful and evidence inadmissible. Harrison v. State, 44 So. 2d 403 (Miss. 1950).

Conviction of unlawful possession of intoxicating liquor cannot be sustained when proof of fact arises out of evidence obtained in violation of defendant's constitutional rights to be secure in person, house and possession from unreasonable search and seizure. Kelly v. State, 43 So. 2d 383 (Miss. 1949).

Taking paper bag containing liquor from defendant's son about to leave premises being searched under proper warrant did not constitute an unlawful search of his person, making evidence obtained thereby inadmissible. West v. State, 42 So. 2d 751 (Miss. 1949).

Evidence procured under search warrant illegal because no return day was named therein is inadmissible in prosecution for violation of liquor laws. Buxton v. State, 205 Miss. 692, 39 So. 2d 310 (1949).

Evidence obtained as result of illegal arrest and search of person is not admissible in prosecution for unlawful possession of intoxicating liquor. Haney v. State, 43 So. 2d 383 (Miss. 1949); Kelly v. State, 43 So. 2d 383 (Miss. 1949).

Evidence obtained by second search, under original search warrant, is inadmissible against defendant when second search is made after original search had been completed and the evidence obtained, and after defendant has been arrested, pleaded guilty and paid fine. Riley v. State, 204 Miss. 562, 37 So. 2d 768 (1948).

Admission in evidence of incriminating articles connected with the crime as its fruits was not error, when the arrest is a lawful one, examination of the articles by the arresting officer is an incident to the arrest and no search is necessary. Poore v. State, 205 Miss. 528, 37 So. 2d 3 (1948), suggestion of error overruled, 205 Miss. 554, 37 So. 2d 357 (1948), cert. denied, 336 U.S. 922, 69 S. Ct. 656, 93 L. Ed. 1084 (1949), reh'g denied, 336 U.S. 947, 69 S. Ct. 810, 93 L. Ed. 1104 (1949), motion granted, 40 So. 2d 172 (Miss. 1949).

Where highway patrolman pursued motorist to check his driver's license, stopped latter's automobile, and thereafter searched it without a warrant and without reason to believe that motorist had violated any laws, and motorist had committed no misdemeanor in the patrolman's presence, evidence that patrolman found whiskey in the automobile was illegally obtained and therefore inadmissible in a prosecution for unlawful possession of intoxicating liquor. Gause v. State, 203 Miss. 377, 34 So. 2d 729 (1948).

Evidence obtained by coroner under illegal warrant for search and seizure of intoxicating liquor was inadmissible in prosecution for permitting games of chance to be played for money on defendant's premises. Millwood v. State, 198 Miss. 485, 23 So. 2d 496 (1945).

Evidence in prosecution for unlawful possession of whisky, that sheriff found on defendant's person a key which fitted door to room wherein the whisky was found, was inadmissible, where the arrest and search of the defendant was illegal because the sheriff had no warrant therefor. Lynch v. Lynch, 198 Miss. 479, 23 So. 2d 401 (1945).

An arrest by sheriff without a warrant, of a person who has committed no crime in his presence is illegal, and a search of the person is likewise illegal and the evidence obtained thereby is inadmissible. Lynch v. Lynch, 198 Miss. 479, 23 So. 2d 401 (1945).

Sheriff's search of defendant's premises was not unreasonable and he could have arrested the defendant without a warrant had he been at home, and his testimony in homicide prosecution as to what he found at the scene of the crime on defendant's premises without a search warrant was properly admitted, where deceased's body was found by the roadside and the sheriff followed trail from body to the home of defendant where he discovered that the yard had recently been thoroughly cleaned, blood near the front steps covered with ashes, a smoldering fire in the back yard wherein many things, including clothes, had been burned, and blood-stained blocks of wood hidden in a hollow tree, since the sheriff had probable cause to believe that a felony had been committed. Stogner v. Crystal Springs Baptist Church, 22 So. 2d 368 (Miss. 1945).

Where peace officer, suspecting illegal sale of beer in the back room of a restaurant, upon being refused admittance thereto, took up his position on the back porch, not for the purpose of making an arrest, but for the purpose of ascertaining whether a misdemeanor would be committed in his presence, such officer was a trespasser and information as to the illegal sale of beer gained there was illegally obtained and was inadmissible in evidence. Hattiesburg Coca Cola Bottling Co. v. Cawley, 2 So. 2d 143 (Miss. 1941).

Evidence of Federal officers who arrested defendant accused of unlawful possession of distillery held not inadmissible on ground that officers had no search warrant, since it was not shown that still was upon premises owned by defendant or that he had interest in such premises, and constitutional prohibition against searches and seizures applied to State and not to Federal officers. McLemore v. State, 178 Miss. 525, 172 So. 139 (1937).

In burglary prosecution, evidence obtained by search without search warrant by private individuals held admissible, since constitutional provision against search and seizure without warrant is applicable only to governmental agencies. Colburn v. State, 175 Miss. 704, 166 So. 920 (1936).

Constitution prohibiting unlawful searches and seizures is inapplicable to unlawful or unauthorized acts of trespass of private citizens as to competency of their evidence. Davis v. State, 175 Miss. 324, 166 So. 761 (1936).

Where private citizen pursued defendant who had picked up suitcase from among weeds and, after defendant had escaped, notified town marshal that defendant was thought to have had whisky, evidence that suitcase permanently abandoned by defendant in tall grass contained whisky held admissible, notwithstanding absence of search warrant. Davis v. State, 175 Miss. 324, 166 So. 761 (1936).

Broadly speaking, Federal officers, being entitled to act in States, are also "State officers" and cannot be deemed private individuals in making search violating State Constitution, and hence evidence obtained by such search is inadmissible in State courts. Little v. State, 171 Miss. 818, 159 So. 103 (1935).

Obtaining evidence unlawfully by search or arrest by officer without authority of law is compelling defendant to testify against himself. Fulton v. City of Philadelphia, 168 Miss. 30, 148 So. 346 (1933).

Evidence of intoxicating liquor procured when sheriff dipped handkerchief in liquor on ground which came from bottles broken by defendant after running away from marshal ordering defendant to halt, without seeing him with any liquor, held illegally obtained, and was inadmissible. Fulton v. City of Philadelphia, 168 Miss. 30, 148 So. 346 (1933).

Persons not owners of premises searched could not complain of evidence obtained against them by illegal search. Polk v. State, 167 Miss. 506, 142 So. 480 (1932).

Evidence obtained through search by private individual of effects of accused's person held not unlawful, so as to render evidence obtained inadmissible. Cutrer v. State, 161 Miss. 710, 138 So. 343 (1931).

Officer discovering liquor law violation by overhearing conversation while secreted on public road right of way held not "trespasser," and evidence obtained was admissible. Goode v. State, 158 Miss. 616, 131 So. 106 (1930).

Search of premises leased by defendant and not described in warrant held unlawful, and evidence obtained not admissible; "possession" defined. Planters' Lumber Co. v. Griffin Chapel M.E. Church, 157 Miss. 714, 124 So. 479 (1929).

An officer cannot insert in the affidavit and warrant after the search is made the name of the person searched, and evidence thus obtained is inadmissible. Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 115 So. 555 (1928).

The question of competency of evidence on the ground that it was obtained by illegal search and seizure of an automobile and the question of the sufficiency of evidence to constitute probable cause must be objected to when offered, and is a matter for the trial court, and not the officer to determine, and if not objected to the incompetency thereof will not be considered. Jordan v. State, 111 So. 860 (Miss. 1927).

Evidence obtained by search, where affidavit insufficiently described the place as the estate of the deceased person was inadmissible. Parkinson v. State, 145 Miss. 237, 110 So. 513 (1926).

The admission of incompetent evidence obtained from an unlawful search where defendant made no specific objections nor motion to exclude, but obtained instruction eliminating testimony from jury's consideration, is not reversible error. Bailey v. State, 143 Miss. 210, 108 So. 497 (1926).

It must appear that property searched without a search warrant was owned by, or in possession of, the defendant, before evidence thereof thus obtained is inadmissible. Lovern v. State, 140 Miss. 635, 105 So. 759 (1925).

Evidence procured unlawfully by an officer is inadmissible in evidence. Tucker v. State, 128 Miss. 211, 90 So. 845, 24 A.L.R. 1377 (1922); Williams v. State, 129 Miss. 469, 92 So. 584 (1922); Butler v. State, 129 Miss. 778, 93 So. 3 (1922); State v. Patterson, 130 Miss. 680, 95 So. 96 (1923); Strangi v. State, 134 Miss. 31, 98 So. 340 (1924); Spears v. State, 99 So. 361 (Miss. 1924); Matthews v. State, 134 Miss. 807, 100 So. 18 (1924); Morton v. State, 136 Miss. 284, 101 So. 379 (1924); Deaton v. State, 137 Miss. 164, 102 So. 175 (1924); Borders v. State, 138 Miss. 788, 104 So. 145 (1925); Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129 (1925); Harrell v. State, 140 Miss. 737, 106 So. 268 (1925).

25. — — Admissions of defendant, warrantless searches and seizures.

Where an officer was responding to a dispatch regarding a bank robbery, he saw defendant crouched behind cars outside a market; the officer had reasonable suspicion to believe that defendant was a shoplifter and acted reasonably in stopping to investigate, and defendant was not entitled to suppress the statements he made when the officer stopped him because the stop was not illegal. Wilson v. State, 935 So. 2d 945 (Miss. 2006), writ of certiorari denied by 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088, 75 U.S.L.W. 3554 (2007), writ denied by 2012 U.S. Dist. LEXIS 171048 (S.D. Miss. Nov. 26, 2012).

Where a person states to the officer before arrest or search that certain kegs in automobile in the presence of the officer contain whisky, he may be arrested without a warrant and the whisky seized without a warrant. Williamson v. State, 140 Miss. 841, 105 So. 479 (1925).

26. — — Firefighters, warrantless searches and seizures.

The Fourth Amendment to the Federal Constitution and Article 3, § 23 of the Mississippi Constitution apply to volunteer firefighters who conduct a warrantless search of fire-damaged premises. Rose v. State, 586 So. 2d 746 (Miss. 1991).

27. — — Inspections, warrantless searches and seizures.

Where a county sought to enter landowners' property in order to determine whether they were in violation of the county flood plain ordinance — and claimed that it was conducting a criminal investigation on the property — the county was required to obtain a search warrant supported by probable cause because absent consent or some recognized exception or exigency for which a warrant was not required, warrantless entries were illegal. Blakeney v. Warren County, 973 So. 2d 1037 (Miss. Ct. App. 2008).

Search and seizure of diseased hog meat found in accused's restaurant by city health officers without a search warrant, upon advance information that the health laws had been, or were about to be, violated, did not constitute a violation of the constitutional prohibitions against unreasonable searches and seizures. Grillis v. State, 196 Miss. 576, 17 So. 2d 525 (1944).

28. — — Abandoned property, warrantless searches and seizures.

Fourth Amendment does not prohibit warrantless search and seizure of garbage which has been left for collection on curb outside of home, and thus rights of accused narcotics traffickers were not violated where police investigators obtained bagged garbage left by accused on curb from garbage collector who picked them up at fixed collection time. California v. Greenwood, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988).

In a burglary prosecution, where a police officer testified that he observed the defendant throw or drop three bottles at his feet, even though the officer did not have probable cause at the time to arrest the defendant or to search him, once the bottles were abandoned by the defendant, their possession by the officers did not stem from a search, and the defendant was in no position to protest the possession on the basis of constitutional provisions as to searches. Branning v. State, 222 So. 2d 667 (Miss. 1969).

29. — — Arrest, warrantless searches and seizures.

Search and seizure of defendant's truck and the cocaine contained therein were proper as incident to a lawful custodial arrest because defendant was lawfully arrested based on probable cause and the cocaine found inside his vehicle was clearly within the permissible scope of the search, i.e. a container located in the passenger compartment of the vehicle. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

Checkpoint for the purpose of valid license checking was constitutional; where defendant was stopped, arrested for driving with a suspended license, and had his car searched, his constitutional rights were not violated as defendant was not singled out and the search was conducted incident to a lawful arrest as the deputy had probable cause to believe defendant was driving without a proper license. Johnston v. State, 853 So. 2d 144 (Miss. Ct. App. 2003).

Police radio broadcast describing rape suspect, which led officer to look for defendant, established probable cause for arrest and reasonable suspicion justifying stop of defendant's vehicle, and validating defendant's subsequent consent to search of vehicle, rendering rifle and flashlight recovered during vehicle search admissible. Ellis v. State, 667 So. 2d 599 (Miss. 1995).

In a prosecution for possession of crack cocaine, the search of an automobile was not valid as a search incident to an arrest for driving with a suspended license where the police officer searched the car after the defendant had been frisked, handcuffed and placed in the back seat of the officer's patrol car, and therefore the officer could have had no reasonable fear that the defendant might have had a weapon or could have been in a position to destroy incriminating evidence from the crime which led to his arrest. Ferrell v. State, 649 So. 2d 831 (Miss. 1995).

The search of a defendant's person incident to his arrest for carrying a concealed weapon was reasonable within the confines of the Fourth Amendment, even though the search took place after the defendant was taken to the county jail rather than at the time and place of the arrest; thus, the defendant's attorney was not deficient in failing to move to suppress the evidence obtained as a result of this search on the ground that the search was illegal. Rankin v. State, 636 So. 2d 652 (Miss. 1994).

The search of a defendant's jacket incident to his arrest for carrying a concealed weapon was reasonable within the meaning of the Fourth Amendment where the arresting officers saw the defendant take the jacket off and place it on a guard rail beside him, since the jacket was in the area within the defendant's immediate control at the time of his arrest; thus, the defendant's attorney was not deficient in failing to move to suppress the evidence obtained as a result of this search on the ground that the search was illegal. Rankin v. State, 636 So. 2d 652 (Miss. 1994).

A defendant's arrest for driving while intoxicated was legal, and therefore the subsequent intoxilyzer test was not tainted, even though the arresting officer did not observe the defendant driving, where the defendant admitted to the arresting officer that he had been driving an automobile which was involved in an accident, and the defendant was publicly intoxicated in the presence of the officer and others in violation of § 97-29-47. Goforth v. City of Ridgeland, 603 So. 2d 323 (Miss. 1992).

Arrest of defendant at his home without arrest warrant was proper because it was supported by probable cause, where defendant was arrested for house burglary upon seizure from his room of 2 guns, serial numbers of which matched 2 weapons reported stolen from nearby homes, and officers had gone into his home pursuant to valid search warrant. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Warrantless arrest of murder suspect is based upon probable cause where suspect admits having passed marked $2 bill which was stolen during murder-robbery and suspect matches description of person who passed bill; even if arrest were illegal, statement given by suspect following arrest is admissible at trial where intervening circumstances and nonexistence of flagrant violation by police indicate that statement is voluntarily given. Swanier v. State, 473 So. 2d 180 (Miss. 1985).

In defendant's trial for murder of a police officer which occurred during a "shoot-out" at a dwelling house, the warrantless search of the house immediately following defendant's arrest was a lawful search instant to an arrest and the items therein seized were admissible into evidence; where the search incident to the arrest was delayed by the removal of bomb devices discovered during the initial search, the final portion of the search after reentry was merely a continuation of the original search and was not unreasonable, and the items therein seized were also admissible into evidence. Norman v. State, 302 So. 2d 254 (Miss. 1974), cert. denied, 421 U.S. 966, 95 S. Ct. 1956, 44 L. Ed. 2d 453 (1975).

The arrest, in the defendant's apartment, of a person whom the police incorrectly believed to be the defendant, was made in good faith where the police had probable cause to arrest the defendant and where the person arrested fit the description which they had of the defendant, and a search of the apartment incident to the arrest and the seizure of articles subsequently admitted as evidence against the defendant in a robbery prosecution were valid. Hill v. California, 401 U.S. 797, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971).

Where arresting officers were informed over the police radio that someone described by an informer had attempted to make a sale of LSD, and the automobile in which such person was riding was described and the description met the description of an automobile in which defendants were riding when arrested, the information given the officers by radio constituted sufficient probable cause to justify an arrest, and the warrantless search of the automobile was not illegal. Hamburg v. State, 248 So. 2d 430 (Miss. 1971).

Empty cartridge hulls, taken from the cab of the defendant's truck after a search without a warrant conducted after the defendant's arrest in a nearby cafe, were products of an illegal search and seizure, and objection to their admission should have been sustained. Kent v. State, 241 So. 2d 657 (Miss. 1970).

A rifle taken without a warrant from the cab of the defendant's truck was not procured by an unlawful search and seizure, where the defendant had been validly arrested, the rifle was observable through the truck windows, and the sheriff testified that he knew from observation the caliber and type of the rifle and who made it. Kent v. State, 241 So. 2d 657 (Miss. 1970).

Where police officers arrested a defendant for driving while under the influence of intoxicants, and the arrest took place in a county where intoxicants were outlawed and considered contraband, the officers' search of the interior of the defendant's automobile, including a briefcase which lay upon its rear seat and in which drugs were concealed, was not unreasonable. McMillian v. Patton, 235 So. 2d 704 (Miss. 1970).

Where a defendant is arrested for the possession of intoxicating liquors transported by him, following a search and seizure without a warrant, his counsel is entitled to know who gave the information that he would be transporting the liquors in a particular automobile at a particular place and time, together with a full disclosure of all of the facts upon which the officer acted, in order that the issue may be presented of whether there was probable cause. Terry v. State, 252 Miss. 479, 173 So. 2d 889 (1965).

Peace officers had probable cause to arrest defendants, and evidence obtained as a result of search of their persons subsequent to the arrest was admissible in evidence, where one of the officers, to whom the defendants had attempted to sell a new record player at a cheap price, had observed burglary tools in an automobile operated by the defendants. Corn v. State, 250 Miss. 157, 164 So. 2d 777 (1964).

Sheriff entering one's private backyard without a warrant and arresting owner for possession of intoxicating liquor was a trespasser making unlawful arrest. Hartfield v. State, 209 Miss. 787, 48 So. 2d 507 (1950).

Where the sheriff and deputy sheriff invaded the premises for the purpose of making an unlawful arrest of person other than the owner, without a search warrant, this was a violation of this section. Pettis v. State, 209 Miss. 726, 48 So. 2d 355 (1950).

Where the sheriff and deputy sheriff were unlawful in arresting a person without a warrant for an alleged misdemeanor not committed in their presence and also were unlawful in invading the home of the owner, the acts of the owner in resisting entry were not unlawful. Pettis v. State, 209 Miss. 726, 48 So. 2d 355 (1950).

The action of a sheriff who after spying a cow and truck on highway one-quarter of a mile ahead, overtook the truck, asked defendant occupants if they had a bill of sale to cattle therein, and upon receiving negative answer and unsatisfactory explanation as to the identification of alleged seller, and the presence of cattle, took the defendants into custody, did not constitute an unlawful search and seizure. Quick v. Holcomb, 47 So. 2d 852 (Miss. 1950).

Finding of liquor in purse on rear seat of car by officer making search of automobile under search warrant does not authorize officer to arrest husband of owner of purse for unlawful possession of liquor without warrant, and arrest cannot be vindicated by finding, after arrest, of liquor in possession of defendant husband. Kelly v. State, 43 So. 2d 383 (Miss. 1949).

Finding of liquor in purse on rear seat of car, belonging to woman in car, by officer making search of automobile under search warrant does not authorize officer to arrest without warrant former passenger who has left car and entered his own place of business and subsequent search of passenger's person is unlawful. Kelly v. State, 43 So. 2d 383 (Miss. 1949).

Officer was authorized to arrest defendant for unlawful possession of liquor without warrant only if misdemeanor was being knowingly committed in his presence. Kelly v. State, 43 So. 2d 383 (Miss. 1949).

City marshal held unauthorized to arrest defendant not seen with any liquor when he was called to halt. Fulton v. City of Philadelphia, 168 Miss. 30, 148 So. 346 (1933).

Officer may make arrest for misdemeanor committed in his presence; he may arrest felon when having probable cause to believe person arrested committed crime. Bird v. State, 154 Miss. 493, 122 So. 539 (1929).

Officer may, as incident to arrest, search person for arms and evidence tending to establish commission of crime; admission of hacksaw and other articles taken from defendant at time of arrest for burglary held not erroneous. Bird v. State, 154 Miss. 493, 122 So. 539 (1929).

Officers held to have reasonable ground to believe felony was about to be committed, authorizing arrest without warrant and seizure and use of evidence. Mapp v. State, 152 Miss. 298, 120 So. 170 (1929).

Under this section an officer cannot arrest a person without a warrant for a mere misdemeanor not committed in the officer's presence. Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129 (1925).

Notwithstanding the provision of this section an officer may enter any premises wherein he has reason to believe and does believe there is concealed a criminal for whose arrest he holds a warrant, or whom he has authority to arrest without a warrant, and a search by an officer in a reasonably necessary manner merely to arrest a person does not render such officer liable to the owner although the officer had no search warrant. Monette v. Toney, 119 Miss. 846, 81 So. 593, 5 A.L.R. 261 (1919).

30. — — Motor vehicle searches, warrantless searches and seizures.

Defendant's vehicle was stopped lawfully and an officer had probable cause to conduct a walk-around inspection of the vehicle because police were "looking for a vehicle as a murder weapon," witnesses identified the victim as being with defendant, police arrested defendant on an outstanding warrant, and an officer noticed something hanging from the vehicle that was later determined to be the victim's skin. Galloway v. State, 122 So. 3d 614 (Miss. 2013), writ of certiorari denied by 189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685, 82 U.S.L.W. 3685 (U.S. 2014).

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove, when an informant told officers the subject of outstanding arrest warrants would be driving a similar vehicle, because the good-faith exception to the exclusionary rule did not apply as (1) an officer said the officer did not know the identity of the subject of the arrest warrants, so the officer could not reasonably execute the warrants without verifying the suspect's identity, and (2) the officer's misinterpretation of constitutional mandates, contradictions between the officer's arrest report and testimony, and the officer's failure to resolve the suspect's identity made the exception inapplicable. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove because it was clear error to find that officers who stopped the vehicle were allowed to rely on arrest warrants for another person who, an informant told officers, would be driving a similar vehicle, as the officers' observations and the informant's information gave the officers no reasonable suspicion since the officers acted, without independent investigation, on the caller's vague description of the car. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove because it was clear error to find that officers who stopped the vehicle were allowed to rely on arrest warrants for another person who, an informant told officers, would be driving a similar vehicle, as (1) the subject of the warrants was not present, and (2) nothing showed the officers knew the description of the arrest warrants' subject's car, so, absent further independent investigation, the officers could only stop defendant to clarify defendant's identity, but the stop exceeded this permissible scope. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

Defendants' convictions for possession of more than five kilograms of marijuana were appropriate because, under Miss. Code Ann. § 63-3-1213, defendants' vehicle was seen driving in a careless or imprudent manner and the deputy had the authority to stop them. When defendants acted nervous, the deputy's retrieval of a drug-detecting dog was appropriate and the drug-detecting dog's positive alerts created probable cause for the deputy to search the trunk of the rental car. Shelton v. State, 45 So. 3d 1203 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 548 (Miss. 2010), writ of certiorari denied by 2010 Miss. LEXIS 553 (Miss. Oct. 21, 2010).

Where several witnesses testified that the shooter left the murder scene in defendant's car, which the police found at defendant's home shortly after the murder, probable cause existed for a valid warrantless search of defendant's automobile. Jordan v. State, 995 So. 2d 94 (Miss. 2008).

Where an officer heard loud music from defendant's vehicle and saw him cross over the center line, he had probable cause to stop the vehicle; the officer's inability to cite the noise ordinance did not affect the probable cause finding. Loveless v. City of Booneville, 972 So. 2d 723 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2008 Miss. LEXIS 2 (Miss. 2008).

In a statutory rape case, defendant was unable to challenge the manner in which police obtained a pair of child's panties from his vehicle since the issue was not raised below. Roles v. State, 952 So. 2d 1043 (Miss. Ct. App. 2007).

Defendant's seizure at a roadblock was constitutional because its primary purpose was to check for driver's licenses and insurance cards and because the officers were consistently and indiscriminately stopping every vehicle coming through the roadblock. McLendon v. State, 945 So. 2d 372 (Miss. 2006), writ of certiorari denied by 551 U.S. 1145, 127 S. Ct. 3008, 168 L. Ed. 2d 727, 2007 U.S. LEXIS 8338, 75 U.S.L.W. 3694 (2007).

Officers had reasonable suspicion to stop defendant's vehicle because they received information from an informant that she had been purchasing marijuana from an individual she knew as "Trouble," further investigation revealed that "Trouble" was defendant, the officers asked the informant to arrange to buy marijuana from defendant, and as defendant's vehicle, which matched exactly the description of "Trouble's" car given by the informant, approached the abandoned bridge, it was stopped by an officer who recognized defendant and knew that he was on probation for a prior conviction. Carlisle v. State, 936 So. 2d 415 (Miss. Ct. App. 2006).

During a traffic stop, defendant was arrested for driving without a license, no taillights, and possession of beer by a minor; his car was searched by police. The circuit court correctly admitted evidence of marijuana found in the vehicle, because the search fit squarely into the automobile exception. Jim v. State, 911 So. 2d 658 (Miss. Ct. App. 2005).

There was sufficient probable cause to search defendant's vehicle after an accident and to seize beer in the vehicle because the smell of beer on defendant's breath, coupled with his impaired coordination and his statement that he had consumed a good bit of alcohol earlier in the day, constituted probable cause to seize beer in plain view. Comby v. State, 901 So. 2d 1282 (Miss. Ct. App. 2004), writ of certiorari denied by 901 So. 2d 1273, 2005 Miss. LEXIS 313 (Miss. 2005).

Court erred in denying defendant's motion to suppress evidence of steroids found in a search of his vehicle during a traffic stop because driving in the left-hand lane of a four-lane highway did not violate state law. Because the stop was not proper, the court erred in not suppressing all contraband that stemmed from the stop. Couldery v. State, 890 So. 2d 959 (Miss. Ct. App. 2004).

A police officer lawfully stopped the defendant's motor vehicle on the basis of a tip that it was being operated in a reckless manner, notwithstanding that reckless driving is a misdemeanor and that the officer did not personally observe the vehicle being driven in a reckless manner. Floyd v. City of Crystal Springs, 749 So. 2d 110 (Miss. 1999).

The warrantless search of a boat pursuant to § 49-1-43 was proper under the vehicle exception to the warrant requirement, notwithstanding a three hour delay between the time an officer saw illegal fishing on the boat and the actual search. One 1992 Toyota 4-Runner v. State ex rel. Miss. Dep't of Wildlife Fisheries & Parks, 721 So. 2d 609 (Miss. 1998).

A warrantless search of an automobile was proper, even though the vehicle had been immobilized, since the "automobile exception" to the warrant requirement "does not vanish once the car has been immobilized." Additionally, the search was valid because the contraband had been observed in plain view inside the vehicle. The search was also lawful because it was made in connection with the inventory of an impounded vehicle, where the vehicle was in the lawful custody of the police, a police officer had information that the vehicle had been used in a shoplifting, and a search of the driver bore no fruit. Franklin v. State, 587 So. 2d 905 (Miss. 1991).

At trial of a defendant charged with possession, with intent to distribute, of more than one kilogram of marijuana, evidence obtained by a warrantless search of the trunk of an automobile which had been stopped for speeding did not require suppression where state troopers, upon approaching stopped automobile, had observed marijuana seeds and parts and had detected odor of marijuana emanating from, passenger compartment. Fleming v. State, 502 So. 2d 327 (Miss. 1987).

The search of an automobile without a warrant, extending to any place in the vehicle in which the items sought might reasonably be found, is permissible if there is probable cause, under a standard which must be at least as stringent as that required for the obtaining of a search warrant, to believe that the automobile is mobile and contains contraband or other items which offend against the law; the probable cause required in such instance, unlike that required for a warrantless search of a vehicle incident to arrest, is concerned not necessarily with the guilt of an individual, but with the reasonable belief that there is evidence in the particular automobile. Wolf v. State, 260 So. 2d 425 (Miss. 1972), cert. denied, 409 U.S. 1042, 93 S. Ct. 535, 34 L. Ed. 2d 492 (1972).

In a murder prosecution, a search of the defendant's automobile, which had been identified by witnesses as the automobile in which the victim had been taken away by the defendant after the defendant's arrest, was proper as a search for the instrument or implement by which the crime was committed. Taylor v. State, 254 So. 2d 728 (Miss. 1971).

Where an automobile was itself an integral part of the evidence of a robbery committed and was seized in order to preserve it as evidence, search of the automobile without a warrant at Highway Patrol headquarters was reasonable, although not made at the scene of the arrest. Gordon v. State, 222 So. 2d 141 (Miss. 1969).

It was neither a trespass nor an unlawful search, nor was it illegal for a deputy sheriff to look into a station wagon recently occupied by three persons subsequently charged with burglary, and through the windows of the vehicle to observe and consider marks and other indicia that tended to establish that the vehicle had been used for the transportation of property allegedly stolen. Wilson v. State, 186 So. 2d 208 (Miss. 1966).

A search of a woman's handbag found in the automobile of one lawfully arrested is not unlawful where the officers did not know at the time that it belonged to her. Johnson v. State, 246 Miss. 182, 145 So. 2d 156 (1962), cert. denied and appeal dismissed, 372 U.S. 702, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963).

The search of an arrested person's automobile is not unreasonable because not made at the place of arrest, where, under the circumstances, carrying him to a place of detention was a reasonable precaution, and the search was made immediately afterward. Fuqua v. State, 246 Miss. 191, 145 So. 2d 152 (1962), appeal dismissed, cert. denied, 372 U.S. 709, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963), reh'g denied, 373 U.S. 947, 83 S. Ct. 1536, 10 L. Ed. 2d 703 (1963).

A search of an automobile following an illegal arrest of the driver is not legal. Jennings v. Jennings, 128 So. 2d 857 (Miss. 1961).

Where a deputy sheriff having no probable cause to believe that car was being used in transportation of liquor, and without a search warrant, searched the car, the car owner was entitled to damages. State, for Use of Brooks v. Wynn, 213 Miss. 306, 56 So. 2d 824 (1952).

Search of defendant's parked automobile and seizure of quantity of whisky found therein were unlawful where such search and seizure took place after officers, armed with warrant to search defendant's premises for stolen money and other chattels, failed to find anything, there being no evidence or information that the automobile was used for the transportation of liquor; and order of sale of such automobile pursuant to Code 1942, § 2618, constituted reversible error. Brooks v. Wynn, 209 Miss. 156, 46 So. 2d 97 (1950).

The fact that officers arresting one for driving while intoxicated had no search warrant is immaterial where prosecution is not based on any evidence discovered by reason of the search of the automobile but on what they had observed prior thereto in regard to his condition while driving. Ball v. State, 203 Miss. 521, 36 So. 2d 159 (1948), error overruled, 203 Miss. 527, 36 So. 2d 797 (1948).

Passenger in truck being driven by its owner in compliance with contract of sale of cow and delivery thereof to defendant's home, could not object to the search of the truck cab by deputy sheriff without a search warrant, or to the admission of evidence secured thereby in prosecution for unlawful possession of intoxicating liquor. Smith v. State, 198 Miss. 788, 24 So. 2d 85 (1945).

Refusal to grant instruction in murder prosecution against rum runners, one of whom shot and killed a law enforcement officer who was attempting to stop their automobile, that defendant could not be guilty of more than manslaughter, predicated on the contention that the law enforcement officers were attempting to make an arrest or a search without a warrant and without probable cause because the information given the officer concerning the illegal transportation of whisky did not adequately describe the automobile in which the whisky was being transported, was not erroneous where the informer, in giving the information to the officers, told him he would be in the car, which was a sufficient description of the instrumentality used. Franklin v. State, 189 Miss. 142, 196 So. 787 (1940).

An officer undertaking to search an automobile without a warrant under § 2, c 244, Laws of 1924 is not the judge finally of probable cause or the sufficiency of information on which such officer acts, but the court is the final judge. McNutt v. State, 143 Miss. 347, 108 So. 721 (1926).

31. — — Probable cause, warrantless searches and seizures.

Officer had probable cause to stop defendant's vehicle based on his observation of an improper turn and a missing headlight, notwithstanding the fact that the officer had received word from dispatch to be on the lookout for a vehicle matching that description. Scott v. City of Booneville, 962 So. 2d 698 (Miss. Ct. App. 2007), writ of certiorari denied by 968 So. 2d 948, 2007 Miss. LEXIS 637 (Miss. 2007).

Denial of defendant's motion to suppress 864 unit dosages of ephedrine was affirmed; police had reasonable suspicion for stopping the car in which defendant was riding as the car matched the description given by store employees after two men bought large quantities of cold medicine containing ephedrine, and the driver of the car consented to a search of the car. Burchfield v. State, 892 So. 2d 248 (Miss. Ct. App. 2004), affirmed by 892 So. 2d 191, 2004 Miss. LEXIS 1346 (Miss. 2004).

Where defendant was charged with possession of "precursors" used in the illegal manufacture of controlled substances, having purchased or having attempted to purchase quantities of the subject common cold medication, the anonymous tip information given to the officer who conducted the investigatory stop included the color of the van, the number and race of occupants, the license plate number and the direction of travel, including the name of the street. All of those details were verified by the officer prior to the investigatory questioning, and under the totality of the evidence standard, the investigatory stop based on the anonymous tip was lawful. Williamson v. State, 876 So. 2d 353 (Miss. 2004).

The police officers had probable cause to search defendant when the car in which he was a passenger was stopped after running a roadblock, the officers saw defendant trying to hide something in the car, demanded defendant reveal what he was hiding, and then observed defendant place the concealed substance in his mouth to hide it further. Roberson v. State, 754 So. 2d 542 (Miss. Ct. App. 2000).

In a prosecution for the sale of cocaine to an undercover police officer, the trial court did not err in admitting into evidence currency seized from the defendant when he was stopped at a traffic light since the officers had probable cause to arrest the defendant without a warrant where one of the officers had videotaped the defendant earlier the same day in a drug sale transaction with other undercover officers, and the stop of the defendant for running a red light was lawful and a subsequent consensual search produced evidence justifying an arrest. Curry v. State, 631 So. 2d 806 (Miss. 1994).

Substantial evidence existed to support a finding that probable cause existed for a warrantless search of a defendant's automobile where there was probable cause to obtain a warrant to search the defendant's home, and evidence found in the home provided probable cause to believe that a murder may have been committed in the home and that the victim's body may have been placed in the automobile for transportation. Spivey v. Mowdy, 617 So. 2d 999 (Miss. 1992).

A police officer who observed a crime in progress had probable cause to arrest the defendant, and was therefore justified in searching the defendant incident to a lawful arrest, even though the defendant was not actually arrested until after the search was completed. Ellis v. State, 573 So. 2d 724 (Miss. 1990).

No constitutional rights were implicated in an officer's seizure of illegal drugs where the drugs were found on the front porch ledge of an abandoned apartment in which the defendant had no propriety or possessory interest. The officer had probable cause to arrest and search the defendant where the officer had observed suspicious behavior by the defendant and had seized drugs which he had seen the defendant handling. Young v. State, 562 So. 2d 90 (Miss. 1990).

The warrantless seizure of a defendant's tennis shoes did not violate his constitutional rights where the shoes were removed at the sheriff department's request pursuant to a valid arrest which was based on probable cause, since law enforcement officials may seize personal effects and clothing from one who has been arrested. Shell v. State, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

Probable cause existed for law enforcement officers to stop and search an automobile for contraband where 2 strange individuals drove to one particular area of a small town airport to which vehicles did not usually travel, an occupant got out of the automobile, walked directly to a place in the grass, picked up 2 garbage bags and put them into the trunk, the auto immediately sped off, and the individuals were observed by a reliable person with some experience in law enforcement who reported the entire activity to the sheriff. Rooks v. State, 529 So. 2d 546 (Miss. 1988).

Where defendant's actions and demeanor in the presence of the arresting officer were indicative of drunkenness in a public place, a misdemeanor, probable cause existed for his arrest, and there was no constitutional impediment to the introduction of testimony relative to the arrest and subsequent events even though the officer's ticket indicated the arrest was for driving under the influence. Ewing v. State, 300 So. 2d 916 (Miss. 1974).

Constitutional rights of defendant in prosecution for assault and battery with intent to kill were violated warranting reversal of conviction where proof of state failed to show any authority for seizure of defendant's automobile, the search of his premises and seizure of his coat and pistol, the examination of the person of defendant for a bullet wound and a photograph thereof, the sheriff's comparison of a tire on the automobile with the dim track which he had observed at the scene, and on cross-examination of defendant the state was permitted to ask questions showing guilt of another crime, notwithstanding that record failed to show any objections thereto or that a motion for new trial was made. Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

Search of persons and property forbidden by Constitution without warrant or probable cause is such only as constitutes a trespass. Goodman v. State, 158 Miss. 269, 130 So. 285 (1930).

The court may pass on the question of probable cause without warrant. Brown v. State, 149 Miss. 219, 115 So. 436 (1928).

32. — — Plain view doctrine, warrantless searches and seizures.

Basis of the totality of circumstances began with an anonymous tip that drug activity was occurring, and the officer responded and confirmed the anonymous source's information and smelled marijuana when he approached the cars and determined that the smell was coming from defendant's car. Defendant had admitted to having a gun on his person, so the officer, for his protection, asked defendant to get out of the car, and when defendant was out of the car, the officer found, in plain view, a bag commonly used in drug transactions with what appeared to be marijuana residue inside it; thus, defendant's arrest was supported by probable cause, and the evidence seized pursuant to a search of his person incident to arrest was admissible. Kennedy v. State, 909 So. 2d 1128 (Miss. Ct. App. 2005).

Though crack cocaine was often carried in plastic bags, and defendant's having a plastic bag inside his pants was unusual, neither consideration creates probable cause to believe that there was cocaine in defendant's pants. It took a look after pulling open defendant's pants before probable cause existed. Thus, the bag and its contents were not in plain view and the searching of defendant's pants was not justified. Anderson v. State, 864 So. 2d 948 (Miss. Ct. App. 2003).

Photographing a defendant's injured hand, which was within the plain view of police officers and was incident to a lawful arrest, was not an improper search, as defendant had no more of a reasonable expectation of privacy with respect to his hand than he would have had with his handwriting. Jones v. State, 841 So. 2d 115 (Miss. 2003).

In a prosecution for possession of crack cocaine, the search of an automobile was not valid under the plain view exception to the search warrant requirement where the police officer entered the car to retrieve the keys, he saw an ordinary matchbox on the passenger seat and opened it to find only matches, and he then noticed another matchbox between the 2 front seats and opened it to find that it contained 9 rocks of crack cocaine; no incriminating evidence was visible at the time the officer entered the car, since the mere presence of a matchbox on the front seat of a car ordinarily cannot be termed an incriminating object in plain view. Ferrell v. State, 649 So. 2d 831 (Miss. 1995).

A trial court did not err in admitting into evidence a powdery substance, which was later identified as a by-product resulting from the manufacture of methamphetamine, found on the property near a trailer, where the owner of the trailer gave a valid consent to search the trailer, the police were validly on the property on which the trailer was located, and the powdery substance was visible from the trailer itself, thus falling under the plain view doctrine. Waldrop v. State, 544 So. 2d 834 (Miss. 1989).

The trial court erred in refusing to suppress marijuana plants seized under a void search warrant, notwithstanding the fact that the arresting officers had previously observed what appeared to be growing marijuana plants from a tract of land adjacent to defendant's land and could then have arrested defendants for committing a felony in their presence, where no such arrest occurred prior to execution of the void warrant; contraband in "plain view" may be seized without a warrant (1) incident to a lawful arrest, or (2) incident to "hot pursuit" of a fleeing suspect, or (3) incident to a search of a stopped vehicle on probable cause or because of the mobility of the vehicle, or (4) where officers have a valid search warrant to search a given area for specific objects and in the course of the search come across contraband; the "plain view" doctrine does not eliminate the requirement that seizure of contraband discovered while in "plain view" must comply with constitutional requirements and in the absence of "exigent circumstances" must be based on a valid warrant. Isaacks v. State, 350 So. 2d 1340 (Miss. 1977).

There was no unlawful search where a deputy sheriff looked through the windows of a station wagon recently occupied by three persons subsequently charged with burglary to observe and consider marks and other indicia tending to establish that the vehicle had been used for the transportation of property allegedly stolen. Wilson v. State, 186 So. 2d 208 (Miss. 1966).

Where entry upon premises is lawful, contraband open to observation thereon may be seized. Williams v. State, 216 Miss. 158, 61 So. 2d 793 (1953).

An officer has the right to arrest without a warrant for the commission of a misdemeanor in his presence and a misdemeanor is being committed in the presence of an officer when he then and there acquires knowledge thereof through one of his senses. Harrison v. State, 44 So. 2d 403 (Miss. 1950).

Obtaining information by means of the eye, where no trespass is committed in aid thereof, does not constitute unlawful search. Bone v. State, 207 Miss. 868, 43 So. 2d 571 (1949).

Testimony of officer describing car and its contents which officer saw on street on night of burglary near building burglarized and which he saw following afternoon in garage in another city where defendant had been placed in jail claiming that neither he nor car had left city on night of burglary is admissible in prosecution for burglary even though officer had no search warrant. Bone v. State, 207 Miss. 868, 43 So. 2d 571 (1949).

Obtaining information by means of eye, where no trespass has been committed in aid thereof, does not constitute unlawful search. Goodman v. State, 158 Miss. 269, 130 So. 285 (1930).

Observance of automobile occupants emptying jug of liquor did not constitute trespass, and therefore did not constitute unlawful search, rendering testimony showing what officers observed, admissible. Goodman v. State, 158 Miss. 269, 130 So. 285 (1930).

33. — — Consent or waiver, warrantless searches and seizures.

Trial court did not abuse its discretion in denying defendant's motion to suppress photographs found at his mother's home because defendant did not offer any evidence that his mother did not consent to the search of the house where the incident occurred in his motion to suppress or in his argument at the hearing. Brown v. State, 119 So. 3d 1079 (Miss. Ct. App. 2013).

In a prosecution for manslaughter by culpable negligence and driving under the influence, the trial court did not err when it denied defendant's motion to suppress the results of a blood test because defendant consented to the blood draw. The arresting officer testified defendant consented, and a nurse testified that she would not have drawn the blood without defendant's consent. Setzer v. State, 54 So. 3d 226 (Miss. 2011).

Trial court did not err in failing to suppress evidence obtained through a warrantless search of defendant's automobile where defendant consented to the search and never withdrew his consent. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011), remanded by 2013 Miss. LEXIS 109 (Miss. Feb. 14, 2013).

Motion to suppress deoxyribonucleic acid evidence was denied because officers were not required to give defendant Miranda warnings since he was not detained under U.S. Const. Amend. IV and Miss. Const. Art. 3, § 23 before he consented to a blood draw; the officers went to defendant's residence, asked him to submit to the testing, and defendant rode to the hospital in the front seat of one officer's car. Moreover, defendant's mild mental retardation did not give rise to a finding of per se involuntariness to give consent, and his cooperative nature was also considered. Robinson v. State, 2 So. 3d 708 (Miss. Ct. App. 2008).

Despite defendant being seized when a second officer questioned him by having been placed in the back seat of a police car to be transported to a hospital for a blood test, defendant was not seized when he made a statement and consented to the blood test when he spoke with a first police officer during the first officer's general investigation of an accident; defendant's first consent remained valid as it was never revoked and thus it was not necessary that the second consent be valid. Turner v. State, 12 So. 3d 1 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 303 (Miss. 2009).

Trial court did not err in denying defendant's motion to suppress because: (1) at the hearing on defendant's motion to suppress, two sheriff's deputies testified that defendant gave free and voluntary consent to search defendant's home; (2) a signed and executed consent to search form was introduced into evidence at trial purporting that voluntary consent; and (3) defendant presented no evidence that defendant was impaired or suffered from diminished capacity when defendant gave the deputies consent to search defendant's home. Evans v. State, 984 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

Trial court did not commit reversible error in admitting beer cans found in defendant's car into evidence because even though the beer cans were found in the course of a warrantless search of the car, there was no Fourth Amendment violation, as the car was parked on defendant's brother's premises and defendant's brother, as the renter of the premises, had sufficient authority to consent to a search of the premises; because defendant's brother did consent to a search of his premises, the evidence collected pursuant to that consent was constitutionally acquired. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Trial court did not err in denying defendant's motion to exclude evidence taken from a car that he was driving; because defendant's wife was the titled owner of the automobile, the police were reasonable in their belief that she possessed common authority, joint control, and mutual use over the car so as to give her the authority to consent to a search. Peters v. State, 920 So. 2d 1050 (Miss. Ct. App. 2006).

Where the inmate claimed in a postconviction appeal that the inmate's arrest was illegal under U.S. Const. amend. IV and Miss. Const. Art. III, § 23 for lack of a warrant or probable cause, the inmate waived the argument by entering a guilty plea. Battaya v. State, 861 So. 2d 364 (Miss. Ct. App. 2003).

In a possession of precursor drugs with knowledge that the drugs would be used to manufacture a controlled substance case, after a drug store clerk informed the police that two suspects purchased large amounts of ephedrine/pseudoephedrine contained in over-the-counter cold medications and described their car, a be on the lookout announcement was made and the officers investigatory stop of the driver's car, in which defendant was a passenger, was entirely proper and the driver's consent to search the car relieved the officer of any need for a search warrant; thus, the admission of the evidence of the pills found was proper and did not violate defendant's federal and state constitutional rights under U.S. Const. Amend. IV and Miss. Const. Art. 3, § 23. Burchfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 660 (Miss. Ct. App. July 22, 2003), opinion withdrawn by, substituted opinion at 892 So. 2d 248, 2004 Miss. App. LEXIS 538 (Miss. Ct. App. 2004).

Defendant was barred from raising his argument that the police officer's search of his pants pocket violated his right against illegal search and seizure on appeal where his guilty plea resulted in the waiver of his right to raise that constitutional issue. Smith v. State, 845 So. 2d 730 (Miss. Ct. App. 2003).

The fact the the defendant's wife attached conditions to her consent to search and demanded compliance with the conditions before the search began was a strong indicator that she understood that she was not obligated to permit the officers to inspect the defendant's premises and, therefore, her consent was properly found to be voluntary. Logan v. State, 773 So. 2d 338 (Miss. 2000).

When the issue is the voluntariness of a consent to search, there is no absolute requirement that the person receive a Miranda-like notification that the person can refuse the officer's request, even though the Supreme Court has suggested that it will, using state constitutional concerns, apply a stricter test of voluntariness than the United States Supreme Court does under Fourth Amendment jurisprudence. Logan v. State, 773 So. 2d 338 (Miss. 2000).

The fact that the defendant's wife was not affirmatively informed by police officers of her right to decline to consent to the inspection of the defendant's premises did not render her consent involuntary where, after she was requested to consent to an inspection of the premises, she declined to do so unless the officers agreed to remove a substantial number of the police cars parked at her residences, since the very act of attaching conditions to the consent to search and demanding compliance with the conditions before the search began was a strong indicator that she understood that she was not obligated to permit the officers to inspect the premises.

Logan v. State, 2000 Miss. LEXIS 128 (Miss. May 25, 2000), opinion withdrawn by, substituted opinion at 773 So. 2d 338, 2000 Miss. LEXIS 267 (Miss. 2000).

The search of the defendant's truck, which was made pursuant to his wife's consent, was proper since (1) the defendant failed to meet his burden to show that his wife did not know of her right to refuse, (2) her written consent evidenced the fact that her consent was voluntary, and (3) evidence also established that she gave oral consent to the search. Gazaway v. State, 708 So. 2d 1385 (Ct. App. 1998).

Where, as part of routine drug interdiction effort, two uniformed police officers boarded bus during stopover and without articulable suspicion requested passenger's consent to search his luggage, advising passenger that he had right to refuse consent, and passenger manifested consent, and search of luggage disclosed cocaine, encounter was not necessarily "seizure" for purposes of Fourth Amendment because if same encounter had taken place before passenger boarded bus it would not have risen to level of seizure; analysis of whether reasonable person in passenger's position would feel "free to leave" is inapplicable because restriction of freedom of movement was result of factor independent of police conduct; appropriate inquiry in such situation is whether reasonable person would feel free to decline officers' requests or otherwise terminate encounter. Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991), on remand, 593 So. 2d 494.

A confidential informant's tip to a sheriff's deputy provided probable cause to justify a stop, and therefore a subsequent search and seizure of the suspect's property did not violate his constitutional rights, where the officer knew the informant, information supplied by the informant had been successfully used by the officer in the past, and the informant accurately told the officer that the suspect would be traveling in a certain direction on a certain road which demonstrated a special familiarity with the suspect's affairs. Neely v. State ex rel. Tate County, 628 So. 2d 1376 (Miss. 1993).

A trial court did not err in overruling a capital murder defendant's motion to exclude certain physical evidence seized from his automobile, even though the search was conducted pursuant to consent given by the defendant's wife who may not have had mutual use of the car, since the police were reasonable in their belief that the wife had common authority, mutual use, and joint control over the car where the wife held title to the car, she told the police she owned the car and provided them with keys, and she never indicated that the car had been in the defendant's sole possession. Mettetal v. State, 615 So. 2d 600 (Miss. 1993).

There is no requirement that Miranda warnings precede a consent search. Jones v. State ex rel. Mississippi Dep't of Pub. Safety, 607 So. 2d 23 (Miss. 1991).

A search pursuant to a defendant's consent was constitutionally valid, even though the defendant, who was deaf, was not afforded an interpreter in accordance with § 13-1-303(3), where the testimony of the law enforcement officers clearly indicated that the defendant understood what he was doing when he agreed to the search, the defendant was asked questions to which he gave appropriate responses, he was specifically told that he did not have to consent to the search, both the request for and the granting of the consent were done in writing, and the defendant used communicative and cognitive faculties other than hearing when he consented to the search. Shook v. State, 552 So. 2d 841 (Miss. 1989).

A defendant's mother had the right to consent to a search of her son's bedroom where the mother paid the rent on the home and had access to the defendant's room. Stokes v. State, 548 So. 2d 118 (Miss. 1989), cert. denied, 493 U.S. 1029, 110 S. Ct. 742, 107 L. Ed. 2d 759 (1990), dismissal of habeas corpus aff'd, 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

Even if the defendant was the owner of land on which a trailer was located, police officers did not illegally trespass on his land in order to search the trailer, where the owner of the trailer consented to the search since police officers are allowed the right of ingress and egress onto private property. Waldrop v. State, 544 So. 2d 834 (Miss. 1989).

A second search of a defendant's truck for blue fountain pens, after the investigator had previously conducted a valid consent search, had seen the pens in the truck, and had subsequently learned that there was a similar pen at the crime scene, was reasonable even though, after the first consent search, the defendant had been allowed to take the truck and continue his daily work activities. Woodward v. State, 533 So. 2d 418 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989), reh'g denied, 490 U.S. 1117, 109 S. Ct. 3179, 104 L. Ed. 2d 1041 (1989), vacated in part, 635 So. 2d 805 (Miss. 1993).

Owner of automobile in which marijuana is found during warrantless search cannot argue that driver has no authority to consent to search where driver has lawful possession of car, having been given keys by owner, who requested that driver drive car and who has not asked that keys be returned. Shaw v. State, 476 So. 2d 22 (Miss. 1985).

Warrantless search of robbery suspect's apartment is reasonable where consent to search is given by suspect's girlfriend who has dominion and control over apartment, and who rents apartment in her name and pays all bills, particularly where at time consent is obtained, investigating officers are unaware that suspect is person living in apartment. Hudson v. State, 475 So. 2d 156 (Miss. 1985).

Where defendant advised the sheriff by telephone that she had shot her husband and the sheriff subsequently came to the murder scene to accompany the body to the hospital, a deputy sheriff's return to the murder scene 25 minutes later was not an illegal search but rather was merely a continuation of the initial investigation permitted by defendant. Crum v. State, 349 So. 2d 1059 (Miss. 1977).

Warrantless search of the backyard of the house occupied by the defendant, his brother, his parents, and other family members was not unreasonable where consent to search was given by the defendant's brother in the presence of their mother, who was, with their father, joint owner of the property. Loper v. State, 330 So. 2d 265 (Miss. 1976).

In a prosecution for possession of amphetamine tablets with intent to sell, where defendant's companion voluntarily testified that the amphetamines had been given to her by the defendant, were in her possession at the time of the search, and that she had given them to a policeman, the defendant had no standing to object to the admission of the tablets. Simmons v. State, 301 So. 2d 565 (Miss. 1974).

Where the defendants specifically denied having any interest in an automobile allegedly used by them on the date of the alleged shoplifting, they were without standing to object to a search of the automobile. Watkins v. State, 262 So. 2d 422 (Miss. 1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1416, 35 L. Ed. 2d 692 (1973).

Where the defendant, a guest at a dance at which police officers were chaperones, requested the officers to help him find his coat and authorized them to examine any coat they might find to determine whether or not it belonged to the defendant, marijuana found in the defendant's coat when the officers searched the pockets for identifying marks or items, was not wrongfully admitted into evidence, since the officers had not been conducting a search for the purpose of discovering evidence to be used in a prosecution, but had been merely trying to help that defendant. Amos v. State, 234 So. 2d 630 (Miss. 1970), cert. denied, 401 U.S. 942, 91 S. Ct. 945, 28 L. Ed. 2d 222 (1971).

An officer cannot enter the home of one charged with crime after the defendant has been arrested and incarcerated in jail without his consent and without a valid search warrant. May v. State, 199 So. 2d 635 (Miss. 1967).

Where the record revealed that all persons who wanted to do business with the defendant were impliedly invited to approach the house in which he was staying along a circular driveway to a point where the defendant met law enforcement officers to ascertain what he could do for them, and where the officers purchased and received from the defendant a bottle of intoxicating liquor but made no search of the person or premises of the defendant, the testimony of the officers was not inadmissible on the ground that the purchase was an illegal search or that their testimony was in effect a method of requiring the defendant to testify against himself. Lyons v. State, 195 So. 2d 91 (Miss. 1967).

Waiver of its [this section's] protection is not created by the defendant neither objecting nor consenting to the search. Adams v. State, 202 Miss. 68, 30 So. 2d 593 (1947).

When a person carries on a business for the dispensation and sale of food for human consumption and members of the public are invited to become patrons, the proprietor of the establishment thereby impliedly consents that the public, through its authorized departmental agents or officers, may from time to time make such reasonable inspections as will protect against unwholesomeness of the food and against any unwholesome conditions surrounding the preparation thereof, and against disease which might result therefrom, and so consenting, the search and seizure provision of the state and Federal constitutions is not involved, so far as health officers are concerned. Grillis v. State, 196 Miss. 576, 17 So. 2d 525 (1944).

This section is not violated where the home and premises of a defendant are searched by his consent. Faulk v. State, 127 Miss. 894, 90 So. 481 (1921); Adams v. State, 202 Miss. 68, 30 So. 2d 593 (1947).

34. — — Exigent circumstances, warrantless searches and seizures.

School officials' warrantless search of a high school student's locker and their seizure of two handguns therefrom did not violate § 23 of the Mississippi Constitution, where another student had told the assistant principal that the first student had offered to sell him two handguns and had told him that he had the guns at school. The exigency of the circumstances provided an exception to the warrant requirement of § 23, even though there was no suggestion that the student was carrying the guns on his person, since high school students change classes every hour and normally have access to their lockers between classes, and there were more than 900 teenage boys and girls at the school. Additionally, a responsible school official under the circumstances would have regarded the information obtained from the second student to be sufficient to take action, since high school students fall into a different and generally less suspect class than other informants; absent information that the particular student informant might be untrustworthy, school officials may ordinarily accept at face value the information he or she supplies. S.C. v. State, 583 So. 2d 188 (Miss. 1991).

The Fourth Amendment was designed to protect against "general warrants" and other exploratory searches. The fact that contraband is believed to be on the premises cannot in and of itself justify a warrantless search. The discovery of evidence does not "create" an exigent circumstance such that a valid warrant is not required. Carney v. State, 525 So. 2d 776 (Miss. 1988).

The search of defendant and his possessions at an airport violated both the Fourth Amendment to the U.S. Constitution and Miss Const § 23, where there was no reasonable ground on which to arrest defendant, he was not under arrest at the time of the search, the federal agent conducting the search was not confronted with exigent circumstances, the defendant was not informed he had a right to refuse the search, and the search was the result of a detention and custodial interrogation of defendant in a police office during which he was not informed of his rights, and this violation tainted the search. Penick v. State, 440 So. 2d 547 (Miss. 1983).

Even if there is probable cause for the seizure or search of an automobile, such search without a valid warrant is unconstitutional unless there are exigent circumstances making it impracticable to obtain a warrant; such circumstances were not present where (1) the police had known for some time of the probable role of the automobile in a murder, (2) the accused was aware that he was a suspect in the murder, but had been co-operative throughout the investigation, and there was no indication that he meant to flee, (3) he had already had ample opportunity to destroy any incriminating evidence, (4) the automobile was regularly parked in the driveway of his home, and was not being used for any illegal purpose when it was seized, (5) the objects searched for were neither stolen nor contraband nor dangerous, (6) there was no way in which the accused could have gained access to the automobile after the police arrived on his property. Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), reh'g denied, 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120 (1971).

35. — — Damages, warrantless searches and seizures.

Officers of live-stock sanitary board seizing cattle without legal process and charging owner with cost of dipping them are liable to owner for damages. D'Aquilla v. Anderson, 153 Miss. 549, 120 So. 434 (1929).

A case where an officer held liable for damages for an unauthorized search. United States Fid. & Guar. Co. v. State, 121 Miss. 369, 83 So. 610 (1920).

36. — — Unreasonable searches and seizures, warrantless searches and seizures.

Defendant, who was walking his pit bulls on leashes, was unlawfully stopped by a police sergeant because the sergeant had no reasonable suspicion defendant was engaged or had been engaged in criminal conduct; thus, it was manifest error for the trial court to refuse to suppress evidence of defendant's actions and statements made after the unlawful stop. Harrell v. State, 109 So. 3d 604 (Miss. Ct. App. 2013).

Trial court erred in denying defendant's motion to suppress cocaine evidence in defendant's trial for possession of cocaine with intent to sell because the police lacked probable cause or reasonable suspicion to stop defendant's vehicle where there was no evidence of any traffic violation and the officer's suspicion that defendant was tired or impaired was not sufficient to constitute a reasonable basis for the traffic stop. Trejo v. State, 76 So. 3d 702 (Miss. Ct. App. 2010), affirmed by 76 So. 3d 684, 2011 Miss. LEXIS 602 (Miss. 2011).

Motion to suppress cocaine thrown under a car at a gas station should have been granted under USCS Const. Amend. 4 and Miss. Const. Art. 3, § 23 because there was no reasonable suspicion to support an investigative stop, and other than a police officer's testimony, there was nothing to show an unprovoked flight due to defendant's backing his car; there was no evidence of speed or erratic driving. Rainer v. State, 944 So. 2d 115 (Miss. Ct. App. 2006).

Trial court erred in failing to grant defendant's motion to suppress where, pursuant to Miss. Const. Art. 3, § 23 and the Fourth Amendment, the officers did not have reasonable suspicion to detain defendant because there was no evidence that he attempted to flee the scene when approached by police in what they believed to be a high crime area. Rainer v. State, — So. 2d —, 2005 Miss. App. LEXIS 917 (Miss. Ct. App. Nov. 22, 2005), opinion withdrawn by, substituted opinion at 944 So. 2d 115, 2006 Miss. App. LEXIS 885 (Miss. Ct. App. 2006).

Where city officer investigated defendant's parked vehicle outside the city limits, no crime was committed in the officer's presence or jurisdiction, and even if the officer had been authorized to do a patdown search for weapons under Terry v. Ohio, the officer's identification of a small "knot like nudge" was unreasonable. The continued exploration of defendant's pockets after determining that no weapon was present amounted to the sort of evidentiary search that Terry expressly refused to authorize, and therefore, the trial court erred in failing to suppress the methamphetamine found as a result of the officer's unlawful search. McFarlin v. State, 883 So. 2d 594 (Miss. Ct. App. 2004).

Search, of person who makes sudden reaching motion toward pocket upon being informed that officers have warrant for person's arrest, is reasonable. Dixon v. State, 465 So. 2d 1092 (Miss. 1985).

Where a warrant for a search of an accused's land was based upon information acquired by a game warden who committed a trespass upon the land while "checking for violations", the search by a sheriff under the warrant was illegal, since a legal search must be based on preceding steps which are themselves lawful in their entirety. Davidson v. State, 240 So. 2d 463 (Miss. 1970).

Every search and seizure is unreasonable where it is not made according to law. Adams v. State, 202 Miss. 68, 30 So. 2d 593 (1947).

Violation of this constitutional guaranty by an unreasonable search is tantamount to compelling defendant to testify against himself. Adams v. State, 202 Miss. 68, 30 So. 2d 593 (1947).

This section prohibits only unreasonable searches. Stogner v. Crystal Springs Baptist Church, 22 So. 2d 368 (Miss. 1945).

Only State officers come within State constitutional prohibition against unreasonable searches and seizures. McLemore v. State, 178 Miss. 525, 172 So. 139 (1937); Little v. State, 171 Miss. 818, 159 So. 103 (1935).

This section does not prohibit all searches and seizures, nor require a warrant in all cases, but it only prohibits unreasonable searches and seizures. Moore v. State, 138 Miss. 116, 103 So. 483 (1925).

The reasonableness of a search or seizure is a judicial question. Moore v. State, 138 Miss. 116, 103 So. 483 (1925).

Before a search can be unlawful the officer must invade the premises or property of the defendant who must at least have a right of possession that would make him owner for the time being. Lee v. City of Oxford, 134 Miss. 647, 99 So. 509 (1924).

37. Arrest supported by probable cause.

When an officer approached to disperse a crowd drinking alcohol in violation of a city ordinance, he saw defendant drop a bag that the officer believed to be crack cocaine; the recovered bag was confirmed through testing to contain crack cocaine. Under these facts, the officer had more than sufficient probable cause to arrest defendant; therefore, the trial court did not abuse its discretion in admitting the recovered crack cocaine into evidence. Butler v. State, 19 So. 3d 111 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 490 (Miss. 2009).

Even without the evidence from a recorded telephone call, a deputy had probable cause to arrest defendant because the defendant's daughter's allegation of sexual battery alone gave law enforcement officers probable cause for an arrest warrant. Bankston v. State, 4 So. 3d 377 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 110 (Miss. 2009).

In a manslaughter case, defendant's argument that there was an illegal arrest was rejected because there was a reasonable belief that a homicide had been committed based on the statement of a coroner and a doctor who performed an autopsy, as well as the discovery of the knife used in the murder and the fact that an eyewitness later changed her story that the victim committed suicide and implicated defendant as the perpetrator. Therefore, evidence in the case was properly admitted; it was noted that some of the evidence was found prior to defendant's arrest. Brown v. State, 970 So. 2d 1300 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

ALR. Constitutionality of statute or ordinance authorizing an arrest without a warrant. 1 A.L.R. 585.

Constitutional guaranties against unreasonable searches and seizures as applied to search for or seizure of intoxicating liquor. 3 A.L.R. 1514; 13 A.L.R. 1316; 27 A.L.R. 709; 39 A.L.R. 811; 74 A.L.R. 1418.

Entry and search of premises for purpose of arresting one without search warrant. 5 A.L.R. 263.

Right to jury trial in case of seizure of property alleged to be illegally used. 17 A.L.R. 568, 50 A.L.R. 97.

Federal Constitution as a limitation upon the powers of the state in respect of search and seizure. 19 A.L.R. 644.

Admissibility of evidence obtained by illegal search and seizure. 24 A.L.R. 1408; 32 A.L.R. 408; 41 A.L.R. 1145; 52 A.L.R. 477; 88 A.L.R. 348; 134 A.L.R. 819; 150 A.L.R. 566; 50 A.L.R.2d 531.

Right of search and seizure incident to lawful arrest without a search warrant. 32 A.L.R. 680; 51 A.L.R. 424; 74 A.L.R. 1387; 82 A.L.R. 782.

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Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message. 53 A.L.R. 1485; 66 A.L.R. 397; 134 A.L.R. 614.

Search of automobile without a warrant by officers relying on description of persons suspected of a crime. 60 A.L.R. 299.

Liability on bond of sheriff or other peace officer for unlawful search. 62 A.L.R. 855.

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Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in place of, arrest and search. 19 A.L.R.2d 727.

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Lawfulness of search of motor vehicle following arrest for traffic violation. 10 A.L.R.3d 314.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant. 10 A.L.R.3d 359.

Comment Note: "Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search. 43 A.L.R.3d 385.

Search and seizure: "furtive" movement or gesture as justifying police search. 45 A.L.R.3d 581.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant. 99 A.L.R.3d 1232.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident)—state cases. 1 A.L.R.4th 673.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property—state cases. 2 A.L.R.4th 1173.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse—state cases. 4 A.L.R.4th 196.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant—state cases. 4 A.L.R.4th 1050.

Odor of narcotics as providing probable cause for warrantless search. 5 A.L.R.4th 681.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure. 10 A.L.R.4th 376.

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Employment of photographic equipment to record presence and nature of items as constituting unreasonable search. 27 A.L.R.4th 532.

Searches and seizures: reasonable expectation of privacy in contents of garbage or trash receptacle. 28 A.L.R.4th 1219.

Searches and seizures: validity of searches conducted as condition of entering public premises — state cases. 28 A.L.R.4th 1250.

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Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child—state cases. 51 A.L.R.5th 425.

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Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property — state cases. 61 A.L.R.5th 1.

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Belief that burglary is in progress or has recently been committed as exigent circumstances justifying warrantless search of premises. 64 A.L.R.5th 637.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident cases) — state cases. 65 A.L.R.5th 407.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant — state cases. 68 A.L.R.5th 343.

Civilian participation in execution of search warrant as affecting legality of search. 68 A.L.R.5th 549.

Effect of retroactive consent on legality of otherwise unlawful search and seizure. 76 A.L.R.5th 563.

Permissibility and sufficiency of warrantless use of thermal imager or Forward Looking Infra-Red Radar (F.L.I.R.). 78 A.L.R.5th 309.

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Constitutionality of secret video surveillance. 91 A.L.R.5th 585.

Expectation of privacy in internet communications. 92 A.L.R.5th 15.

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Validity of warrantless search of motor vehicle based on odor of marijuana — State cases. 114 A.L.R.5th 173.

When are facts relating to marijuana, provided by police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of controlled substance — State cases. 114 A.L.R.5th 235.

Application of constitutional "compactness requirement" to redistricting. 114 A.L.R.5th 311.

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Validity of warrantless search based in whole or in part on odor of narcotics other than marijuana, or chemical related to manufacture of such narcotics. 115 A.L.R.5th 477.

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Validity of routine roadblocks by state or local police for purpose of discovery of driver's license, registration, and safety violations. 116 A.L.R.5th 479.

Validity of search conducted pursuant to parole warrant. 123 A.L.R.5th 221.

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Federal court determination of probable cause for search warrant: consideration of oral testimony which was, in addition to affidavit, before officer who issued warrant. 24 A.L.R. Fed. 107.

Sufficiency of description of business records under Fourth Amendment requirement of particularity in federal warrant authorizing search and seizure. 53 A.L.R. Fed. 679.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's relative. 48 A.L.R. Fed. 131.

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Validity, under Federal Constitution, of search conducted as condition of entering public building. 53 A.L.R. Fed. 888.

Aerial observation or surveillance as violative of Fourth Amendment guaranty against unreasonable search and seizure. 56 A.L.R. Fed. 772.

Validity, under Fourth Amendment, of "mail cover". 57 A.L.R. Fed. 742.

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Propriety in federal prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant. 69 A.L.R. Fed. 522.

What constitutes "an opportunity for full and fair litigation" in state court precluding habeas corpus review under 28 USCS § 2254 in federal court of state prisoner's Fourth Amendment claims. 75 A.L.R. Fed. 9.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse. 160 A.L.R. Fed. 165.

Validity of warrantless administrative inspection of business that is allegedly closely or pervasively regulated; cases decided since Colonnade Catering Corp. v. U.S., 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970). 182 A.L.R. Fed. 467.

When are facts offered in support of search warrant for evidence of federal nondrug offense so untimely as to be stale. 187 A.L.R. Fed. 415.

Validity of warrantless search of motor vehicle based on odor of marijuana — Federal cases. 188 A.L.R. Fed. 487.

Validity of warrantless search of other than motor vehicle or occupant of motor vehicle based on odor of marijuana — Federal cases. 191 A.L.R. Fed. 303.

Sufficiency of information provided by confidential informant, whose identity is known to police, to provide probable cause for federal search warrant where there was indication that informant provided reliable information to police in past-

Cases decided after Ilinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). 196 A.L.R. Fed. 1.

When facts are offered in support of search warrant for evidence of federal drug offense so untimely as to be stale. 13 A.L.R. Fed. 2d 1.

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22 Am. Jur. Pl & Pr Forms (Rev), Searches and Seizures, Forms 1 et seq. (requisites of valid warrant); 41 et seq. (effect of illegal search and seizure in criminal proceeding); 101 et seq. (civil liability for wrongful search and seizure).

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Validity, under Federal Constitution, of warrantless search of automobile. 26 L. Ed. 2d 893.

Warrantless automobile search held constitutional even though vehicle had been impounded and secured. 80 L. Ed. 2d 381.

Warrantless "murder scene" search of defendant's home held unconstitutional. 80 L. Ed. 2d 246.

Warrantless removal and test by federal agent of powder discovered in damaged package by employees of freight company held not violative of Fourth Amendment. 80 L. Ed. 2d 85.

Warrantless search of packages 3 days after their seizure from vehicle held permissible under Fourth Amendment. 80 L. Ed. 2d 890.

Evidence obtained in reasonable reliance on defective search warrant held admissible. 82 L. Ed. 2d 677.

Installation of beeper in container of chemicals held not to constitute search or seizure but monitoring of beeper in private residence held to violate Fourth Amendment. 82 L. Ed. 2d 530.

Compelled surgical procedure to remove bullet from suspect's chest held to constitute unreasonable search under Fourth Amendment. 84 L. Ed. 2d 662.

Detention and "seizure" of defendant at airport held justified by articulable suspicion. 93 L. Ed. 2d 165.

What constitutes "seizure" within meaning of Federal Constitution's Fourth Amendment — Supreme Court cases. 100 L. Ed. 2d 981.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity — Supreme Court cases. 104 L. Ed. 2d 1046.

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§ 24. Open courts; remedy for injury

All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.

SOURCES: 1817 art I § 14; 1832 art I § 14; 1869 art I § 28.

JUDICIAL DECISIONS

1. Construction and application.
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13. Taxpayer action.
14. Abatement of nuisances.
15. Elections.
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1. Construction and application.

Where delays in a divorce case were caused by a former wife's illness and car accident, as well as the hospitalization of one of the husband's attorneys, the delay was necessary under Miss. Const. Art. 3, § 24; moreover, the husband had no right to a speedy trial. Stuart v. Stuart, 956 So. 2d 295 (Miss. Ct. App. 2006).

The Remedy Clause, Miss. Const. Art. 3, § 24, does not conflict with sovereign immunity, does not require exceptions to sovereign immunity, and does not grant an absolute guarantee of a trial; thus, no violation of the Remedy Clause occurred when plaintiff's action against the Mississippi Department of Corrections and a prison official for the wrongful death of an inmate was dismissed based on the immunity granted in Miss. Code Ann. § 11-46-9(1)(m). Carter v. Miss. Dep't of Corr., 860 So. 2d 1187 (Miss. 2003), writ of certiorari denied by 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399, 2004 U.S. LEXIS 2392, 72 U.S.L.W. 3614 (2004).

Mississippi Constitution Article III, § 24 and § 25 permit a party to proceed pro se. Thus, a husband and wife were permitted to proceed pro se in a divorce action. Bullard v. Morris, 547 So. 2d 789 (Miss. 1989).

Sections 24 and 25 of the Mississippi Constitution, together with Code 1942, § 2944, constitute a separate and distinct classification of legal authority vested in citizens and taxpayers for the apparent purpose of preventing and correcting improbity in office by duly elected public officials. Saxon v. Harvey, 223 So. 2d 620 (Miss. 1969).

Not one party, but all parties may claim the benefit of this provision. Gordin v. State, 159 So. 2d 278 (Miss. 1964).

This provision does not preclude necessary delay. Gordin v. State, 159 So. 2d 278 (Miss. 1964).

This section requiring that "all courts shall be open" means that the court shall "afford equal access to all" and a "fair hearing" conforming to the principles of due process of law. Miles v. Board of Supvrs., 33 So. 2d 810 (Miss. 1948).

Provision that every person shall for an injury, etc., have remedy by due course of law refers to legal injury, and affords judicial remedy for unlawful violation of the named rights. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

2. Ecclesiastical controversies.

This provision of Constitution and Fourteenth Amendment to the Constitution of United States do not require that courts shall be open to hear ecclesiastical controversies even though reputation of litigant may be affected by failure of court to set aside action of ecclesiastical body. Trapani v. State ex rel. Dist. Att'y Maples, 44 So. 2d 52 (Miss. 1950).

3. Right to remedy.

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art. 3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064 (Miss. 2009).

Former employer that had consistently and arrogantly denied a former employee's right to an accounting of earnings allegedly in the employer's possession was not denied due process or its rights to a remedy when the chancery court ordered an equitable accounting without holding a hearing. Univ. Nursing Assocs., PLLC v. Phillips, 842 So. 2d 1270 (Miss. 2003).

Section 11-46-9(1)(d) does not violate either the fourteenth amendment of the U.S. Constitution or the Remedy Clause of the Mississippi Constitution, Article 3, Section 24, which guarantees that individuals shall have access to courts to redress their injuries. Jones v. Mississippi DOT, 744 So. 2d 256 (Miss. 1999).

A member of a labor union may resort to the courts for the protection of his rights as such member. Lowery v. International Bhd. of Boilermakers , Iron Ship Bldrs. & Helper, 241 Miss. 458, 130 So. 2d 831 (1961).

Action of Governor calling out national guard and what members of militia may do in pursuance of such order, was subject to judicial review at suit or other appropriate legal challenge of any citizen who can show he has been unlawfully affected in his private personal or private property rights. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Mandamus, prohibition, or injunction cannot direct or restrain Governor in the exercise of his power, but any Act which may injure a citizen in his legal rights under the law is subject to redress in the courts. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Breach of legal duty owed by one person to another gives rise to cause of action where damages result therefrom. Stokes v. Newell, 174 Miss. 629, 165 So. 542 (1936).

4. Right to maintain suit without prepayment of costs.

This section of the constitution does not make applicable statute permitting a person to commence suit upon a poverty affidavit without prepayment of, or security for, cost through the setting down of the mandate of the supreme court. Life & Cas. Ins. Co. v. Walters, 190 Miss. 761, 200 So. 732 (1941).

All persons satisfying court of inability to secure costs are entitled to maintain suit, though not able to give bond or deposit money. Meeks v. Meeks, 156 Miss. 638, 126 So. 189 (1930).

5. Notice rights.

"Due course of law" requires actual notice to known resident defendants. Brown v. Board of Levee Comm'rs, 50 Miss. 468 (1874).

6. Right of appeal.

Order enjoining grand jury's investigation of district attorney's alleged receipt of improper payments was appealable by state. State v. Pacific, 705 So. 2d 1308 (Miss. 1997).

The due process clause of the Mississippi Constitution required that a plaintiff's appeal, which had been dismissed for failure to file a timely notice of appeal, be reinstated, since (1) 3 jury verdict forms which did not contain the word "judgment" did not constitute final judgments and therefore were not appealable, (2) the plaintiff was never notified of the existence of those forms, they were not in the court file, were not entered on the docket, and were presented to the judge ex parte, and (3) the plaintiff filed her notice of appeal within 30 days of the disposition of the post-trial motions and timely perfected her appeal to the Supreme Court. Roberts v. Grafe Auto Co., 653 So. 2d 250 (Miss. 1994), opinion after reinstatement of appeal, 701 So. 2d 1093 (Miss. 1997), reh'g denied, 702 So. 2d 133 (Miss. 1997).

The legislature cannot discriminate against a class of persons as to incidents of an appeal from the judgment of an inferior court. Chicago, St. L. & N.O.R. Co. v. Moss, 60 Miss. 641 (1882).

The legislature cannot take away the right to an appeal after it has been exercised. Commercial Bank v. Chambers, 16 Miss. (8 S. & M.) 9 (1847).

7. Form of action.

Form of action for breach of legal duty owed by one person to another giving rise to cause of action where damages result is called a "tort." Stokes v. Newell, 174 Miss. 629, 165 So. 542 (1936).

8. Validity of statutes.

Sovereign immunity protection granted under Miss. Code Ann. § 11-46-7 to a doctor of a state hospital in a medical malpractice action brought by a patient did not constitute a violation of the remedy clause. Gilchrist v. Veach, 807 So. 2d 485 (Miss. Ct. App. 2002).

Sections 11-46-1 through 11-46-23 do not violate the constitutional requirements that courts be open and that a remedy be available for every injury since the remedy clause is not an absolute guarantee of trial and it is the legislature's decision whether to address restrictions upon actions against government entities. Quinn v. Mississippi State Univ., 720 So. 2d 843 (Miss. 1998).

The Mississippi Legislature's post-Pruett legislative enactments on sovereign immunity (§§ 11-46-1 et seq.) do not violate the remedy clause of the Mississippi Constitution. Robinson v. Stewart, 655 So. 2d 866 (Miss. 1995).

Section 11-46-6 [repealed] is not unconstitutional by virtue of conflict with "remedy clause" of § 24 of Article 3 of state constitution; proper forum to address complaints regarding immunity of sovereign is the legislature, and inasmuch as state constitution places no limit on legislature's ability to enact legislation, state is free from liability unless it carves an exception in the form of tort claims acts, and legislature has carved no such exception for type of suit brought in present case, where survivors of a girl who drowned in Pearl River when outboard motorboat in which she was riding struck a submerged object and went over dam and capsized, and where Water District had installed cable and warning signs such cable and signs were not maintained and present on day in question. Grimes v. Pearl River Valley Water Supply Dist., 930 F.2d 441 (5th Cir. 1991).

The exemption of school districts from mandatory worker's compensation coverage has rational basis, and does not impinge upon the equal protection rights of injured school district employees. Adams v. Petal Mun. Separate Sch. Sys., 487 So. 2d 1329 (Miss. 1986).

A statute giving school boards the power to reemploy a principal without the recommendation of the superintendent does not deny the superintendent due process of law where the statute affords him ample opportunity to present evidence in support of his decision. Lamar County Sch. Bd. v. Saul, 359 So. 2d 350 (Miss. 1978).

The Workmen's Compensation Law does not violate constitutional provision providing that all courts shall be open and that every person, for an injury done him in his lands, goods, person or reputation, shall have the remedy by due process of law, and that right and justice shall be administered without sale, denial or delay. Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).

A statute making the jurisdiction of a justice of the peace concurrent with the circuit court of the county over all crimes occurring in their several districts of the character of misdemeanor and providing that if there should not be a justice of the peace in the district in which any crime was committed qualified to try the accused, any justice of the peace of the county should have jurisdiction thereof, is valid. Farrar v. State, 191 Miss. 1, 2 So. 2d 146 (1941).

Law requiring banks to pay interest on tax collections held not in violation of constitutional provisions relative to due process. Bank of Indianola v. Miller, 147 Miss. 695, 112 So. 877 (1927), error dismissed, 276 U.S. 605, 48 S. Ct. 337, 72 L. Ed. 727 (1928).

Chapter 115, Acts of 1908 provides that the possession of certain appliances shall be presumptive evidence of violation of law prohibiting sale of intoxicating liquors and is constitutional. State v. Kirby, 96 Miss. 629, 51 So. 811 (1910).

9. Limitation of actions.

It is not unconstitutional to allow wrongful death plaintiffs a better statute of limitations than that applied to personal injury plaintiffs under § 15-1-41. Fluor Corp. v. Cook, 551 So. 2d 897 (Miss. 1989).

The ten-year limitation contained in § 15-1-41 does not violate either Article 3, § 24 or Article 4, § 87 of the Mississippi Constitution. Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981).

A one-year statute of limitations barring actions for the recovery of land does not violate the section. Cameron v. Louisville, N.O. & T. Ry. Co., 69 Miss. 78, 10 So. 554 (1891).

10. Trial practice and procedure.

Counsels' performance in failing to investigate and present mitigation evidence was not deficient where the prisoner blocked his counsels' efforts and elected to forego presenting mitigation evidence. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

There is entire absence of any undue restrictions placed by trial judge upon acts of counsel in trial of case where counsel was directed to refrain from delay and to get on with trial and there was delay and docket of court was crowded, and there was no prejudicial impropriety in judge's comment upon excessive consumption of time, when counsel was not unduly restricted or his knowledge challenged or his motives impugned. Vail v. City of Jackson, 206 Miss. 299, 40 So. 2d 151 (1949).

Trial court is not in error in refusing to grant delays and continuances in civil action to party who testifies that he has made no attempt whatsoever to gain any information which was made basis for request for delays and who has had approximately two months in which to obtain information which he desired to prepare for trial, during which period no effort was made to obtain information readily available. Vail v. City of Jackson, 206 Miss. 299, 40 So. 2d 151 (1949).

11. Powers of local government.

City's use of financial costs as criteria for location of water lines in annexed area was rational and did not violate homeowner's state equal protection rights. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995).

Since a municipality is a creature of the Legislature, it may, within the limitations of § 17 and this section of the State Constitution, impart to it some of its sovereignty by statute. Bishop v. City of Meridian, 223 Miss. 703, 79 So. 2d 221 (1955), error overruled, 223 Miss. 713, 79 So. 2d 815 (1955).

Authority given a municipality to close or vacate a street is judicial in character and does not violate this section. Polk v. Hattiesburg, 109 Miss. 872, 69 So. 675 (1915), sugg. error overruled, 110 Miss. 80, 69 So. 1005 (1915); Covington County v. Watts, 120 Miss. 428, 82 So. 309 (1919).

12. Damage to property.

Where plaintiff residents and land owners sued defendant energy and chemical companies alleging the companies' emitted greenhouse gasses contributed to global warming, resulting in rising sea levels and Hurricane Katrina's ferocity, which combined to destroy plaintiff's property and public property, because the complaint relied on scientific reports, alleging a chain of causation between the companies' substantial emissions and the injuries, the public and private nuisance, trespass, and negligence claims satisfied the traceability requirement for standing under U.S. Const. Art. III, and thus also satisfied standing under Miss. Const. Art. III, § 24, because Mississippi's Constitution did not limit the judicial power to cases or controversies and Mississippi's courts had been more permissive than federal courts in granting standing to parties. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), vacated by 598 F.3d 208, 2010 U.S. App. LEXIS 4253 (5th Cir. Miss. 2010).

A corporation which employed a seismograph crew to explore land was liable to a landowner for damages to his land resulting from the explosion of a charge of dynamite below the landowner's dam, as part of the exploratory process, which injured the dam and caused a pond and a spring to go dry. Bynum v. Mandrel Indus., Inc., 241 So. 2d 629 (Miss. 1970).

Appraisers appointed to determine the amount of the actual cash value of the insured property and of loss may not, consistently with this section, determine whether damage was due to cause insured against. Munn v. National Fire Ins. Co., 237 Miss. 641, 115 So. 2d 54 (1959).

Where a wife brought an action against the husband to recover injuries sustained by wife when the husband negligently drove his car, the contention by the wife that she was entitled to have a remedy by due course of law for this injury to her person was not maintainable on the ground that the act of her husband constituted no legal wrong. Ensminger v. Ensminger, 222 Miss. 799, 77 So. 2d 308 (1955).

State Highway Commission was liable to a property owner for damage to her land, resulting from the use thereof for parking its machinery, during the course of road construction and as an essential part of its work, over the protest of the landowner. State Hwy. Comm'n v. Mason, 192 Miss. 576, 4 So. 2d 345 (1941), error overruled, 192 Miss. 595, 6 So. 2d 468 (1942).

13. Taxpayer action.

A taxpayer was entitled to bring a suit in his own name and against the county supervisor for an accounting and to act as his own attorney. Saxon v. Harvey, 223 So. 2d 620 (Miss. 1969).

14. Abatement of nuisances.

Landowners, joining in equity suit to abate common nuisance and for damages, have right to have their controversy adjudicated in court of competent jurisdiction, and chancery court in which suit was brought has jurisdiction to proceed, after settlement of suit on abatement of nuisance issue, to full and complete determination of all remaining issues, even though they may cover only legal rights and require granting of none but legal remedies. McClendon v. Mississippi State Hwy. Comm'n, 205 Miss. 71, 38 So. 2d 325 (1949).

15. Elections.

A hearing before a board of supervisors to determine whether a petition for an election to exclude wine and beer from a county contains the names of a sufficient number of qualified electors is a judicial proceeding from which interested parties and their attorneys may not be excluded and from whom relevant facts may not be withheld. Miles v. Board of Supvrs., 33 So. 2d 810 (Miss. 1948).

An order by the board of supervisors adjudicating the sufficiency of the petition and ordering an election, after a secret session from which interested parties and their attorneys were excluded, and a final judgment of the board excluding wine and beer from the county, pursuant to such election, are without authority of law and a denial of due process. Miles v. Board of Supvrs., 33 So. 2d 810 (Miss. 1948).

16. Fraternal societies.

Positions in fraternal societies, social or religious organizations, are valuable rights pertaining to the liberty of the citizen, and one's reputation is affected if he is expelled from such an organization, or deprived of his rights without an opportunity to be heard. Cherry v. Bivens, 185 Miss. 329, 187 So. 525 (1939).

RESEARCH REFERENCES

ALR. Liability for prenatal injuries. 40 A.L.R.3d 1222.

Who is "public figure" in the light of Gertz v. Robert Welch Inc. (1974) 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997. 75 A.L.R.3d 616.

Exterminator's tort liability for personal injury or death directly resulting from operations. 29 A.L.R.4th 987.

Proof of injury to reputation as prerequisite to recovery of damages in defamation action-post-Gertz cases. 36 A.L.R.4th 807.

Criticism or disparagement of physician's or dentist's character, competence, or conduct as defamation. 38 A.L.R.4th 836.

Defamation: privilege accorded state or local governmental administrative records relating to private individual member of public. 40 A.L.R.4th 318.

Right to compensation for real property damaged by law enforcement personnel in course of apprehending suspect. 23 A.L.R.5th 834.

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 366, 367, 400.

49 Am. Jur. Proof of Facts 2d 649, General Reputation of Person in Community.

5 Am. Jur. Proof of Facts 3d, Defama-

tion by Employer, §§ 1 et seq.

6 Am. Jur. Proof of Facts 3d, Invasion of Privacy by False Light Publicity, §§ 1 et seq.

CJS. C.J.S. Constitutional Law §§ 1428 to 1432.

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Collins, Reliance on State Constitutions: Some Random Thoughts. 54 Miss L. J. 371, Sept.-Dec., 1984.

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Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

§ 25. Access to courts

No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both.

SOURCES: 1817 art I § 29; 1832 art I § 29; 1869 art I § 30.

JUDICIAL DECISIONS

1. In general.
2. Pro se representation.
3. Representation by counsel.

1. In general.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. §§ 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (2010).

In a custody dispute, the trial court erred in enjoining the teenage daughter's counsel from discussing the final outcome of the trial with her, because the order effectively prevented the daughter from further prosecuting the civil action brought by her through her counsel in violation of Miss. Const. Art. 3, § 25, and denied her access to legal advice from the attorney who represented her throughout the trial. If the chancellor believed that the daughter was not properly before the court as a party, or felt that it was inappropriate for the daughter to continue as a party, she could have granted the motion to dismiss or appointed a guardian ad litem. D.A.P. v. C.A.P.R. (In re E. C. P.), 918 So. 2d 809 (Miss. Ct. App. 2005).

Citizens may challenge governmental actions contrary to law where the action would otherwise escape challenge. Fordice v. Thomas, 649 So. 2d 835 (Miss. 1995), but see USPCI of Miss., Inc. v. State ex rel. McGowan, 688 So. 2d 783 (Miss. 1997).

Sections 24 and 25 of the Mississippi Constitution, together with Code 1942, § 2944, constitute a separate and distinct classification of legal authority vested in citizens and taxpayers for the apparent purpose of preventing and correcting improbity in office by duly elected public officials. Saxon v. Harvey, 223 So. 2d 620 (Miss. 1969).

The Grand Lodge cannot arrest or forfeit the charter of a subordinate lodge and by such act acquire the property belonging to such lodge. Vicksburg Lodge No. 26 v. Grand Lodge of Free & Accepted Masons, 116 Miss. 214, 76 So. 572 (1917), cert. denied, 246 U.S. 668, 38 S. Ct. 336, 62 L. Ed. 930 (1918).

A litigant cannot be excluded from the hearing of the testimony of other witnesses in the case because he is himself to testify; but may be made to testify, if at all, before the other witnesses are examined. French v. Sale, 63 Miss. 386 (1885).

The legislature cannot discriminate against classes of persons as litigants. Chicago, St. L. & N.O.R. Co. v. Moss, 60 Miss. 641 (1882).

2. Pro se representation.

Trial court abused its discretion in dismissing an action under Miss. R. Civ. P. 41(b) for failure to obtain counsel because there was no legal basis to support the dismissal, as there was no requirement that a party be represented by an attorney. Holly v. Harrah's Tunica Corp., 962 So. 2d 136 (Miss. Ct. App. 2007).

Trial court did not err in allowing defendant to proceed pro se on a kidnapping charge, and defendant could not allege ineffective assistance of counsel; record contained nothing to suggest that the trial court should have questioned defendant's claims to have a college degree and to have taken correspondence courses in law from Harvard while defendant was in prison. Brooks v. State, 835 So. 2d 958 (Miss. Ct. App. Jan. 28, 2003).

The state constitutional right to self-representation loses effect upon a suit's removal to federal court; thus, the plaintiff was not denied his constitutional rights when he was barred by federal court order from prosecuting any case in federal court without representation. Prewitt v. City of Greenville, 161 F.3d 296 (5th Cir. 1998).

Mississippi Constitution Article III, § 24 and § 25 permit a party to proceed pro se. Thus, a husband and wife were permitted to proceed pro se in a divorce action. Bullard v. Morris, 547 So. 2d 789 (Miss. 1989).

A taxpayer was entitled to bring a suit in his own name and against the county supervisor for an accounting and to act as his own attorney. Saxon v. Harvey, 223 So. 2d 620 (Miss. 1969).

3. Representation by counsel.

In a medical-malpractice action, although the patient was constitutionally entitled to participate in closing argument, the untimeliness and method by which she sought to participate was impermissible. During closing argument, rebuttal was strictly limited to providing a response to issues addressed in the closing argument; however, when announcing the patient's intention to personally participate, her attorney declared that she would "repeat" her testimony, not rebut arguments made by the doctor. Dunn v. Yager, 58 So. 3d 1171 (Miss. 2011).

In a burglary trial, defendant did not establish ineffective assistance of counsel because there was no evidence to show that defendant was deprived of a fair trial, and testimony elicited about the use of a stolen car was clearly within the ambit of trial strategy; further, counsel's failure to pursue a post-trial hearing did not amount to ineffective assistance of counsel because there was no new and material evidence. Cheeks v. State, 843 So. 2d 87 (Miss. Ct. App. 2003).

Physician did not have right to counsel under Mississippi Constitution at hearing before hospital's judicial review committee to revoke his surgical privileges; tribunal which revoked physician's privileges was not tribunal of the state. Wong v. Stripling, 700 So. 2d 296 (Miss. 1997).

A photographic lineup is not a "critical stage" of criminal proceedings and, therefore, an accused enjoys no right to counsel in connection with a photographic lineup. Magee v. State, 542 So. 2d 228 (Miss. 1989).

The violation of a defendant's right to counsel at his lineup was harmless constitutional error beyond a reasonable doubt where the witness did not identify the defendant at the lineup and the witness' in-court identification testimony was not impermissibly tainted by anything that occurred at the lineup. Magee v. State, 542 So. 2d 228 (Miss. 1989).

South Carolina trial judge's order that defendant in homicide trial not consult with his attorney during 15-minute recess at conclusion of defendant's direct testimony does not violate defendant's right to counsel under federal constitution's Sixth Amendment. Perry v. Leeke, 488 U.S. 272, 109 S. Ct. 594, 102 L. Ed. 2d 624 (1989).

An officer conducting a parole revocation proceeding is not "a tribunal" but rather is performing an administrative act, and parolees are not entitled to counsel in all such hearings. Mississippi State Probation & Parole Bd. v. Howell, 330 So. 2d 565 (Miss. 1976), stay denied, 425 U.S. 988, 96 S. Ct. 2199, 48 L. Ed. 2d 814 (1976), cert. dismissed, 426 U.S. 955, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976).

Limitation of fee of attorney appearing before board of review did not deprive claimant of constitutional right where neither claimant nor his attorney appeared at the hearing of the appeal. Mississippi Emp. Sec. Comm'n v. Wilks, 247 Miss. 737, 156 So. 2d 583 (1963), motion granted, 251 Miss. 744, 171 So. 2d 157 (1965).

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Am Jur. 30 Am. Jur. Trials 607, Defending against Claim of Ineffective Assistance of Counsel.

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§ 26. Rights of accused; state grand jury proceedings

In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial. Notwithstanding any other provisions of this Constitution, the Legislature may enact laws establishing a state grand jury with the authority to return indictments regardless of the county where the crime was committed. The subject matter jurisdiction of a state grand jury is limited to criminal violations of the Mississippi Uniform Controlled Substances Law or any other crime involving narcotics, dangerous drugs or controlled substances, or any crime arising out of or in connection with a violation of the Mississippi Uniform Controlled Substances Law or a crime involving narcotics, dangerous drugs or controlled substances if the crime occurs within more than one (1) circuit court district of the state or transpires or has significance in more than one (1) circuit court district of the state. The venue for the trial of indictments returned by a state grand jury shall be as prescribed by general law.

SOURCES: 1817 art I § 10; 1832 art I § 7; Laws, 1994, ch 668, eff Dec 9, 1994.

Editor's Note — The 1994 amendment of Section 26, Mississippi Constitution of 1890, proposed by Laws, 1994, ch. 668 (House Concurrent Resolution No. 79), was approved by the House of Representatives on March 29, 1994, and by the Senate on March 30, 1994. It was ratified by the electorate on November 8, 1994, and inserted as part of the Constitution by proclamation of the Secretary of State on December 9, 1994.

Laws, 1994, ch. 668, further provides:

"BE IT FURTHER RESOLVED, That the explanatory statement of the substance of this proposed constitutional amendment for the ballot shall read as follows: 'This proposed constitutional amendment authorizes the Legislature to enact laws establishing a state grand jury and authorizes such grand jury to return indictments in criminal cases regardless of the county where the crime was committed. The jurisdiction of a state grand jury is limited to drug offenses which occur in more than one circuit court district. Venue for the trial of indictments returned by a state grand jury shall be as prescribed by general law.

"BE IT FURTHER RESOLVED, That House Concurrent Resolution No. 79, 1994 Regular Session, supersedes House Concurrent Resolution No. 21, 1993 Regular Session (Chapter 624, Laws of 1993).

"BE IT FURTHER RESOLVED, That the Secretary of State shall give public notice of an election in the manner and for the time provided by Section 273 of the Constitution, for the purpose of submitting the amendment to Section 26, Mississippi Constitution of 1890, as proposed by House Concurrent Resolution No. 79, 1994 Regular Session, in substitution and in lieu of the amendment to Section 26, Mississippi Constitution of 1890, as proposed by House Concurrent Resolution No. 21, 1993 Regular Session, and for the purpose of submitting any other proposed amendments to the Constitution to the qualified electors of this state for ratification or rejection, such election to be conducted and held on the first Tuesday after the first Monday of November 1994, in the manner provided by law for statewide general elections."

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26. — — Confessions generally, self-incrimination.
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30. — — Videotapes, self-incrimination.
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33. — — Comment on refusal to testify generally, self-incrimination.
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35. — — Comment of counsel at sentencing phase of capital prosecution on refusal to testify, self-incrimination.
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67. — — Expert witnesses, fair trial.
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104. — — Continuances, compulsory process.
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162. — — Post-conviction remedies, ineffectiveness of counsel.
163. — Victim statements, ineffectiveness of counsel.

1. In general.

Inmate's voluntary act of pleading guilty to the crime of manslaughter foreclosed an appellate court from considering issues relating to the voluntariness of a confession or the right to a speedy trial in a motion seeking postconviction relief. Young v. State, 877 So. 2d 552 (Miss. Ct. App. 2004).

In a divorce action, a former husband's constitutional rights were not violated by a complaint that alleged cruel and inhumane treatment because he was not charged with an infamous crime. Richardson v. Richardson, 856 So. 2d 426 (Miss. Ct. App. 2003), writ of certiorari denied by 2003 Miss. LEXIS 638 (Miss. Nov. 6, 2003).

Courts should jealously guard constitutional right of individuals, including suspected or actual criminals, but should not strain themselves into hypercritical condemnation of reasonable and time-tried police methods in discharge of their duties, by police officers, seeking to protect peace and safety of law-abiding people against anti-social characters. Miller v. State, 207 Miss. 156, 41 So. 2d 375 (1949), appeal dismissed, cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

2. Public trial.

Defendant's conviction for fondling was appropriate in regard to the closure of the courtroom to the public during the victim's testimony. Defendant and his counsel remained in the courtroom during the testimony and defendant was permitted to face his accuser during her testimony; the limitation was no broader than necessary to protect the victim during her testimony. Richardson v. State, 990 So. 2d 247 (Miss. Ct. App. 2008).

Defendant's convictions for sexual battery and fondling of a child were appropriate because his right to a public trial under Miss. Const. Art. 3, § 26 was not violated; the requirement of the victim to testify to potentially embarrassing or emotionally disturbing facts of a sexual nature clearly fell within the category of instances in which public exclusion is appropriate. Tillman v. State, 947 So. 2d 993 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 81 (Miss. 2007).

Court did not violate defendants' rights to a public trial where defendants escaped from the maximum security unit at Parchman, and both defendants were dangerous, violent, and habitual offenders. As a result of their past criminal convictions, their previous escapes, and the evidence of their willingness to do anything to remain free, the trial court was correct to find a clear and present overriding public interest in safety for the public that justified its consideration of whether to conduct the trial inside the penitentiary. Harper v. State, 887 So. 2d 817 (Miss. Ct. App. 2004).

A defendant's Sixth Amendment right to a public trial was not violated by the exclusion of the public from his rape trial during the victim's testimony where the trial judge held an evidentiary hearing and made findings sufficient to exclude members of the public during the victim's testimony, and where the court officials, the defendant, legal counsel and the jury were never excluded from the courtroom. Lee v. State, 529 So. 2d 181 (Miss. 1988).

It is irrelevant that Article 3 § 26 enumerates crimes for which closed trials may be conducted, and that murder is not one of them, where closure order did not propose to close trial. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

Criminal processes should be open to public scrutiny, and exceptions can be made only for good cause; however, right to public trial belongs to accused, and no one else. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

Guarantees of open public proceedings in criminal trials embodied in First Amendment cover proceedings for voir dire examination of potential jurors and closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs value of openness. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

A defendant's constitutional rights were not violated when the public was excluded from a hearing on a petition to revoke his suspended sentence and probation; the hearing was not a part of a criminal prosecution and thus the full panoply of rights due a defendant in a criminal prosecution under the requirements of the United States and Mississippi Constitutions did not apply. Williams v. State, 409 So. 2d 1331 (Miss. 1982).

Defendant was not denied his right to a public trial by the trial court's order excluding a spectator who resembled defendant from the courtroom, where the spectator possibly was defendant's brother and the purpose of the exclusionary order was to preclude confusing state's witnesses in making an in-court identification of defendant who was seated with other spectators. Young v. State, 352 So. 2d 815 (Miss. 1977).

Defendant's right to a public trial was not denied by a jury selection procedure under which challenges to jurors were discussed and made in trial judge's chambers, and district attorney was not required to announce in open court the name of each juror challenged by the state. Peters v. State, 314 So. 2d 724 (Miss. 1975), cert. denied, 423 U.S. 1019, 96 S. Ct. 457, 46 L. Ed. 2d 392 (1975).

In an armed robbery prosecution, the defendant was not denied his constitutional right to a public trial by virtue of the fact that the courthouse doors were locked for a period of 30 minutes while the court heard motions of the defendant to suppress alleged illegally obtained evidence, and to quash alleged illegally obtained declarations, in the absence of any other restriction, limitation, or exclusion of the public during the trial. Norwood v. State, 258 So. 2d 756 (Miss. 1972).

In a prosecution for unlawful possession of intoxicating liquors where a motion for directed verdict was heard in the chambers and the accused in no way objected to this procedure and in fact actively participated by initiating his motion in the chambers, the accused waived his right to complain of the private hearing and there was no error although the better practice would be for the trial judge to retire the jury and for him to remain in the courtroom to hear and pass upon the motion inasmuch as the public has a substantial interest in the public nature of a trial. Brown v. State, 222 Miss. 863, 77 So. 2d 694 (1955).

In order to comply with the constitutional mandate of a public trial, peremptory challenges should be exercised at the bar, in open court. Hollis v. State, 221 Miss. 677, 74 So. 2d 747 (1954).

Concentration of those spectators of the defendant's race in the balcony when requested to remain off the crowded main floor did not deny any constitutional right of the defendant. Murray v. State, 202 Miss. 849, 33 So. 2d 291 (1948), stay granted, 333 U.S. 859, 68 S. Ct. 737, 92 L. Ed. 1139 (1948), vacated, 333 U.S. 879, 68 S. Ct. 914, 92 L. Ed. 1155 (1948), motion granted, 35 So. 2d 323 (Miss. 1948).

Court may lawfully exclude general public from courtroom in exercise of its discretion in prosecution for attempt to rape. Sallie v. State, 155 Miss. 547, 124 So. 650 (1929).

This section does not permit the exclusion from the courtroom of the public in murder trials. Carter v. State, 99 Miss. 435, 54 So. 734 (1911).

3. Venue of trial.

Where a child testified that defendant sodomized him while they were in a chicken house in Lena, Mississippi, which the boy believed was in Scott County, as Lena was in fact in Leake County, and the jury was never instructed that it had to find beyond a reasonable doubt that the crime had occurred in Scott County—an essential element of the offense—defendant's conviction of fondling the child was reversed. Rogers v. State, 95 So. 3d 623 (Miss. Aug. 16, 2012).

Trial court abused its discretion in not allowing capital murder defendant to exercise his constitutional right under Article 3, § 26 of the Mississippi Constitution to be tried in the county where the offense occurred. Once defendant requested that the trial court return venue to the county where the offense was committed, the trial court was under an obligation to either grant his request, or at the very least, to offer clear justification for the decision to deny the request and change venue to another county. Maye v. State, 49 So. 3d 1140 (Miss. Ct. App. 2009), vacated by, remanded by 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

Defendant's convictions for attempting a burglary, arson, and a murder, were proper where venue was proper in the county where defendant attempted to burn the structure; venue was proper pursuant to U.S. Const. Art. III, § 2 cl. 3, U.S. Const. Amend. VI, and Miss. Const. Art. 3, § 26 because there was nothing conceptually outrageous or bizarre in bringing charges in the county for an attempt to burn a building in that county. Holbrook v. State, 877 So. 2d 525 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 865 (Miss. 2004), writ of certiorari denied by 543 U.S. 1166, 125 S. Ct. 1340, 161 L. Ed. 2d 141, 2005 U.S. LEXIS 1746, 73 U.S.L.W. 3496 (2005).

In a capital murder case, the trial court did not err in denying defendant's request for a change of venue as no evidence was offered of any threatened violence toward defendant, nor was there an inordinate amount of media coverage; the testimony of the State's witnesses demonstrated that defendant could receive a fair trial, defendant offered no additional evidence to rebut the State's witnesses, and defendant present no evidence that he could not or did not receive a fair trial from the jurors who heard his case. Howell v. State, 860 So. 2d 704 (Miss. 2003), writ of certiorari dismissed by 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371, 18 Fla. L. Weekly Fed. S 105 (2005).

In a prosecution for conspiracy to possess morphine and to commit grand larceny, possession of morphine, and aggravated assault, where testimony showed that defendants conspired to steal morphine in one county, and that their assault victim was found unconscious and injured in a second county, the evidence was sufficient to establish jurisdiction in the second county. Stubbs v. State, 845 So. 2d 656 (Miss. 2003).

Publicity associating a defendant with 3 robberies and 3 rapes was insufficient to entitle him to a change of venue for his trial for rape where the publicity consisted of 4 newspaper articles, 3 of which appeared on the front page, and 6 months of silence intervened between the publicity and the trial. McKinney v. State, 521 So. 2d 898 (Miss. 1988), cert. denied, 494 U.S. 1017, 110 S. Ct. 1321, 108 L. Ed. 2d 497 (1990).

A defendant waived his right to a change of venue where he filed a motion for change of venue with 2 supporting affidavits prior to selection of the jury but did not call the motion to the trial court's attention and did not request a hearing on the motion until after completion of voir dire, after selection of the jury, and after both sides had announced their readiness for trial. Wash v. State, 521 So. 2d 890 (Miss. 1988), overruled on other grounds, Wharton v. State, 734 So. 2d 985 (Miss. 1998).

Defendant has both federal and state constitutional right to be tried in county where offense was committed. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

Defendant's constitutional right to have his criminal trial conducted in the county where the offense was committed, which was waived during his first trial, may be reinstated after appellate reversal and, where, because of a 6 year time lapse between the date of the killing and defendant's upcoming retrial, defendant believed the adverse publicity surrounding his original trial had subsided, Supreme Court was required to grant defendant's motion for reinstatement of that right. State v. Caldwell, 492 So. 2d 575 (Miss. 1986).

When coverage by local media, including television, radio and newspaper, of capital murder case, which in effect tries and finds defendant guilty not only of capital murder as charged, but also of capital murder in another, uncharged case, is so extensive that at proceedings on voir dire of prospective jurors some 10 ½ months after defendant's arrest, everyone of prospective jurors has heard of case, there is presumption that defendant cannot obtain fair and impartial jury and venue of case should be transferred to county substantially outside area of coverage of local media. Fisher v. State, 481 So. 2d 203 (Miss. 1985).

Refusal to grant capital murder defendant's request for change of venue impermissibly deprives defendant of right to impartial jury where defendant has made prima facie showing of community prejudice by submitting affidavit signed by 2 witnesses with knowledge; furthermore, testimony of 15 defense witnesses who state specific reasons why defendant cannot receive fair trial in county in which offense has been committed raises irrebutable presumption of prejudice. Johnson v. State, 476 So. 2d 1195 (Miss. 1985).

Under Article 3, § 26, a defendant has the right to be tried "by an impartial jury of the county where the offense was committed." Fairchild v. State, 459 So. 2d 793 (Miss. 1984).

A convict charged with escaping and breaking prison must be indicted and tried in the county where the crime is alleged to have been committed, unless the venue is changed as provided by law, and if the alleged offense occurred in a county other than the one in which the state penitentiary is located an indictment returned in the county of the penitentiary's situs must be quashed. Everitt v. Jack, 192 So. 2d 698 (Miss. 1966).

It is not the intention of the framers of the constitution that one who commits a crime partly in one county and partly in another should not be amenable to the jurisdiction of the court in either county and should therefore be exempt from prosecution. Aldridge v. State, 232 Miss. 368, 99 So. 2d 456 (1958).

Where the promise of marriage occurred in Forrest County and the act of intercourse occurred in Jones County, since both of these acts constituted essential elements of the offense of seduction, venue could be properly laid in Forrest County without contravening this section. Aldridge v. State, 232 Miss. 368, 99 So. 2d 456 (1958).

Venue of crime was established as being in First Judicial District of Jones County, Mississippi, by evidence showing that decedent was last seen alive by accused in Jones County, near place where his body was found in same county, that he had received a blow on head breaking skull, small fragments of which were lying on ground. Poore v. State, 205 Miss. 528, 37 So. 2d 3 (1948), suggestion of error overruled, 205 Miss. 554, 37 So. 2d 357 (1948), cert. denied, 336 U.S. 922, 69 S. Ct. 656, 93 L. Ed. 1084 (1949), reh'g denied, 336 U.S. 947, 69 S. Ct. 810, 93 L. Ed. 1104 (1949), motion granted, 40 So. 2d 172 (Miss. 1949).

Venue of crime may be proved by either direct or circumstantial evidence. Poore v. State, 205 Miss. 528, 37 So. 2d 3 (1948), suggestion of error overruled, 205 Miss. 554, 37 So. 2d 357 (1948), cert. denied, 336 U.S. 922, 69 S. Ct. 656, 93 L. Ed. 1084 (1949), reh'g denied, 336 U.S. 947, 69 S. Ct. 810, 93 L. Ed. 1104 (1949), motion granted, 40 So. 2d 172 (Miss. 1949).

Owner of automobile, loaning his automobile to killer and his brother in county of owner's residence, adjoining county in which killing took place, was not subject to prosecution as an accessory after the fact in county in which killing occurred because killer and his brother who drove the automobile, thereafter drove through such county on the way to the killer's home, where, although defendant was aware of the crime, he had no connection therewith, and killer's brother, in driving the automobile, was not the agent of the owner. Washington v. State, 196 Miss. 293, 17 So. 2d 203 (1944).

Where stolen property is carried into another county without the person by whom it was stolen being in any way a party thereto, trial of such person for larceny in such county is a violation of the constitutional provisions requiring prosecution for crime to be conducted in the county where the offense was committed. Woods v. State, 190 Miss. 28, 198 So. 882 (1940).

Where trial court had jurisdiction, its record on trial imported verity, and could not be contradicted by parol in habeas corpus proceeding to show one of jurors was not of county of offense. Lewis v. State, 153 Miss. 759, 121 So. 493 (1929).

4. Self-incrimination — In general.

In a case related to defendant's conviction for gratification of lust, a voluntary statement defendant gave to two police officers was properly admitted, because there were no requirements regarding the form in which the statement had to be memorialized. Jordan v. State, 868 So. 2d 1065 (Miss. Ct. App. 2004).

In defendant's trial for rape, the State presented evidence that defendant had been read his Miranda rights; he did not make any statements until he signed a written waiver of his rights. A deputy stated on the stand that he had made no promises, that he did not threaten defendant, nor did he in any way induce the confession; as such, prior caselaw required the appellate court to affirm the decision. Gray v. State, — So. 2d —, 2003 Miss. App. LEXIS 1267 (Miss. Ct. App. Aug. 26, 2003).

Because defense counsel, at the very least, had notice of the fact that the mental competency examination would take place, since he signed off on the examination order, the trial court did not err in failing to suppress the inmate's confessions. Crawford v. State, 867 So. 2d 196 (Miss. 2003), writ of certiorari denied by 543 U.S. 866, 125 S. Ct. 205, 160 L. Ed. 2d 110, 2004 U.S. LEXIS 6519, 73 U.S.L.W. 3210 (2004).

Where a police witness testified that defendant "stopped talking" after admitting being in the city where a murder occurred, defendant was not entitled to a mistrial based on the alleged inappropriate comment on his right to remain silent under the Fifth Amendment or Miss. Const. Art. 3, § 26; merely stating that defendant stopped talking did not rise to the level of mistrial. Shelton v. State, 853 So. 2d 1171 (Miss. 2003).

A police detective's testimony concerning the fact that the defendant fainted after he was informed of his Miranda rights was not a violation of the defendant's constitutional rights since the defendant did not give a statement and the detective did not comment on his silence; the detective's stating that the defendant fainted was not the same as stating that the defendant refused to testify. Stogner v. State, 627 So. 2d 815 (Miss. 1993).

A witness was properly allowed to invoke his Fifth Amendment rights against self-incrimination at a retrial on the ground that his testimony might result in perjury charges brought against him flowing from his testimony at the first trial. Stringer v. State, 548 So. 2d 125 (Miss. 1989).

It is not necessary that statements made during a custodial interrogation be tape-recorded in order to be admissible at trial. Williams v. State, 522 So. 2d 201 (Miss. 1988), vacated in part, 635 So. 2d 805 (Miss. 1993).

Where the record revealed that all persons who wanted to do business with the defendant were impliedly invited to approach the house in which he was staying along a circular driveway to a point where the defendant met law enforcement officers to ascertain what he could do for them, and where the officers purchased and received from the defendant a bottle of intoxicating liquor but made no search of the person or premises of the defendant, the testimony of the officers was not inadmissible on the ground that the purchase was an illegal search or that their testimony was in effect a method of requiring the defendant to testify against himself. Lyons v. State, 195 So. 2d 91 (Miss. 1967).

While the privilege of refusing to testify, if in doing so his answers would incriminate him, may be waived by witness, it is the duty of the court in proper cases to inform the witness of his privilege, so that the witness may decide for himself whether he will claim the privilege. Hutchins v. State, 212 Miss. 145, 54 So. 2d 210 (1951).

Constitutional privilege against self-incrimination is intended to protect witness and has no proper application when witness is not in danger of actual conviction. State v. Milam, 210 Miss. 13, 48 So. 2d 594 (1950), error overruled 210 Miss. 13, 49 So. 2d 806.

A witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be insured. Wheat v. State, 201 Miss. 890, 30 So. 2d 84 (1947).

Obtaining evidence unlawfully by search or arrest by officer without authority of law is compelling defendant to testify against himself. Fulton v. City of Philadelphia, 168 Miss. 30, 148 So. 346 (1933).

5. — — Validity of statutes, self-incrimination.

The fact that under the statute a prima facie case of false pretenses is made by proof of the fact that a person has given a check for value and at a time when he had no or insufficient funds on deposit to pay the check, did not render the statute invalid on the ground that it compelled a defendant to testify against himself. Ray v. State, 229 So. 2d 579 (Miss. 1969).

6. — — Privilege against self-incrimination.

Defendant never invoked the right to remain silent but repeatedly asked what defendant was doing at the police station; the police asked defendant about where defendant got the credit cards and defendant never indicated in any way that defendant was invoking the right to remain silent, and thus no substantial right was affected, the plain error rule did not protect defendant, and any error was waived. Smith v. State, 984 So. 2d 295 (Miss. Ct. App. 2007).

A trial judge does not have a duty to inform a witness of the privilege against self-incrimination. Moore v. Moore, 558 So. 2d 834 (Miss. 1990).

Trial court committed reversible error by preventing armed robbery defendant, who contended another had committed the crime, from asking questions, in jury's presence, concerning such other person's description and characteristics, of a witness, an accused accessory, who, out of jury's presence, had refused, on self-incrimination grounds, to answer questions concerning the robbery, but had answered questions concerning the description of the other person. Hall v. State, 490 So. 2d 858 (Miss. 1986).

7. — — Immunity, self-incrimination.

Witness in capital murder case was improperly compelled to testify in violation of Fifth Amendment privilege against self-incrimination where witness was under indictment for conspiracy to commit arson at time he was called to stand, and charge of arson was so intertwined with murder case being tried that any testimony given by witness concerning murder could have been used in subsequent trial on arson charges. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

Where a defendant was brought to the courtroom from her home by a deputy sheriff for the purpose of testifying at the preliminary hearing of another, was sworn as a witness for the state and testified and answered to questions of the state's attorney, and she was not advised that the evidence she was giving could be used against her but had previously been advised by her attorney that the state had offered her immunity, the introduction of that testimony at the defendant's subsequent prosecution at which she did not testify, was a violation of her constitutional right not to be compelled to testify against herself. Miller v. State, 250 So. 2d 624 (Miss. 1971).

One who is required by the power of the state to testify to his hurt is immune from prosecution for the thing for which he was required to testify, whether that testimony is used by the state or not. Kellum v. State, 194 So. 2d 492 (Miss. 1967).

When witnesses subpoenaed to testify as to how they voted in a contested election claimed the privilege of not testifying on the ground of self-incrimination, the court had no authority to grant them immunity if they would testify, and was correct in refusing so to advise them. Hubbard v. McKey, 193 So. 2d 129 (Miss. 1966), overruled on other grounds, O'Neal v. Simpson, 350 So. 2d 998 (Miss. 1977).

An accused may waive his constitutional immunity from giving testimony against himself, and does so when he takes the stand and testifies on the merits of the case. Autry v. State, 230 Miss. 421, 92 So. 2d 856 (1957).

In a suit by the state tax collector to collect from defendant statutory fines and penalties for unlawful sales of intoxicating liquors, where the defendants raised the issue that by answering averments to the bill of complaint they would incriminate themselves and where defendants were compelled by the court to answer the bill fully, the defendants were immune from liability for the fines and penalties although the bill of complaint waived answer under oath. Bailey v. Muse, 227 Miss. 51, 85 So. 2d 918 (1956).

Where in a suit by state tax collector to collect from defendants statutory fines and penalties for unlawful sale of intoxicating liquors, the defendants were required to answer allegations in a bill of complaint in chancery and therefore they were required to incriminate themselves, the defendants were immune from assessment of fines and penalties. Bailey v. Muse, 227 Miss. 51, 85 So. 2d 918 (1956).

Where defendants who were charged with assault and battery executed a waiver of immunity of prosecution in the grand jury room and in the presence of the grand jury, the county attorney, and the district attorney, the testimony was involuntarily given and was inadmissible and not usable as a basis of criminal prosecution. State v. Milam, 210 Miss. 13, 48 So. 2d 594 (1950), error overruled 210 Miss. 13, 49 So. 2d 806.

8. — — Nature of proceeding, self-incrimination.

An individual may not be compelled to testify against himself or herself or to offer testimony which might render him or her liable to a criminal prosecution, whether he or she is a witness in a civil, criminal, or quasi-criminal proceeding. Moore v. Moore, 558 So. 2d 834 (Miss. 1990).

The privilege against self incrimination applies to civil as well as criminal actions. Bailey v. Muse, 227 Miss. 51, 85 So. 2d 918 (1956).

The constitutional privilege against self-incrimination applies to proceedings before a grand jury, or coroner's jury, as well as to those before a court. State v. Milam, 210 Miss. 13, 48 So. 2d 594 (1950), error overruled 210 Miss. 13, 49 So. 2d 806.

One compelled to testify before a legislative committee is immune from prosecution for any crime involving facts or acts brought out in his testimony, where such immunity is promised by statute. Wheat v. State, 201 Miss. 890, 30 So. 2d 84 (1947).

9. — — Grand jury proceedings, self-incrimination.

The constitutional right against self-incrimination requires a transactional immunity grant when a witness is granted immunity from prosecution in exchange for the witness' agreement to testify before the grand jury. In order to place an individual in a position where he or she has no right to refuse to testify and may be held in contempt if he or she refuses to testify, the prosecution is required to grant immunity from prosecution for the witness' involvement in the transaction which is the subject of the grand jury investigation and for or on account of any transaction, matter or thing concerning which the witness may testify or produce evidence. Moreover, no testimony or evidence produced by the witness, nor any information directly or indirectly derived from such testimony or evidence, may be used against the witness in any criminal prosecution, except perjury. Only such broad immunity will make the individual as secure as if he or she had remained silent. Wright v. McAdory, 536 So. 2d 897 (Miss. 1988).

Where there was an appeal from a judgment of trial court which quashed an indictment against defendants on the ground that they testified before the grand jury under circumstances indicating that their testimony was not voluntary, the affirmance by the Supreme Court was not a holding that the defendants were immune from prosecution under an indictment by some other grand jury before whom they did not testify. State v. Milam, 210 Miss. 13, 48 So. 2d 594 (1950), error overruled 210 Miss. 13, 49 So. 2d 806.

In prosecution of mother and son for murder of father, testimony of mother taken at coroner's inquest, if mother had been called and used as a witness in like manner with other witnesses at inquest, would not be "voluntary," and hence would not be admissible in prosecution of mother for murder. Church v. State, 179 Miss. 440, 176 So. 162 (1937).

Defendant's testimony before grand jury was such as would tend to incriminate him. Thornton v. State, 143 Miss. 262, 108 So. 709 (1926).

10. — — Civil proceedings generally, self-incrimination.

A father in a child support proceeding would be required to assert his claim of privilege against self-incrimination on a question by question basis with respect to questions regarding his tax returns, and would be required to tender sufficient information to allow the court to make an informed decision concerning the claim of privilege. Harrell v. Duncan, 593 So. 2d 1 (Miss. 1991).

At a hearing on a former wife's petition to hold her former husband in contempt for failure to pay child support, the wife could not invoke her right against self-incrimination to shield herself from questions on cross-examination as to whether she maintained that the husband had an account at a particular bank, where the wife had voluntarily taken the stand on direct examination and unequivocally identified the signature on the bank account as the husband's. A party may not testify as to material facts in proceedings which he or she initiated, and later invoke the privilege against self-incrimination on those same matters. Thus, when the wife voluntarily took the stand and testified to material matters on direct examination, she also waived her right against self-incrimination. Wallace v. Jones, 572 So. 2d 371 (Miss. 1990).

A former husband waived his privilege against self-incrimination when he took the witness stand and testified on the merits of the case in a contempt action brought by his former wife who alleged that he failed to abide by their judgment of divorce; an objection made at the close of trial was much too late to object to testimony which was incriminating. Since the contempt hearing was a quasi-criminal proceeding, the former husband had no right to forbid questioning altogether, but once he was asked anything outside of the innocuous arena-the introductory questions-he should have invoked his privilege on a question by question basis. Moore v. Moore, 558 So. 2d 834 (Miss. 1990).

Privilege against self-incrimination exists in bar disciplinary proceedings, even though no criminal charges are pending against attorney being charged at time, although questions concerning personal history, unrelated to charges in formal complaint, should be answered. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

In a creditor's suit seeking disclosure of certain assets, the chancellor did not commit error in holding that the judgment debtor was entitled to assert his privilege against self-incrimination, under statutes making it a crime to remove property subject to liens out of the state or out of the county without consent or with intent to defraud. Ferguson v. Johnson Implement Co., 222 So. 2d 820 (Miss. 1969).

An individual who in applying to a surety for a performance and payment bond, obligated himself to furnish financial statements to the surety, and who was adjudged liable to the surety on the bond, was estopped from claiming a privilege against self-incrimination in the surety's creditor's suit against the individual, respecting the location of the individual's assets. Ferguson v. Johnson Implement Co., 222 So. 2d 820 (Miss. 1969).

Member of board of supervisors of county district, in suit against him and his surety to recover loss resulting from unauthorized use of construction equipment for benefit of private individuals, could not defeat right to recovery as to the loss, expenses and outlays incurred, on ground that it would tend to incrimination, inasmuch as the member's action was not criminal, even though it might involve moral turpitude or fraud. Shumpert v. Lee County, 197 Miss. 513, 20 So. 2d 82 (1944).

In view of the fact that an illegal voter, when put on the stand and questioned, could at once invoke the privilege under this section against self-incrimination and refuse to testify, a contestant under the Corrupt Practices Act, upon proof that a number of illegal votes were cast sufficient to change the result of a primary election, was not required to prove that enough of the illegal votes were cast for the contestee to give him the apparent, although not real, majority. Harris v. Stewart, 187 Miss. 489, 193 So. 339 (1940).

In prosecution for conspiracy to defraud State of gasoline excise taxes, evidence furnished by accused's books which showed date of shipment and number of car of gasoline, without which evidence State could not proceed with prosecution, which books were involuntarily taken from accused by a subpoena duces tecum issued by State senatorial committee, held incompetent. State v. Billups, 179 Miss. 352, 174 So. 50 (1937).

Fact that disbarred attorney, seeking reinstatement, refused to go into matter involved in disbarment trial, was not indication of insufficient repentance, where to do so would require admission that he committed criminal offense. Ex parte Marshall, 165 Miss. 523, 147 So. 791 (1933).

11. — — Pleadings in civil actions, self-incrimination.

That the defendant may not be required to incriminate himself does not render demurrable a petition to enjoin as a public nuisance what is also a crime. State v. Myers, 244 Miss. 778, 146 So. 2d 334 (1962).

12. — — Discovery proceedings, self-incrimination.

A criminal defendant's deposition in a civil action arising out of the same transaction as the criminal action was admissible in the later criminal trial in which the defendant elected not to testify. The defendant waived his right against self-incrimination by answering the deposition questions even though he was not aware that any criminal prosecution was likely at the time he was deposed, was not represented by an attorney at the deposition, and was not advised by anyone that his answers could be termed voluntary and used against him in a criminal proceeding. Reed v. State, 523 So. 2d 62 (Miss. 1988).

Defendant in discovery proceeding who files a motion to strike on ground that petition requires answers which would tend to incriminate him and deny him his constitutional rights, does not, simply by filing the motion, waive his constitutional privilege against self-incrimination. Dabdoub v. Venus, 192 So. 2d 418 (Miss. 1966).

This section applies to answers in chancery, and to interrogatories propounded by a defendant. State v. Myers, 244 Miss. 778, 146 So. 2d 334 (1962).

13. — — Pro se or hybrid representation, self-incrimination.

The law does not require a defendant to make a choice between proceeding pro se and exercising his right against self-incrimination. He may conduct his entire defense without ever being sworn in as a witness or being subject to cross examination. Trunell v. State, 487 So. 2d 820 (Miss. 1986).

A defendant who chooses to argue his case to a jury and at the same time invokes the Fifth Amendment must confine his remarks to the evidence in the record. Thus, in a prosecution for capital murder, a defendant who argued pro se to the jury and clearly went beyond the evidence in the record had to accept as a consequence the prosecution's comment on his failure to swear to the testimony, since defendant's remarks constituted a waiver of both the constitutional privilege against self-incrimination and the prohibition against the prosecution from commenting on his failure to testify. Rigdon v. Russell Anaconda Aluminum Co., 381 So. 2d 983 (Miss. 1980), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81 (1980).

14. — — Pre-arrest admissions, self-incrimination.

Incriminating statements made by a murder defendant were properly admitted into evidence where the defendant was not under arrest at the time of the questioning, the law enforcement officers were merely seeking information about a missing person, the defendant voluntarily went with the officers to the sheriff's office, he was free to leave, and he was taken home by an officer when the questioning was over. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

Recording of conversations involving defendant and undercover agent, which were prior to her being indicted or placed under arrest, did not violate constitutional right to counsel, because such right becomes applicable only when government's role shifts from investigation to accusation, and at time of conversation defendant was neither under indictment, nor arrest, nor had arrest warrant been issued. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

Where minor defendant was not warned by the sheriff that his statement might be used against him and in response to sheriff's inquiry, defendant's statement that he had struck the deceased because he had cursed him and no force or threat or duress was used, was admissible and warning was not necessary under the circumstances. Benson v. State, 48 So. 2d 119 (Miss. 1950).

15. — — Miranda warnings, self-incrimination.

During defendant's trial for sexual battery of a child, the State did not impermissibly comment on his initial post-Miranda refusal to speak with investigators prior to his later statement about fondling the victim because the prosecutor's statement and an officer's testimony about his prior refusal to speak were simply a recitation of the facts concerning a preceding interview. Beasley v. State, 74 So. 3d 357 (Miss. Ct. App. 2010).

As defendant was given his Miranda warnings at the time of his arrest and before he was questioned, the trial court did not abuse its discretion in allowing the statements into evidence. Bankston v. State, 4 So. 3d 377 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 110 (Miss. 2009).

Where defendant was being questioned about whether he had been drinking due to the smell of alcohol on him or emanating from within his vehicle, the deputy testified that defendant twice prevented the portable breathalyzer device from properly producing a reading due to biting down on the mouthpiece, the question to defendant about what he would register on the breathalyzer was asked prior to the deputy obtaining an incriminating reading from the breathalyzer device, and no arrest had yet been made; thus, pursuant to the Fifth Amendment and Miss. Const. Art. III, § 26, defendant was not subject to a custodial interrogation and did not need to receive Miranda warnings at the moment he was asked what he would register on a breathalyzer. Keys v. State, 963 So. 2d 1193 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

Defendant voluntarily went to the police station, was told about the 15-year-old victim's accusations that defendant had fondled him, and agreed to give a statement to police, he was not placed under arrest before questioning, and the officers emphasized that he was free to end his questioning at any time; thus, defendant was not in custody and therefore was not entitled to the Miranda protections, but out of caution the officers did read defendant his Miranda warnings, and he signed a waiver indicating that he fully understood those rights, and therefore his statement to the police before his arrest was admissible. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

In a murder and aggravated assault case, incriminating statements made to police as defendant was being led to a patrol car were not suppressed because they were not the product of an interrogation; defendant made the statements as police were trying to read him his rights, and he was not questioned until after these warnings were given. Wilson v. State, 936 So. 2d 357 (Miss. 2006).

Appellate court affirmed defendant's conviction in violation of Miss. Code Ann. § 63-11-30 and the denial of his motion to suppress because an officer was not required to read defendant his Miranda rights when the officer first started speaking to defendant about an accident as defendant was not in custody at that time. Levine v. City of Louisville, 924 So. 2d 643 (Miss. Ct. App. 2006).

Trial court did not err in admitting defendant's confession to the police that he was walking by the victim's business and decided to take some things as defendant blurted out the statement after he was read his Miranda rights. Wess v. State, 926 So. 2d 930 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 218 (Miss. 2006).

In a felony child abuse case, no Miranda warnings were required prior to a statement given by defendant at the police station because defendant came in on his own volition, and warnings were given when it became apparent that inculpatory statements were being made; moreover, defendant's contention that threats were made was not credible. Wells v. State, 913 So. 2d 1053 (Miss. Ct. App. 2005).

Although defendant challenged his convictions for fondling a child under Miss. Code Ann. § 97-5-23(1) and for sexual battery to a child between the ages of 14 and 16 under Miss. Code Ann. § 97-3-95(1)(c) on the ground that the trial court had erred in admitting a statement he made to police that the girls' acts were consensual, defendant conceded that he had not objected to the statement at trial. Defendant's claim of error did not rise to the level of plain error where the evidence did not support his claim that his sole reason for testifying was to explain the statement; defendant had been given his Miranda warnings two days earlier and was not being questioned at the time he gave the statement; consent was not an issue in sex crime cases involving children, thus there was no violation of defendant's self-incrimination privilege or his Miranda rights. Smith v. State, 907 So. 2d 389 (Miss. Ct. App. — 2005), writ of certiorari denied by 910 So. 2d 574, 2005 Miss. LEXIS 452 (Miss. 2005).

Miranda applies to custodial interrogations or statements, and it does not apply to statements when a person is not in custody and has the liberty to come and go as he pleases. Fisackerly v. State, 880 So. 2d 368 (Miss. Ct. App. 2004).

Defendant's conviction for burglary of a dwelling house was improper where defendant exercised his right to remain silent up until the time of the trial and the trial court committed reversible error by allowing the prosecutor to imply to the jury that defendant's post-arrest silence was an indication that he was untruthful and, by implication, an indication that he had committed the crime. Emery v. State, 869 So. 2d 405 (Miss. 2004).

A trial court erred by admitting testimony concerning a defendant's confession where the defendant testified that he could not recall being read his Miranda rights and that he thought he would be incarcerated that same day if he did not confess, the prosecution did not produce all officers who were present when the defendant was questioned and his confession given, and no adequate reason for the officers' absence was given. Lettelier v. State, 598 So. 2d 757 (Miss. 1992).

It is not the duty of law enforcement officers and prosecutors, nor the function of the courts, to insist that a person accused of a crime actually confer with an attorney before talking about the crime nor is there any prescribed procedure or form to be followed in the waiver of the right to such assistance. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A warning advising a suspect "that anything he said might be used against him in a court of law" is constitutionally adequate; an officer is not required to advise a suspect of all specific possible criminal consequences. One of the virtues of Miranda is its clarity; the warnings are the same in every case. Adding the requirement that the officer inform the suspect of specific criminal consequences would add a component variable from case to case and undermine the simplicity and bright-line character of the rule as it stands. Fowler v. State, 566 So. 2d 1194 (Miss. 1990).

A defendant was under arrest and was therefore entitled to Miranda warnings where he was taken into custody by a deputy sheriff, he was told to go with the officer and was told that it was a very serious matter, he was not allowed to drive his own truck, and he was never released even though he told the officers no more about his whereabouts at the time of the crime then they had already been told. Although the questioning officer may have assumed that the defendant was not under arrest when he questioned him, that is not the test; if the officer had any intention of questioning the defendant without first giving him the Miranda warnings, it was incumbent upon him to have ascertained clearly from the officer who brought the defendant in that the defendant had not been taken into custody and that there was no reason for the defendant to believe that he was in custody. Bevill v. State, 556 So. 2d 699 (Miss. 1990).

Where, before a defendant under arrest made a confession, he was not given warnings of his rights to remain silent and to counsel, his confession and a subsequent confession given after he had received the warnings were inadmissible. Brunson v. State, 264 So. 2d 817 (Miss. 1972).

Where the arresting officer and the officer who swore out the affidavit for arrest testified that the defendant had been informed of his right to remain silent and his right to counsel at the state's expense, and that everything he said could be used against him, and testified that the defendant had not been searched before arrest and that an informer who had advised the police that the defendant was the person who had broken into a shop and stolen the items set forth in the indictment was a credible person, bore probable cause warranting the introduction of physical evidence seized in the search, as well as the alleged confession. Jordan v. State, 257 So. 2d 208 (Miss. 1972).

It is not necessary for an officer to warn every person he talks to about a crime of his constitutional right nor is it necessary that a person being questioned sign a waiver waiving the presence of counsel, until such time as it becomes apparent that the person being interrogated is likely to be charged with a crime; after such time the officer must promptly warn the person of his rights so that such person will not be required to give information that may incriminate him. Smith v. State, 229 So. 2d 551 (Miss. 1969).

In the absence of a clear showing that the warnings required in Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 394, were given, the testimony of a sheriff as to certain admissions alleged to have been made to him by the defendant which was disputed by the defendant's evidence, should not have been admitted. Williams v. State, 220 So. 2d 325 (Miss. 1969).

16. — — Request for counsel, self-incrimination.

In a case in which defendant argued that the trial court should have suppressed her statements because they were taken in violation of her constitutional right to counsel. The record supported a finding that defendant received the Miranda warning, that she knowingly and intelligently waived the rights, and that she freely and voluntarily made the statements, and, pursuant to the Davis decision, she failed to make an unambiguous, unequivocal request for an attorney. Barnes v. State, 30 So. 3d 313 (Miss. 2010).

Defendant's statements, "I need to talk to somebody," "I don't know if I need a lawyer or not," and "Do I have the right to stop talking?," were at best ambiguous requests for an attorney, and investigators did not overstep the constitutional parameters of U.S. Const. Amend. V and Miss. Const. Art. 3, § 26, in following up on defendant's statements with further questions regarding the statements in order to clarify whether defendant was, in fact, requesting an attorney. Blakeney v. State, 29 So. 3d 46 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 114 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 137, 178 L. Ed. 2d 84, 2010 U.S. LEXIS 6081, 79 U.S.L.W. 3198 (U.S. 2010).

Defendant contended that he repeatedly asked the officers whether he was going to need a lawyer, that they gave no response, and that when he delayed signing the waiver, one officer jumped across the table and told him he (the officer), would give defendant 34 years in prison, but that if defendant gave a statement he could probably get a more lenient sentence. However, the two officers testified to the contrary and they testified that nothing was promised to defendant in exchange for his testimony; defendant had signed a waiver and his confession was deemed voluntary and admissible. Tyler v. State, 911 So. 2d 550 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 600 (Miss. 2005).

A defendant's question during interrogation-"Don't you think I need a lawyer?"-constituted an ambiguous request for an attorney, requiring the officers to cease interrogation except for that intended to clarify the defendant's request. The officers' response to the defendant's ambiguous request, which culminated in the defendant's decision to waive his rights, did not exceed constitutional parameters where the officers responded by twice explaining the defendant's option to exercise his Miranda rights or to relate "his side of the story." Holland v. State, 587 So. 2d 848 (Miss. 1991).

When an accused makes an equivocal statement suggesting a request for counsel, the interrogation may only continue "on the narrow road" to ascertain the meaning of the equivocal statement. The interrogating officer has an affirmative duty to attempt to clarify the request before proceeding with the substance of the interrogation; the officer's subsequent finding will determine whether or not interrogation may continue. Kuykendall v. State, 585 So. 2d 773 (Miss. 1991).

A defendant's confession should not have been admitted into evidence where the confession was obtained by law enforcement officers after the defendant made a request for an attorney to the justice court judge who was considering binding him over to await the action of the grand jury, and one of the officers heard the defendant's request. Although the defendant may only have meant that he wanted a lawyer for court proceedings and did not want a lawyer to advise him before being questioned about the crime, the officers did not seek to make such a determination, but simply proceeded to question the defendant, knowing that he was a cocaine addict and to some extent, because of such addiction, judgment-impaired at the time. No intelligent, knowing waiver of the right to counsel, which the defendant had expressed to the justice court judge, could be found from an officer testifying that he simply orally gave the defendant the Miranda warning. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

Admission of written statement into evidence violated defendant's constitutional rights where, after Miranda rights were read, father of defendant informed police that attorney was desired and that no statement would be made until one was present. After this right had been invoked, officer continued questioning at which point defendant gave oral statement, which was reduced to writing following day. Prosecution could not show that defendant understood and waived his rights where officer stated that Miranda rights were read to him and defendant was asked if he understood it, to which he replied "yes", but rights were not discussed with defendant. Impermissible questioning which occurred in police station after defendant had invoked right to counsel bears on admissibility of written statement which was obtained following morning. Reuben v. State, 517 So. 2d 1383 (Miss. 1987).

17. — — Interrogation generally, self-incrimination.

Defendant's conviction for felony possession of methamphetamine was appropriate in part because there was no evidence suggesting that defendant attempted to invoke his right to counsel or his right against self-incrimination during what was determined to be a voluntary statement to a police officer; each of those rights was required to be invoked. Mooney v. State, 951 So. 2d 627 (Miss. Ct. App. 2007).

The defendant's statement that he shot his mother was not made in response to a custodial interrogation or any police action designed to elicit an incriminating response where, after a traffic accident, the defendant was handcuffed and placed in the back of a police car and an officer asked him where he was staying and where his parents were. Greenlee v. State, 725 So. 2d 816 (Miss. 1998).

When a suspect requests counsel while being informed of his or her rights, the police should complete the reading of the suspect's rights, then ask the suspect to state clearly what he or she elects to do. If the suspect indicates that he or she wishes to remain silent, then the interrogation must cease. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A defendant's statement of his birth date elicited by the police after his arrest was obtained during routine "booking"-type questioning, so that the questioning by the police did not amount to impermissible interrogation. Testimony concerning the defendant's admission of age was, therefore, admissible in his prosecution for rape of a female child under the age of 12, regardless of whether Miranda warnings were given. Wesley v. State, 521 So. 2d 1283 (Miss. 1988).

18. — — Interrogation after counsel requested, self-incrimination.

Trial court did not abuse its discretion in finding no Miranda violation and in failing to suppress an audio recording of defendant's interview with law enforcement because defendant's waiver of Miranda rights was voluntary, and defendant's continuing to speak without the presence of a requested attorney was also voluntary. Jones v. State, 130 So. 3d 519 (Miss. Ct. App. 2013), writ of certiorari denied by 131 So. 3d 577, 2014 Miss. LEXIS 65 (Miss. 2014).

A defendant's statements should have been suppressed where he invoked his right to remain silent and to have an attorney present after he was taken into custody and Mirandized by Tennessee authorities, and he was subsequently Mirandized by Mississippi officers without his having initiated the conversation. Duplantis v. State, 644 So. 2d 1235 (Miss. 1994), cert. denied, 514 U.S. 1123, 115 S. Ct. 1990, 131 L. Ed. 2d 876 (1995), appeal after remand, 708 So. 2d 1327 (Miss. 1998).

A trial court erred in admitting a defendant's confession evidence since the confession was tainted by the constitutional violation of the defendant's Sixth Amendment right to counsel and rights secured by Article 3, § 26 of the Mississippi Constitution, where the defendant "waived her rights" and made the confession after a sheriff department investigator and deputy initiated contact with her within less than 4 hours after she invoked the right to counsel at her initial appearance; the confession was also tainted by violation of the defendant's Fifth and Fourteenth Amendment rights since the defendant had also requested a lawyer and declined to waive any rights at the time of her arrest. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

Where accused who was arrested for armed robbery was given Miranda warnings and refused to answer questions but did not request assistance of attorney, and public defender represented accused at bail hearing, but while in jail awaiting further proceedings accused was questioned as to, and admitted involvement in, three other crimes, accused's Sixth Amendment right to assistance of counsel with respect to the three offenses posed no bar to admission, at trial for these three crimes, of his incriminating statements, since statements were made before right under Sixth Amendment could have been invoked, since right is offense-specific and does not attach until initiation of adversary criminal proceedings. McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991).

In custodial interrogation where accused requests counsel, interrogation must cease when counsel is requested and police officials may not re-initiate interrogation without counsel present regardless of fact that accused has consulted with counsel; requirement, that accused who invokes right to counsel while undergoing custodial interrogation is not subject to further interrogation until counsel has been "made available" to accused, refers to more than opportunity to consult with attorney outside interrogation room, and protection afforded by such rule in connection with privilege against self-incrimination is not terminated or suspended when counsel has simply consulted with accused; under circumstances of present case, where police agents ceased interrogation at request of accused and accused subsequently spoke with attorney who advised him not to make statement but accused subsequently made confession without counsel present, confession to deputy sheriff was taken in violation of constitutional protection which accused had not validly waived, and was not admissible against accused at trial. Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Once an accused has requested an attorney, it is improper for either the same or another law enforcement officer to question the accused about his or her criminal conduct. If the accused indicates in any manner at any time prior to or during questioning that he or she wishes to remain silent or to have access to counsel, the officers must cease interrogation. When the accused asks for counsel, the officers may not resume interrogation until counsel has been provided, except where the accused voluntarily reinitiates the discussion of the charges. If the accused requests access to counsel, all officers of the prosecution force are bound thereby, including those who have no actual knowledge of the request. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

A defendant's verbal statement, which was given after the defendant asserted his right to counsel, should have been suppressed even though the defendant signed a statement waiving his constitutional rights, including the right to counsel "at this time," where the defendant invoked his right to counsel after signing the statement, and counsel was not furnished. Burnside v. State, 544 So. 2d 1352 (Miss. 1988).

19. — — Capacity to waive rights, self-incrimination.

Evidence supported finding that 17-year-old defendant, intelligently, knowingly, and voluntarily waived his privilege against self-incrimination and right to presence of counsel, even though defendant presented evidence that he had low IQ and only read at fourth or fifth grade level, where detectives testified that they advised defendant of his *Miranda* rights, they read warnings line by line and defendant indicated that he understood each line, they read waiver form to defendant and defendant stated that he understood it and signed form, and they did not make promises of leniency, threats, or use coercive measures, and two of defendant's teachers testified that defendant could understand basic *Miranda* rights. McGowan v. State, 706 So. 2d 231 (Miss. 1997).

Where defendant claims to have lacked mental capacity to understand *Miranda* warning, determination of trial judge, who has seen defendant on stand, must necessarily be given great weight. McGowan v. State, 706 So. 2d 231 (Miss. 1997).

Doctrines of res judicata and waiver barred capital murder defendant's postconviction claims that his alleged mental retardation prevented him from giving free and voluntary confession and from understanding his *Miranda* rights, where only issue raised on direct appeal concerning defendant's confession was whether he was effectively prevented from making jury arguments about confession's credibility, and it was clear that defendant's low intelligence level was considered during suppression hearing in determining voluntariness of his confession. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Confession is not rendered involuntary simply because person making it is mentally weak. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A trial court did not err in allowing a defendant's statement to the police into evidence, in spite of the defendant's argument that his statement was not voluntary because of his age, education, and intelligence, where the defendant was 17 years old at the time of his arrest and interrogation, he had an 8th grade education, his parents were uneducated, he had suffered head injuries as a young child which allegedly sometimes caused impairment of his mental faculties, and the arresting officers testified that the defendant was read his *Miranda* rights at least twice before any interrogation, he stated that he understood those rights and the waiver of those rights, and he stated that he did not have any trouble reading or writing. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), postconviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Although there is no constitutional requirement to examine the mental capacity of the defendant in making a determination as to whether a confession was voluntary, it remains true as a matter of evidence that before any confession is admissible, it must have been given by a person with enough intelligence to be a competent witness. Butler v. State, 608 So. 2d 314 (Miss. 1992).

There is no constitutional requirement to examine the mental capacity of the defendant in making a determination as to whether a confession is free and voluntary; the focus is directed entirely to the conduct on the part of the State. Butler v. State, 608 So. 2d 314 (Miss. 1992).

A defendant's confession was not the product of mental deficiency, and therefore the defendant "knowingly" confessed, even though there was evidence that the defendant was mildly mentally retarded, where the defendant graduated from high school though he flunked 3 grades in school, there was no evidence that he was ever placed in special education classes, he admitted that he could read and write and that he understood the charges against him, and all who witnessed the interrogation said they saw no evidence that the defendant suffered mental abnormalities such that he could not understand the interrogation process or its consequences. Veal v. State, 585 So. 2d 693 (Miss. 1991).

Confessions were held to be voluntary, despite defendants' assertions to the contrary, where defendants' alleged involuntariness was based on: their youth, one being 17, the other 22; their lack of education, one went through tenth grade and other graduated from high school; holding of both defendants incommunicado for 3 days after their initial incarceration, allowing no visits by friends or family until a statement was given; and, one defendant was confined for that period in "drunk tank" with no bed, shower, or change of clothes; both defendants had signed waiver of rights forms prior to giving statements. Johnson v. State, 512 So. 2d 1246 (Miss. 1987), cert. denied, 484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402 (1987).

The trial court in a capital murder prosecution properly concluded at the end of a lengthy suppression hearing that defendant's confession was admissible as having been freely and voluntarily given, notwithstanding the fact that defendant was mentally retarded, where there was no evidence of any threats, promises, or any form of physical abuse of coercion, where defendant never requested the assistance of counsel, where there was no evidence that on any occasion during the questioning defendant had been under the influence of drugs or liquor, where the record was replete with the inference that the detective who interrogated defendant had been courteous, considerate, patient and persistent, and where that detective testified that the confession had been given at a time when defendant had understood and appreciated the gravity of the charges against him, and that it had been given at a time when defendant was fully aware of his constitutional privilege against self-incrimination and his right to counsel. Neal v. State, 451 So. 2d 743 (Miss. 1984), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984), denial of post-conviction relief aff'd, 687 So. 2d 1180 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

The statements made by a defendant on the way to jail after his arrest were admissible in his prosecution for murder, even though they were objected to at the time of admission because of the defendant's mental condition at the time and because he had not been advised of his constitutional rights, where the proof showed that the statements were not elicited by questions but were voluntary and spontaneous, and where, upon overruling objections, the court explained that counsel would have an opportunity to cross-examine on the defendant's condition and the jury would determine what credence to give the statements. Howell v. Kirk, 254 So. 2d 887 (Miss. 1971).

Where the defendant was in an acute, rampant state of intoxication equivalent to mania he could not have rationally, voluntarily, and intentionally waived his constitutional rights guaranteed by the Fifth Amendment to the U.S. Constitution and by Article 3, § 26 of the Mississippi Constitution, and his confession made while in that condition that he had committed armed robbery and murder in 1947 was properly excluded at his trial. State v. Williams, 208 So. 2d 172 (Miss. 1968).

Admission in evidence of confession in murder prosecution is not error when prosecution shows that when confession was made defendant was in full possession of his mental faculties, and defendant did not deny making statements, testified that officials had been nice to him, that he had suffered no mistreatment, but that he simply had no recollection of statements or confessions. Price v. State, 207 Miss. 111, 41 So. 2d 37 (1949), cert. denied, 338 U.S, 844, 70 S. Ct. 92, 94 L. Ed. 516 (1949), reh'g denied, 338 U.S. 888, 70 S. Ct. 187, 94 L. Ed. 545 (1949).

20. — — Waiver of rights, self-incrimination.

Whether there has been intelligent, knowing, and voluntary waiver of *Miranda* rights is essentially factual inquiry to be determined by trial judge from totality of circumstances. McGowan v. State, 706 So. 2d 231 (Miss. 1997).

The evidence was sufficient to support a finding that the defendant knowing, intelligently, and voluntarily waived his *Miranda* rights, even though the defendant had been drinking prior to his arrest, he had not slept for nearly 24 hours prior to waiving his rights, and he had periodic bouts of crying, where the defendant repeatedly acknowledged that he understood his *Miranda* rights and expressed this acknowledgment both orally and in writing, he was 49 years old, had a high school and vocational education, and considered himself to be a "very intelligent person," his criminal past provided him with some experience and knowledge about a suspect's *Miranda* rights, 5 witnesses testified that he did not appear to be impaired by alcohol and did not slur his speech, the defendant testified that he had been a chronic drinker, the defendant was for the most part calm and cooperative throughout the investigation and particularly at the moment he waived his rights, the defendant had meticulously schemed to "cover his tracks" to avoid arrest which reflected a coherent, unimpaired state of mind, and the defendant's taped confession contained the admission that no one had "threatened," "intimidated," or "promised him anything." Holland v. State, 587 So. 2d 848 (Miss. 1991).

A defendant knowingly and intelligently waived the right to counsel, and his subsequent statement was freely and voluntarily given, where the defendant initially invoked his constitutional right to counsel but indicated that he no longer wished to contact an attorney when given the opportunity to call, the defendant then indicated that he was willing to enter into a discussion of the crime, and the defendant was again advised of his *Miranda* rights, after which he confessed. The defendant "initiated" when he indicated that he no longer wished to telephone his attorneys; one cannot halt an inquiry by first indicating a desire to call an attorney, then declining to do so when offered the opportunity. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

The fact of a waiver of the privilege against self-incrimination in one proceeding is limited to a waiver for that proceeding and that proceeding only. In re Knapp, 536 So. 2d 1330 (Miss. 1988).

When witness voluntarily took the stand in a perjury trial and testified on behalf of the defendant therein as to the truthfulness of witness' brother's statements concerning a murder, to which witness had pled guilty and had been sentenced, witness waived his Fifth Amendment right and was subject to cross-examination on all relevant and material matters. Hentz v. State, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

If the right to counsel or the privilege against self-incrimination is waived at an initial trial which is later reversed, on appellate review, on retrial defendant can reinvoke rights previously waived. State v. Caldwell, 492 So. 2d 575 (Miss. 1986).

The privilege against self-incrimination is personal, and is waived unless claimed. State v. Myers, 244 Miss. 778, 146 So. 2d 334 (1962).

A person does not waive his right to refuse to testify as a witness for the defendant concerning the matters proposed to be proved by him on the ground that his answers might incriminate himself when he testified at the preliminary inquiry conducted by the court in the absence of the jury for the purpose of determining the competency of the alleged confession which the state has introduced as a part of its testimony. Hutchins v. State, 212 Miss. 145, 54 So. 2d 210 (1951).

21. — — Refusal to sign waiver of rights, self-incrimination.

An accused's refusal to sign a waiver of rights form does not in and of itself constitute a demand for an attorney. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

A murder defendant's initial refusal to sign a waiver of rights form did not constitute a demand for an attorney where he was not questioned again until more than

32 hours had lapsed when he was presented with incriminating physical evidence connecting him to the crime, and he was again advised of his rights before further questioning; thus, admission of his confession into evidence did not violate his constitutional right against compulsory self-incrimination or right to an attorney. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

A defendant's confession was freely and voluntarily given, and was therefore admissible into evidence in his murder trial, where law enforcement officers testified that he was given all the *Miranda* warnings prior to giving his confession and that he did not ask for an attorney at any time, he was familiar with his constitutional rights as evidenced by his refusal to sign a waiver form and the fact that he had previously been convicted of a felony, and his videotaped confession did not suggest any coercion. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

22. — — Voluntariness of admission, self-incrimination.

Deputies testified that none of the officers present at the scene told defendant they could do it the easy way or the hard way, and all deputies testified that defendant was not promised a reward or leniency or threatened in any way, such that the State met its burden of proving that defendant's statements were made voluntarily, and the trial court's decision to deny defendant's motion to suppress his statements was not manifestly wrong. Morales v. State, 990 So. 2d 273 (Miss. Ct. App. 2008).

Defendant's confession to murder was voluntary because defendant signed a waiver of rights form, officers testified that defendant was not promised anything for his truthfulness, defendant did not seem to have any problems understanding his rights, and at the hearing, defendant was able to read each right listed on the waiver. Although he claimed to not remember where he lived, or any of his teachers' names, defendant acknowledged initialing the waiver in front of the officers. Booker v. State, 5 So. 3d 411 (Miss. Ct. App. 2008), affirmed by 5 So. 3d 356, 2008 Miss. LEXIS 519 (Miss. 2008).

In an armed robbery case, suppression of an incriminating statement made to police was not appropriate where there was no credible evidence that the statement was involuntary; the evidence did not show that it was falsified or inaccurate, other than defendant's own bare assertions that he made no statement to police. Carter v. State, 965 So. 2d 705 (Miss. Ct. App. 2007).

Where a guilty plea was entered in a sexual battery case, there was no way to later challenge based on an allegation that a confession was involuntary since the right to do so was waived by the entry of the plea; therefore, post-conviction relief was properly denied on this ground. Parkman v. State, 953 So. 2d 315 (Miss. Ct. App. 2007).

Detective that was interrogating defendant stated that he told defendant to "tell the truth" and "come clean," and he would tell the district attorney of defendant's cooperation; those statements have been held not to be promises of leniency, and also defendant did not show by testimony or otherwise that the alleged promises of leniency by the detective were the proximate cause of his confession to sexual battery. Divine v. State, 947 So. 2d 1017 (Miss. Ct. App. 2007).

In defendant's manslaughter case, his confession was voluntary because defendant conceded that he gave the statement voluntarily, and he was given Miranda warnings and understood his rights; an officer testified that he was outside of the interrogation room, another officer and defendant came out of the room, and the officer told him that defendant had said "he just lost it and shot her and he would show us where the body was." McBride v. State, 934 So. 2d 1033 (Miss. Ct. App. 2006).

Statement of a thirteen-year-old defendant was properly admitted at his murder trial where he and his mother both signed a Miranda statement, there was no requirement that his mother be present during questioning, and the court was bound to apply the same standards for the voluntariness of defendant's confession as it would for any other confession. Edmonds v. State, — So. 2d —, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), opinion withdrawn by, substituted opinion en banc at, modified and rehearing denied by 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

Trial court did not err in denying defendant's motion to suppress his pre-trial confession to police because the State presented sufficient evidence to show that defendant's statements were voluntarily made without threats, coercion, or an offer of reward. The State introduced a police officer's testimony that stated that no threats were made and a videotape of the confession; also defendant signed a Miranda warning form and four forms waiving his rights to counsel and to remain silent waiver. Manix v. State, 895 So. 2d 167 (Miss. 2005).

Confession or statement relating to culpability may be admitted into evidence if it is given freely and voluntarily, and without the influence of promises or threats; a volunteered statement, voiced without prompting or interrogation, is admissible in evidence if made prior to the warning and of course if it were voluntarily and spontaneously made subsequent to the Miranda warning, it would remain admissible in evidence, and an officer is not required to turn a "deaf ear" to such statements. Murphy v. State, 868 So. 2d 1030 (Miss. Ct. App. 2003), writ of certiorari denied by 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

Fact that defendant was intoxicated when he gave a statement to police regarding the murder of an acquaintance did not mean that the statement was involuntary; officers in the case set forth a prima facie case that defendant's statement was freely given under the totality of the circumstances since he appeared completely lucid at the time, and there was no evidence of threats or coercion. Schuck v. State, 865 So. 2d 1111 (Miss. 2003).

Trial court did not err in finding that a statement made by defendant during the booking process for the crime of driving while impaired was admissible because the statement was freely and voluntarily given; the admission of the spontaneous statement was not barred by the Fifth Amendment. Watson v. State, 835 So. 2d 112 (Miss. Ct. App. 2003).

The principle enunciated in Agee v. State (Miss. 1966) 185 So. 2d 671 with respect to proving the voluntariness of a confession remains sound, but its importance to an accused has receded in view of the strong affirmative mandates of Miranda; only those persons who are claimed to have induced a confession through some means of coercion are required to be offered by the State as a witness under Agee. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

The delay from the time of a defendant's arrest until he was taken before a judicial officer did not violate Rule 1.04, Miss. Unif. Crim. R. Cir. Ct. Prac. and the 4th Amendment to the United States Constitution where his initial hearing was held within 48 hours of the time he was taken into custody for questioning, and there was no indication that the officers were purposely holding him in custody to gather sufficient evidence to justify his arrest; thus, his confession was not a product of any delay in taking him before a magistrate and was therefore admissible. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

The evidence was sufficient to support a finding that a defendant had knowingly and voluntarily waived his right to assistance of counsel when he made a statement to the police, even though the defendant testified that he had repeatedly requested an attorney and was not provided with one, where the defendant admitted that he understood his rights, and all of his contentions that he had made repeated requests for counsel were specifically refuted by 3 law enforcement officers. Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

A trial court followed the correct legal standards to determine the admissibility of the content of a defendant's confession and there was substantial evidence to support a finding of voluntariness, where no pre-trial motion to suppress was filed, the trial court conducted a hearing in chambers during the trial after the defendant's in-court objection to the voluntariness of his confession, the trial court found that the State had established a "proper predicate" on the testimony of a fire marshall who was present at the time of the confession, and the defendant did not rebut the State's predicate during arguments on the motion, so that the State was not required to produce all of the witnesses to the confession to establish voluntariness. Cox v. State, 586 So. 2d 761 (Miss. 1991).

There are practical and institutional limitations upon the Supreme Court's ability to find facts; consequently, much deference is placed upon the trial judge's full discharge of his or her responsibility to make findings of fact as to the question of whether *Miranda rights* have been intelligently, knowing and voluntarily waived. However, when the trial judge fails to make specific findings and only makes general findings thereby allowing admissibility of evidence, the Supreme Court's scope of review is considerably broader particularly when the trial judge's findings on the precise points at issue on appeal are not clearly inferable from the findings made. McCarty v. State, 554 So. 2d 909 (Miss. 1989).

In determining whether a confession was freely and voluntarily given, the circuit court sits as the factfinder. The trial judge first must determine whether the accused has been adequately warned and, under the totality of circumstances, the court then must determined if the accused voluntarily and intelligently waived his or her privilege against self-incrimination. McCarty v. State, 554 So. 2d 909 (Miss. 1989).

Trial court's decision to admit defendant's confession was supported by substantial evidence and therefore proper where, at hearing on motion to suppress all oral and written confessions, officers testified that statements of defendant were voluntary and not result of coercion or pressure, defendant testified that officers did not pressure him, and only testimony offered by defendant that could be inferred as evidence of coercion was that he was high on day of his arrest when he made statements. Further, defendant signed waiver of rights before making confession and statements were made over course of several days, with each statement occurring after valid, written waiver. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Trial court did not commit error in determining that statements were voluntarily given after knowing and intelligent waiver where defendant contended statements were made when he was misled as to their import, arguing that he was arrested on one charge but questioned concerning a more serious charge. Testimony at suppression hearing supported trial court's determination that waiver was voluntary despite questioning related to crime not charged, where defendant was presented warrants for his arrest on charges of forgery and credit card misuse, but before statement was taken was informed that sheriff was present in regard to investigation into death of man who owned credit cards he was accused of illegally using. Transcript of defendant's recorded statement made clear that he was informed that officers wanted to talk with him about murder investigation. Lutes v. State, 517 So. 2d 541 (Miss. 1987).

The statement of a defendant who had voluntarily surrendered himself, and handed a pistol to the sheriff, to the effect that he had shot a man was voluntary and admissible at his trial. Boyles v. State, 223 So. 2d 651 (Miss. 1969), cert. denied, 396 U.S. 1005, 90 S. Ct. 558, 24 L. Ed. 2d 497 (1970).

Defendant is not entitled to have his confessions of guilt nullified by court for reason that none of his friends or relatives or attorney were summoned to be present when confession was made when accused was advised of his right to have attorney before confession was made, confession was made in presence of eleven witnesses and was free and voluntary. Moore v. State, 207 Miss. 140, 41 So. 2d 368 (1949), appeal dismissed and cert. denied, 338

U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

In a prosecution for statutory rape, court's failure to hold a preliminary hearing outside presence of jury on the question of admissibility of confession which defendant contended was not freely and voluntarily made, and admission of such confession over objection was held prejudicial error as a violation of this section. English v. State, 206 Miss. 170, 39 So. 2d 876 (1949), overruled on other grounds, Otis v. State, 418 So. 2d 65 (Miss. 1982).

23. — — Inducements, self-incrimination.

Because defendants entered voluntary and intelligent guilty pleas to armed robbery, they waived the right to challenge the voluntariness of their confessions to such under the U.S. Constitution and Miss. Const. Art. 3, §§ 14 and 26; therefore, their motions for post-conviction relief were denied. Holland v. State, 956 So. 2d 322 (Miss. Ct. App. 2007).

A defendant's statement to police was admissible and not the product of improper inducement, even though a police officer had told the defendant that "it'd be best for him to tell us to help himself," where the defendant received Miranda warnings twice, he understood his constitutional rights, his statement was a denial rather than a confession, no specific promise was made to him by a law enforcement officer, and he maintained that he would have told the truth regardless of the officer's comments to him. Chase v. State, 645 So. 2d 829 (Miss. 1994), cert. denied, 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995), reh'g denied, 515 U.S. 1179, 116 S. Ct. 20, 132 L. Ed. 2d 903 (1995), post-conviction relief denied, 699 So. 2d 521 (Miss. 1997).

The trial court in a capital murder prosecution erred in refusing to suppress the defendant's confession as involuntary where a former teacher and retired minister was called in by the sheriff to meet privately with the defendant, the minister communicated to the defendant, at the sheriff's direction, the notion that there might be a chance for mercy if he volunteered to cooperate, the minister and the defendant discussed the death penalty and the religious ramifications of the defendant's action, a sheriff's deputy told the defendant that he thought it would look better if the defendant confessed, and an investigator who conducted the interrogation with the sheriff admitted that the defendant may have been given the impression by the investigator and the sheriff that cooperation could be of some benefit. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

Statements made by sheriffs to a defendant that "it was always best to tell the truth" and that "it would be better for him to tell the truth" were mere exhortations to tell the truth and not an inducement to confess, where the defendant was a 22-year-old adult who had several prior convictions and was therefore familiar with the criminal justice system, the defendant's first statement after the sheriff's alleged inducements was a denial rather than a confession, and the defendant testified at his suppression hearing that the sheriffs did not make any specific promises. Willie v. State, 585 So. 2d 660 (Miss. 1991).

Trial court was well within evidence in determining treatment of wife of defendant not to be indicative of impropriety undermining defendant's waiver of rights concerning self-incrimination where defendant was advised that his wife was under arrest for possession of marijuana found growing on premises, defendant inquired if charges could be dropped but was told that officers had no authority to do so, and officer who was present during defendant's questioning specifically denied that defendant was told "you don't want us to have to take her to jail." Lutes v. State, 517 So. 2d 541 (Miss. 1987).

Trial judge's finding that capital murder defendant's confession was voluntary was neither manifestly wrong nor against the overwhelming weight of the evidence where, at the hearing outside the presence of the jury, the defendant stated that he had signed confession to help his brother and father, who were implicated in the crime, and testified as to threats made by police officer, but the threats were denied by the officer alleged to have made them. Cabello v. State, 490 So. 2d 852 (Miss. 1986).

A confession was involuntary where it was induced by a sheriff's statement to the defendant that the defendant would be better off telling the truth, even though the statement of the sheriff may not have been intended as an inducement, where the defendant was a 20-year-old Negro youth of previous good reputation who had never been incarcerated before and who was desirous of being released from jail. Miller v. State, 243 So. 2d 558 (Miss. 1971).

24. — — Coercion or duress, self-incrimination.

In order to establish the admissibility of a murder defendant's confession, the State was not required to offer as witnesses law enforcement officers who allegedly yelled at the defendant and were abusive when he was initially questioned, since the alleged statements made by the officers had no bearing on the defendant's confession which was made 2 days later after he was given the Miranda warnings. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

The failure to provide a defendant with an initial appearance until five days after his arrest even though a judge was available at all times constituted reversible error where the defendant gave a confession in the absence of counsel and in violation of his right to counsel as a consequence of the delay, and the defendant's conviction for capital murder was based entirely on his confession. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

A defendant's waiver of his right to counsel and his right to remain silent when he executed a written waiver prior to confessing could not be found to be voluntary where his confession given immediately thereafter was involuntary due to improper collusion by law enforcement interrogators, since the defendant's waiver of his right and his confession were inextricably bound and were the product of prolonged coercive police interrogation. Abram v. State, 606 So. 2d 1015 (Miss. 1992).

Determination of whether confession is voluntary and freely given, and not product of coercion, is finding of fact which will not be reversed on appeal unless manifestly in error, or contrary to overwhelming weight of evidence; factual determination that confession was voluntarily and freely given was not clearly erroneous where interrogating officer testified that no mental or physical pressure was placed on defendant, no promises of freedom or leniency were offered in exchange for confession, and police officer called attorney for defendant; rejected was defendant's argument that confession was involuntary because it was result of threats, pressure, and coercion, defendant had only 6-grade education, and at time of confession was wearing colostomy bag, which impaired ability of defendant to freely and voluntarily waive his rights against self-incrimination. Sims v. State, 512 So. 2d 1256 (Miss. 1987).

Where a 17-year-old defendant, who had completed the eighth grade, signed a confession less than an hour after he was taken to the highway patrol office, and after he was advised of his constitutional rights and had waived his right to remain silent and to have an attorney with him, his confession was free and voluntary and admissible in a prosecution for rape, even though the defendant later contended that he did not understand the waiver of his rights and the confession which he had signed, and even though defense counsel stated that at the time of the confession, the defendant was bloody, bruised, terrified and in jail late at night. McLeod v. State, 229 So. 2d 557 (Miss. 1969).

Where defendant in a burglary prosecution wanted to show by the testimony of a co-defendant that at the time the burglary was committed the defendant did not instigate the burglary, that he was intoxicated, and that the confession obtained from the defendant was procured as the result of force or violence used by the arresting officers, the court did not err in refusing to have the co-witness testify on the ground that the testimony might incriminate him. Hutchins v. State, 212 Miss. 145, 54 So. 2d 210 (1951).

Slap on face of prisoner by sheriff with open hand and admonition by sheriff against attempt to draw weapon made when prisoner reached toward his pocket, it being explained to prisoner that this was done as precaution for sheriff's protection and that he would not be slapped if no further attempt was made to draw weapon, does not invalidate subsequent confession freely and willingly given when sheriff makes no suggestion or intimation of reward or punishment, immunity or inducement, to prisoner to make statement. Summerville v. State, 207 Miss. 54, 41 So. 2d 377 (1949).

Detention of accused without commitment is only one factor for consideration in reaching conclusion as to whether or not confession is free and voluntary, and it is only where confession is obtained as result of unreasonable delay in taking prisoner before magistrate for examination into his case that his admissions of guilt under such psychological pressure are inadmissible. Moore v. State, 207 Miss. 140, 41 So. 2d 368 (1949), appeal dismissed and cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

Confession is not obtained as result of illegal detention and there is no unnecessary delay in taking prisoner before magistrate for inquiry into case when prisoner is arrested at 5:30 p. m., is questioned about hour with reference to other crimes, there is an hour or more intermission and he admits murder at about 9:30 p. m., and magistrate and other courts are open only within legal hours during daytime. Moore v. State, 207 Miss. 140, 41 So. 2d 368 (1949), appeal dismissed and cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

Use of a confession of guilt by the accused extorted by brutality and violence to obtain a conviction of crime is a denial of due process of law even though coercion was not established until after the confession had been admitted in evidence and the counsel for the accused did not thereafter move for its exclusion. Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

Witness was not incompetent because testimony was obtained by duress, since this section applies only to a defendant being compelled to give evidence against himself. Patterson v. State, 144 Miss. 410, 110 So. 208 (1926).

Confession obtained by improper influence violates this section. Whip v. State, 143 Miss. 757, 109 So. 697 (1926).

The provision that no person shall be compelled to give evidence against himself excludes confessions extorted by violence, and evidence so obtained cannot be used against the prisoner under any circumstances or for any purpose. Jordan v. State, 32 Miss. 382 (1856).

On the question of confessions under duress, etc. Jordan v. State, 32 Miss. 382 (1856).

25. — — Illegal arrest, self-incrimination.

A murder defendant's confession was not the product of an illegal arrest, since conflicting statements regarding the events surrounding the killing related by the defendant to law enforcement officers provided probable cause for his arrest; moreover, the defendant's confession was not the product of the arrest, since he gave his confession only after incriminating physical evidence was found by the officers, and the discovery of the physical evidence was the result of separate questioning of another witness and was therefore unconnected with the arrest. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

26. — — Confessions generally, self-incrimination.

Defendant's conviction for fondling a child under the age of 18 was appropriate because, while defendant might not have possessed exceptional intelligence, that was not required to determine that a confession was given voluntarily. Also, nothing indicated that he was intoxicated while giving the confession. Sellars v. Walgreen Co., 971 So. 2d 1278 (Miss. Ct. App. 2008).

Trial court did not err in not suppressing defendant's statement to the police that defendant shot a victim in self defense because although defendant's initial denial of shooting the victim, followed by defendant's recantation of the denial in the face of a witness's accusation, which the jury subsequently saw and heard the witness testify to, was prejudicial, defendant would have been convicted beyond a reasonable doubt even without the tainted statement. Walton v. State, 998 So. 2d 1011 (Miss. Ct. App. 2007), affirmed by 998 So. 2d 971, 2008 Miss. LEXIS 572 (Miss. 2008).

Defendant's self-incrimination rights were not violated because all law enforcement personnel who testified stated that defendant did not appear to have been under the influence of drugs and there was no corroboration to defendant's assertions to the contrary; additionally, defendant's actions on the day of the murders indicated a mind capable of perceiving the world around him and taking control of his own actions. Scott v. State, 947 So. 2d 341 (Miss. Ct. App. 2006), writ of certiorari denied by 956 So. 2d 228, 2007 Miss. LEXIS 262 (Miss. 2007).

Defendant was not denied his various constitutional rights where the court did not impermissibly consider the truthfulness of defendant's confession in deciding it admissible at a suppression hearing because much of the inquiry into truthfulness occurred as a result of impeaching defendant and attempting to ascertain his credibility. Carter v. State, 956 So. 2d 951 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 302 (Miss. 2007).

Defendant's right against self-incrimination was not violated where the trial court admitted his confession to armed robbery into evidence because four full days had elapsed between the time that defendant took crack cocaine and Lorcet and the time that he confessed; his confession could not be said to be the result of intoxication. Thomas v. State, 936 So. 2d 964 (Miss. Ct. App. 2006).

Defendant argued that the stress of the interrogation and wrongful accusations by a detective caused him to confess to acts against the child victim which he did not commit; however, the trial court's finding that defendant's confession was voluntary was not contrary to the overwhelming weight of the evidence because (1) during the second confession, which occurred after defendant expressly requested the interview to continue, he gave a more detailed confession of two acts of sexual abuse against the victim; (2) there was no evidence that any person coerced defendant or promised him anything in return for his confession; (3) it was hard to believe that defendant would think that confessing to sexual abuse of a child would allow the police to release him; and (4) defendant's argument that the cumulation of the detective's lies caused him mental distress and led to his confessions was belied by his testimony at the suppression hearing where he stated that the detective's lies regarding the rape of his stepdaughter did not cause him to confess. Baker v. State, 930 So. 2d 399 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 497 (Miss. 2006).

Defendant's motion to suppress his confession, contending that his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, Miss. Const. Art. 3, §§ 14, 26 and 28, and Miss. Unif. Crim. R. Cir. Ct. Prac. 6.03 were violated was properly denied where a psychiatrist testified that defendant was not so impaired by mental disease or defect as to make him clearly incompetent to make a confession. Further, in defendant's original direct appeal, he challenged the admission of his confession on five separate grounds and that adverse decision constituted the law of the case. Thorson v. State, 895 So. 2d 85 (Miss. 2004), writ of certiorari denied by 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177, 74 U.S.L.W. 3203 (2005), remanded by 994 So. 2d 707, 2007 Miss. LEXIS 497 (Miss. 2007).

Where defendant was charged with capital murder, defendant testified at trial that defendant was not promised, threatened or coerced to give the videotaped statement, and also testified to giving the statement of defendant's own free will, even though defendant's father told defendant not to speak to anyone until a lawyer arrived. Based on the totality of the circumstances, defendant's constitutional rights were not violated because defendant's statement was given freely without coercion, and the fact that defendant was 18 years old at the time of the arrest had no bearing on defendant's ability to comprehend the questions and waive defendant's rights. Jacobs v. State, 870 So. 2d 1202 (Miss. 2004).

In order for a confession to be valid, it must be an acknowledgement in express terms of the crime charged but, generally, all voluntary statements or confessions of the defendant are admissible when offered by the state for what weight they may have in the case. Dedeaux v. State, 519 So. 2d 886 (Miss. 1988).

Claim that confession was taken in violation of defendant's right to counsel was procedurally barred because it had not been raised in any previous court pleading, nor had defendant shown sufficient legal cause to excuse his failure to timely raise claim. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

In considering totality of circumstances in which written confession is signed, taint resulting from failure of police to inform defendant that counsel is present in jail at time oral statement is being taped is removed when suspect chooses to sign written confession after consultation with attorney. Yates v. State, 467 So. 2d 884 (Miss. 1984), appeal dismissed, 926 So. 2d 959 (Miss. Ct. App. 2006).

Competency of confession should be ascertained preliminary to its introduction before jury, and accused has right to take witness stand during such preliminary hearing and limit his testimony to facts bearing upon whether confession was free and voluntary, and his testimony is entitled to be considered and weighed, along with other evidence, by trial judge upon fact whether accused made confession freely and without hope of reward or fear of punishment, and defendant has right not to take stand and testify. Summerville v. State, 207 Miss. 54, 41 So. 2d 377 (1949).

Right of accused in rape prosecution to testify in preliminary hearing on competency of his confession and to limit his testimony to facts bearing upon whether confession was free and voluntary cannot be limited by trial judge by condition that defendant testify before jury on merits and no conditions are imposed upon accused by trial court who informs him that he may take witness stand "at this stage of the proceedings merely to contest the freedom of the confessions." Summerville v. State, 207 Miss. 54, 41 So. 2d 377 (1949).

Trial court's determination from testimony of those who were present at taking of confession and from testimony offered by accused as to whether or not confession of accused was made freely and voluntarily will be affirmed unless his decision is manifestly wrong. Moore v. State, 207 Miss. 140, 41 So. 2d 368 (1949), appeal dismissed and cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516 (1949).

27. — — Guilty plea, self-incrimination.

Valid guilty plea operated as a waiver of all non-jurisdictional rights or defects which were incidental to trial; defendant was fully advised of his rights and the maximum sentences he faced if he chose to go to trial, and he was provided a detailed admonishment prior to accepting his guilty plea, such that defendant's plea was made knowingly, intelligently, and voluntarily and he waived any rights regarding the allegedly coerced confession. Swindoll v. State, 859 So. 2d 1063 (Miss. Ct. App. 2003).

A trial court's failure to inform a defendant of the mandatory minimum sentence for the crime charged did not render the defendant's guilty plea involuntary where no misrepresentation as to the mandatory minimum sentence was made to the defendant, he did not expect to receive the mandatory minimum sentence, he did not claim that there was a misrepresentation of the sentence which he was to receive, he was fully apprised and understood the consequences of the sentence the State intended to recommend, and he did not allege that the failure to be informed of the minimum sentence induced him to enter his guilty plea. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

The constitutional standard for voluntariness of a guilty plea does not mention knowledge of the mandatory minimum sentence as an essential element; instead, it merely states that the accused should understand the effects of a guilty plea. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A defendant's claim that he blindly entered a plea of guilty because his attorney told him that his mother advised him to do so was not sufficient to render his plea involuntary. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A plea is voluntary if not induced by fear, violence, deception or improper inducements. Smith v. State, 636 So. 2d 1220 (Miss. 1994).

A trial court's failure to inform a defendant, who pled guilty to possession of cocaine with intent to distribute, that a $1,000.00 fine was the minimum penalty for the crime was harmless error where the record contained the defendant's written waiver of indictment, his petition to enter a plea of guilty, and a 12-page transcript of the circuit judge's interrogation of the defendant before accepting the plea. Eley v. State, 631 So. 2d 787 (Miss. 1994).

A defendant was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether his guilty plea was entered voluntarily and intelligently where the transcript of the defendant's plea hearing did not reflect that he was advised concerning the rights of which he alleged he was ignorant; the State would be entitled to prove at the evidentiary hearing that the defendant learned of the rights in question, either from the trial judge or from some other source, prior to pleading guilty. Alexander v. State, 605 So. 2d 1170 (Miss. 1992).

A defendant who pleaded guilty without an affirmative expression by the trial court informing him that by pleading guilty he waived his constitutional right against self-incrimination, was entitled to an evidentiary hearing on the issue of whether his guilty plea was involuntarily and unintelligently made. Although the defendant's petition to the court to accept his plea of guilty recited that there was "no constitutional right or reason why this court should not accept this plea and enter sentence thereon," this was not sufficient to show that he was advised or informed of his constitutional right against self-incrimination. Horton v. State, 584 So. 2d 764 (Miss. 1991).

A guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights. A plea is voluntary if the defendant knows what the elements are of the charge against him or her, including an understanding of the charge and its relation to him or her, what effect the plea will have, and what the possible sentence might be because of the plea. Where a defendant is not informed of the maximum and minimum sentences he or she might receive, his or her guilty plea has not been made either voluntarily or intelligently. A complete record should be made to ensure that the defendant's guilty plea is voluntary. While a transcript of the proceeding is essential, other offers of clear and convincing evidence which prove that the defendant entered a guilty plea voluntarily are sufficient. For example, where an evidentiary hearing has established that a defendant's guilty plea was entered voluntarily, the fact that a record was not made at the time the plea was entered will not be fatal. Wilson v. State, 577 So. 2d 394 (Miss. 1991).

A guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial, and the right that the prosecution prove each element of the offense beyond a reasonable doubt. Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

Admission of guilt is not a constitutional requisite of an enforceable plea. Reynolds v. State, 521 So. 2d 914 (Miss. 1988).

Requiring witness, who had already pled guilty to the murder, to answer questions concerning that murder did not expose witness to prosecution for the murder and did not infringe upon his Fifth Amendment rights, where the witness' petition for writ of habeas corpus or, in the alternative, petition to withdraw his guilty plea, came months after the term of court expired wherein he had pled and sentence had been entered. Hentz v. State, 496 So. 2d 668 (Miss. 1986), cert. denied, 517 U.S. 1225, 116 S. Ct. 1858, 134 L. Ed. 2d 957 (1996).

Defendant was entitled to a hearing on his petition for leave to withdraw his guilty plea, on the asserted basis that he had received incorrect advice from counsel regarding the length of his sentence and the terms of his plea bargain. Tiller v. State, 440 So. 2d 1001 (Miss. 1983).

A plea of guilty constitutes a waiver of some of the most basic rights of free Americans, those secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as those comparable rights secured by Miss Const, Art 3, §§ 14 and 26. Sanders v. State, 440 So. 2d 278 (Miss. 1983).

28. — — Physical evidence, self-incrimination.

Section 63-11-8, which mandates that blood be taken from any driver involved in a fatal accident regardless of the existence of probable cause to believe that alcohol or drugs were involved, does not violate the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution and Article 3, § 26 of the Mississippi Constitution. McDuff v. State, 763 So. 2d 850 (Miss. 2000).

Voice exemplars are prohibited by neither the Fifth Amendment nor Section 26 of the Mississippi Constitution. Martin v. State, 724 So. 2d 420 (Ct. App. 1998).

The obtaining of samples of the defendant's blood, hair and saliva did not violate his constitutional right against self-incrimination. Wesley v. State, 521 So. 2d 1283 (Miss. 1988).

Requiring a defendant to exhibit his scarred hands to a witness for identification purposes was not a violation of the defendant's constitutional right against self-incrimination. Porter v. State, 519 So. 2d 1230 (Miss. 1988).

An individual required to give a handwriting exemplar to a grand jury investigating a forgery charge was not "compelled to give evidence against himself." McCrory v. State, 342 So. 2d 897 (Miss. 1977).

To require a prisoner to exhibit himself for the purpose of identification or to submit to the taking of photographs and fingerprints does not violate the prisoner's constitutional rights against self-incrimination. Smith v. State, 229 So. 2d 551 (Miss. 1969).

To require a defendant to speak in order to assist the prosecuting witness to identify him does not constitute self-incrimination where there was no direct testimony of identification by voice and the matter was raised by the defendant himself, nor would requiring a defendant to put on certain articles of clothing for identification purposes be requiring him to testify against himself. Fondren v. State, 253 Miss. 241, 175 So. 2d 628 (1965).

Where in a prosecution for burglary the identity of the accused was at issue, the defendant's constitutional rights against self-incrimination were not violated in asking the accused to rise and move to the counsel table where his attorneys were seated. Thames v. State, 221 Miss. 573, 73 So. 2d 134 (1954).

Trial court's requiring defendant in murder prosecution to stand up for identification by witness was not error where testimony of witness was excluded upon objection that his identification was indefinite and no request was made to exclude the physical evidence of defendant's standing up for identification. Poore v. State, 205 Miss. 528, 37 So. 2d 3 (1948), suggestion of error overruled, 205 Miss. 554, 37 So. 2d 357 (1948), cert. denied, 336 U.S. 922, 69 S. Ct. 656, 93 L. Ed. 1084 (1949), reh'g denied, 336 U.S. 947, 69 S. Ct. 810, 93 L. Ed. 1104 (1949), motion granted, 40 So. 2d 172 (Miss. 1949).

In prosecution of defendant for shooting prosecuting witness, introduction in evidence of plaster casts made by sheriff of tracks found at scene of crime and of shoes of defendant while defendant was in jail and not wearing such shoes, did not violate defendant's rights against self-incrimination. Jones v. State, 35 So. 2d 706 (Miss. 1948).

Opinion given by sheriff on cross examination as to comparisons between defendant's shoes and tracks made at scene of crime is not subject to objection on appeal, where at the time defendant made no objection and later only in general form that the evidence was in violation of this section. Jones v. State, 35 So. 2d 706 (Miss. 1948).

Word "evidence" within constitutional provision that defendant in criminal prosecution shall not be compelled to give evidence against himself means evidence by defendant out of court as well as in court, and means not only evidence extorted from a defendant by force outside of court, but also evidence obtained from his books and records brought in by process of court. State v. Billups, 179 Miss. 352, 174 So. 50 (1937).

Evidence of intoxicating liquor procured when sheriff dipped handkerchief in liquor on ground which came from bottles broken by defendant after running away from marshal ordering defendant to halt, without seeing him with any liquor, held illegally obtained, and was inadmissible. Fulton v. City of Philadelphia, 168 Miss. 30, 148 So. 346 (1933).

Where shotgun shells were unlawfully seized in searching defendant's home, their introduction in evidence in murder prosecution was violation of constitutional provision relating to giving evidence against oneself. Cofer v. State, 152 Miss. 761, 118 So. 613 (1928).

29. — — Tests and test results, self-incrimination.

During defendant's trial for felony DUI, third offense, the admittance of defendant's refusal to submit to a breath test was not a violation of his right against self-incrimination under either Miss. Const. Art. 3, § 26 or USCS Const. Amend. 5; thus, defendant's challenge to the constitutionality of Miss. Code Ann. § 63-11-41 failed. Starkey v. State, 941 So. 2d 899 (Miss. Ct. App. 2006).

Consent alone is sufficient to permit the taking of a blood sample, and there is no need for a search warrant or exigent circumstances; where a defendant wishes for the trial court to consider whether diminished capacity made his consent ineffective, he has the burden of introducing evidence to raise that issue. Sumrall v. State, 955 So. 2d 332 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 137 (Miss. 2007).

In a prosecution for driving a motor vehicle while under the influence of intoxicating liquor, the admission into evidence under § 63-11-41 of the defendant's refusal to take a breathalyzer test did not violate the Fifth Amendment to the United States Constitution and Article 3, § 26 of the Mississippi Constitution, even though the defendant was not specifically warned that his refusal could be admitted into evidence against him; the penalty of introducing a refusal serves an important state interest in encouraging defendants to submit to a chemical test, and as the refusal is physical instead of testimonial, its introduction into evidence violates neither the Fifth Amendment nor § 26. Ricks v. State, 611 So. 2d 212 (Miss. 1992).

In a prosecution for driving a motor vehicle while under the influence of intoxicating liquor, the defendant's statement to a police officer that the breathalyzer machine would "probably show I'm in a coma" was essentially a confession that the defendant was drunk, and was therefore admissible into evidence as a voluntary statement where it was made spontaneously after the defendant had been given the *Miranda* warnings. Ricks v. State, 611 So. 2d 212 (Miss. 1992).

The Fifth Amendment privilege against self-incrimination is not violated by a court order compelling a defendant to submit to a psychiatric examination, even though the defendant may plan to use no expert testimony at trial to support his insanity defense. Porter v. State, 492 So. 2d 970 (Miss. 1986).

Where the defense of insanity is made, evidence of the facts disclosed by a physical and mental examination of the accused by physicians either prior to or during the trial, without or without his consent does not violate the constitutional privilege of accused not to be a witness against himself. Rogers v. State, 222 Miss. 690, 76 So. 2d 831 (1955).

30. — — Videotapes, self-incrimination.

In a capital murder case, a videotaped confession given by a 16-year-old defendant was admitted as voluntary because officers testified that he was not promised that he would receive treatment as a youthful offender if he gave a statement; the fact that defendant had a limited learning capacity was insufficient until evidence showed that overreaching had occurred. Booker v. State, — So. 2d —, 2006 Miss. App. LEXIS 635 (Miss. Ct. App. Aug. 29, 2006), opinion withdrawn by, substituted opinion at 5 So. 3d 411, 2008 Miss. App. LEXIS 77 (Miss. Ct. App. 2008).

In defendant's criminal trial for statutory rape, the trial court did not violate defendant's right against self-incrimination by admitting audiotapes containing recorded conversations, given to police by his girlfriend, to demonstrate that defendant had sexual contact with the victim. Defendant was at home and not in police custody at the time that he made his statements on the audiotapes; therefore, he was not entitled to Miranda warnings. Fisackerly v. State, 880 So. 2d 368 (Miss. Ct. App. 2004).

Admission of videotape of drug transaction did not force defendant to testify against himself. Crenshaw v. State, 513 So. 2d 898 (Miss. 1987).

31. — — Admissions not presented into evidence, self-incrimination.

Where accused, after having been arrested but before being formally charged with murder, voluntarily testified before a coroner's jury that he had accidentally killed his wife while shooting in self-defense at his father-in-law, and none of this testimony was admitted in the trial on the merits, accused's constitutional privilege not to incriminate himself was not violated. Dykes v. State, 232 Miss. 379, 99 So. 2d 602 (1957).

32. — — Impeachment, self-incrimination.

Defendant's due process rights were not violated by a prosecutor's question regarding the invocation of the right to remain silent because defense counsel referred to the issue during direct examination; moreover, defendant failed to invoke the right during questioning after an arrest for sexual battery. McCoy v. State, 878 So. 2d 167 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 910 (Miss. 2004).

A defendant's out of court signed statement was properly used to impeach his testimony, though the statement was inadmissible in the State's case-in-chief because the defendant signed the statement without being informed of his *Miranda* rights, since the statement was voluntarily given where the defendant was not threatened or mistreated when he made the statement, no one made any promises to him, he was not intoxicated or under the influence of any drugs, and the defendant admitted that he could have stopped talking at any time and could have left the room. Bowen v. State, 607 So. 2d 1159 (Miss. 1992).

In seeking to impeach a prosecution witness, defense counsel could not question the witness as to mere charges of the commission of offenses, especially where such charges were pending and the witness's testimony might incriminate him. Further, the witness could not be asked nor proof made of the details of an alleged crime said to have been committed by the witness sought to be impeached. Haralson v. State, 314 So. 2d 722 (Miss. 1975).

33. — — Comment on refusal to testify generally, self-incrimination.

In a capital murder trial, the trial court did not err in not declaring a mistrial after a witness commented regarding defendant's exercise of his right to remain silent where the trial court gave a curative instruction, to which the defense did not object. Birkhead v. State, 57 So. 3d 1223 (Miss. 2011).

Defendant's capital murder conviction was appropriate because the trial court did not err in not declaring a mistrial after a witness's comment regarding defendant's exercise of his right to remain silent. The trial court's instruction, to which the defense did not object, cured the error of the testimony of the investigator; therefore, the investigator's comment on defendant's exercise of his right to remain silent did not constitute abuse of discretion by the trial court, nor reversible error. Birkhead v. State, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Because alleged comments on defendant's failure to testify did not rise to the level of a reversible constitutional error, review on this issue was procedurally barred; however, the claim was meritless at any rate because the prosecutor was not trying to stress by innuendo the fact that defendant elected not to testify when stating that the state's evidence was unrefuted. Epps v. State, 984 So. 2d 1042 (Miss. Ct. App. 2008).

Where the prosecutor in no way, either directly or inferentially, put a negative spin on the fact that the defendant exercised his constitutional right not to testify, but merely addressed defendant's failure to present any case at all, the prosecutor did not violate Miss. Const. Art. 3, § 26 and the Fifth Amendment in her closing arguments, and no error was committed by the trial court in denying defendant's motion for a mistrial. Wright v. State, 958 So. 2d 158 (Miss. 2007), writ of certiorari dismissed by 964 So. 2d 508, 2007 Miss. LEXIS 501 (Miss. 2007).

Court rejected husband's claim that the State's closing remark stating that neither parent had offered an adequate explanation of how the child was injured violated his Fifth Amendment right not to testify in his own defense because the statements did not penalize the husband for exerting his constitutional privilege but rather were comments on the husband and wife's lack of a defense. Not every comment regarding the absence of a defense or on the defense presented is equivalent to a comment on the defendant's failure to testify. Scarbough v. State, 893 So. 2d 265 (Miss. Ct. App. 2004), writ of certiorari denied by 893 So. 2d 1061, 2005 Miss. LEXIS 103 (Miss. 2005).

In the mother and stepfather's appeal of their convictions for felonious child abuse, the State's comments during closing argument did not violate the stepfather's right under the Fifth Amendment and Miss. Const. Art. 3, § 26 not to be compelled to be a witness against oneself, which included the right not to have the prosecution make any comment upon a defendant's exercise of that right, because the comments were comments on the defense presented, or lack thereof, and not comments on the failure to testify. Not every comment regarding the lack of any defense or upon the defense presented is equivalent to a comment on the defendant's failure to testify; the State is entitled to comment on the lack of any defense, and such comment will not be construed as a reference to a defendant's failure to testify by innuendo and insinuation. Scarbough v. State, 2004 Miss. App. LEXIS 910 (Miss. Ct. App. Sept. 14, 2004), opinion withdrawn by, substituted opinion at 893 So. 2d 265, 2004 Miss. App. LEXIS 1119 (Miss. Ct. App. 2004).

Where a police witness testified that defendant "stopped talking" after admitting being in the city where a murder occurred, defendant was not entitled to a mistrial based on the alleged inappropriate comment on his right to remain silent under the Fifth Amendment or Miss. Const. Art. 3, § 26; merely stating that defendant stopped talking did not rise to the level of mistrial. Shelton v. State, 853 So. 2d 1171 (Miss. 2003).

The defendant's privilege against self-incrimination was not violated when the prosecutor argued that the defendant "pled not guilty. And he doesn't have to do a thing. He sits there. We have to prove the case," since (1) such argument was made in response to the defendant's argument that the state prolonged the trial by putting forth unnecessary or redundant evidence and attempted to place the blame for his crimes on those who failed to obtain proper treatment for him, and (2) the jury was given several instructions which clarified any confusion resulting from the arguments. McGilberry v. State, 741 So. 2d 894 (Miss. 1999), writ of certiorari denied by 529 U.S. 1006, 120 S. Ct. 1273, 146 L. Ed. 2d 222, 2000 U.S. LEXIS 1788, 68 U.S.L.W. 3565 (2000).

Right not to give compelled testimony is violated by direct statement regarding defendant's decision not to testify, or comment which could reasonably be construed by jury to be comment about defendant's failure to testify. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

An accused person who has been given the Miranda warnings is not obliged to answer any questions or to make any explanation. The accused need not invoke the presence of counsel in order to obtain the benefits of these rights. It is improper and, ordinarily, reversible error to comment on the accused's post-Miranda silence. The accused's right to be silent then is equally as strong as the right not to testify and it is error to comment on either. It is therefore improper to inquire of a testifying defendant as to whether he or she made any protest or explanation to the arresting officers. Quick v. State, 569 So. 2d 1197 (Miss. 1990).

A prosecutor's question on cross-examination of the defendant, asking if "today is the first time you have told any official the version you've given today?", did not constitute an improper comment on the defendant's right to remain silent where the defendant, on direct examination, had testified to a version of the events in question that had never before been given to the sheriff's office and the defendant had given the sheriff 4 other versions of the story. Once the defendant related this new sequence of events on direct examination, the prosecution was well within its rights on cross-examination to inquire further about the novelty of the story. Shell v. State, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

An assignment of error based on the prosecutor's comment on the defendant's failure to testify was not procedurally barred for failure to make a contemporaneous objection because the right not to take the witness stand is a fundamental constitutional right. Livingston v. State, 525 So. 2d 1300 (Miss. 1988).

No breach of constitutional right not to testify occurred where comment by counsel allegedly related to failure of accused to testify was in fact statement which court found had not been intended as reference to defendant's silence, but was instead merely mention of other parties who had testified. Russell v. State, 506 So. 2d 974 (Miss. 1987).

34. — — Comment of counsel on refusal to testify generally, self-incrimination.

In a cocaine possession case, defendant's argument that the prosecutor improperly commented on defendant's right not to incriminate himself was meritless. When viewed in context, the prosecutor's comments referred to defendant's lack of defense and not to his failure to testify. Marshall v. State, 22 So. 3d 1194 (Miss. Ct. App. 2009), writ of certiorari dismissed by 2009 Miss. LEXIS 594 (Miss. Dec. 3, 2009).

It is a criminal defendant's constitutional right to choose whether to take the witness stand in his own defense, Miss. Const. Art. 3, § 26; consequently, any reference to the defendant's failure to testify implying that such failure is improper, or that it indicates the defendant's guilt is prohibited. However, there is a difference between a comment on a defendant's choice not to testify in his own defense and a comment on the lack of a credible defense; therefore, when the statement is not an outright violation, an appellate court will review the facts on a case-by-case basis. Mitchell v. State, 21 So. 3d 633 (Miss. Ct. App. 2008), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 575 (Miss. 2009).

Prosecutor's statement "she can't come here with a straight face and tell you I lied for whatever kind, sweet reason counsel opposite might have you believe" was not a comment on defendant's failure to testify. The prosecutor simply responded to the comments that defense counsel made during closing argument. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Prosecutor's remarks did not infringe on defendant's right not to testify because the remarks that defendant could also call witnesses to testify merely attempted to rebut the accusations made by defendant's attorney in his closing argument that the State did not call enough witnesses or present all the evidence that was available to them. Mask v. State, 996 So. 2d 106 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 631 (Miss. 2008).

In a burglary case, defendant's rights under the Fifth Amendment and Miss. Const. Art. 3, § 26 were not violated by a statement made by the prosecution during closing argument, as even though it seemed improper by itself, it was clear from the argument as a whole that the prosecutor was arguing for the credibility of his witness; the trial judge was in the best position to determine the propriety of the comment and it was within his discretion to allow it. Hart v. State, 965 So. 2d 721 (Miss. Ct. App. 2007).

During defendant's trial, the state's examination of an officer properly stopped at the point of the interview where defendant invoked his right to remain silent and went no further, and the officer's testimony about defendant's refusal to write or record a statement was merely a part of the preceding police interview; because defendant gave an oral statement to the police, testimony of refusal to write or record a statement would not prejudice him further, and therefore the trial court did not err in allowing testimony that defendant refused to make a written or recorded statement. Sacus v. State, 956 So. 2d 329 (Miss. Ct. App. 2007).

Prosecutor's comments on the unknown men were a direct comment on defendant's exercise of his right to remain silent and not testify as to who was present, where the prosecutor said that defendant failed to respond to a question about who the men were; there was absolutely no evidence that defendant was ever asked such a question in the first place, much less that he refused to answer it, and thus the prosecutor's comment violated defendant's right to remain silent. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Prosecutor's argument about a hospital was a comment on defendant's right not to testify because the prosecutor commented on the lack of evidence that defendant intended to take the victim to the hospital on an issue where the only one who could have established that issue was defendant; it was an impermissible comment on defendant's failure to take the stand and testify to elaborate on his intent to help the victim, and thus the prosecutor's comment violated defendant's privilege against self-incrimination. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Defendant's right to silence was not violated when the prosecution referred to a witness to a murder as the only witness that could have been produced; this was not a comment on defendant's failure to testify. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

In a prosecution for sale of marijuana to an undercover agent in which the defendant implied that the state mistakenly identified him as the person who sold the marijuana, the prosecutor's comment during closing arguments regarding the defendant's failure to successfully back up the claim of mistaken identity was not a comment on defendant's failure to take the stand in his own defense. Heatherly v. State, 757 So. 2d 357 (Miss. Ct. App. 2000).

Even if prosecutor's statement during closing argument that referred to witness' testimony, in which witness told defense counsel to ask defendant if he had told witness about committing crime, was improper reference to defendant's refusal to testify, statement did not require reversal; defense counsel did not object when witness made comment, prosecutor's remarks could be characterized as summary of witness' testimony rather than remark on defendant's failure to testify, evidence supported conviction beyond reasonable doubt without prosecutor's statement, and comment had almost no persuasive force. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Prosecution is prohibited from making direct comment, or reference by innuendo or insinuation, to defendant's failure to testify on his or her own behalf. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Prosecution did not improperly comment on capital murder defendant's failure to testify, when he stated that accomplice's testimony regarding a ripped shirt was the "only testimony" and the "only reliable information" made available; reading of full remarks made it plain that prosecutor was simply summarizing account of night's events as told by accomplice and rebutting defense efforts to show that accomplice was lying. Walker v. State, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not impermissibly comment upon failure of capital murder defendant to testify when he told jury, following defendant's speech to jury, that "for 11 months [defendant] had wanted to say something" and "if all he had to say was what he said in those less than 2 minutes he stood here before you, I can see why he hasn't bothered until now"; prosecutor's remarks were in direct response to defendant's attempt to show some degree of remorse. Walker v. State, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not comment on defendant's failure to testify by stating that sole issue, in prosecution against defendant for arson, was whether defendant recruited arsonist to burn building on the day in question. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by pointing out that not one defense witness testified that prosecution witness was lying. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating that no evidence was presented, in prosecution against defendant for arson, that arsonist, allegedly recruited by defendant to burn building on the day in question, was a professional criminal; rather, comment merely referred to paucity of evidence supporting defense theory that arsonist burned building to get revenge on defendant. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that it was not likely that government witness fabricated his testimony, in that if he had, he would have fabricated a better story; rather, comment merely referred to paucity of evidence supporting defense theory witness was publicity seeker who would fabricate testimony. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that there was no testimony supporting defense theory that defendant could not have committed the crime inasmuch as he was doctor who derived sense of closeness from the community because he was "their" doctor; rather, comment merely referred to paucity of evidence supporting that defense theory. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor did not comment on defendant's failure to testify by stating, during closing argument in prosecution against defendant for arson, that there was no testimony supporting defense theory that arsonist was blackmailing defendant; rather, comment merely referred to fact that blackmail theory was put forth by defense attorneys rather than by defense witnesses. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Prosecutor is prohibited from commenting on defendant's failure to testify, whether by direct comment or by innuendo and insinuation. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutorial comment on defendant's failure to testify is incurable, and defendant is entitled to mistrial; instruction to jury to disregard prosecutor's comments is insufficient to correct impropriety. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Defendant's constitutional interest in privilege against compelled self-incrimination is balanced on case-by-case basis against rule allowing attorneys wide latitude in making closing arguments, except where attorney makes direct reference to defendant's failure to testify. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutor may comment on lack of any defense, and such comment is not construed as reference to defendant's failure to testify through innuendo and insinuation. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Whether prosecutorial comment is improper comment on defendant's failure to testify is determined on facts and circumstances of each case; question is whether comment can reasonably be construed as comment upon failure of defendant to take stand. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Prosecutor did not make improper comments on defendant's failure to testify, and defendant was thus not entitled to mistrial, when prosecutor commented about what defendant might or might not have said to arresting officer, objected to defense counsel's statement that defendant was a family man who should be sent home to his family, and noted that jury had not heard any proof about where defendant was going if jury did not convict him. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

A prosecutor's remarks during closing argument did not constitute improper comment on the defendant's decision not to testify where the prosecutor did not comment on the defendant's failure to take the stand, but merely attempted to turn the jury's attention to the defendant's confession to the police which had been admitted into evidence. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A prosecutor's comments on the defendant's failure to testify reached a constitutional dimension so egregious that failure on the part of the defense counsel to make a proper objection either at trial or in his motion for a new trial did not waive the error where the prosecutor made 4 separate statements telling the jury that the State's witness' testimony was "unopposed," "unimpeached," "unrebutted," and that there was "no evidence whatsoever toward their unreliability." Whigham v. State, 611 So. 2d 988 (Miss. 1992).

A prosecutor did not improperly comment during closing argument on the defendant's right to remain silent where the prosecutor remarked that the victim could not talk because she was dead and stated that only the defendant and God knew what happened, but he did not observe the defendant's silence during trial; the prosecutor's comments would be a reference to the defendant's failure to testify only if innuendo and insinuation were employed. Alexander v. State, 610 So. 2d 320 (Miss. 1992).

A prosecutor improperly commented during closing argument on a capital murder defendant's failure to testify where the prosecutor stated that the defendant "hasn't told you the whole truth yet," that "you still don't know the whole story," and that the defendant was the only person alive who could give the whole story. Butler v. State, 608 So. 2d 314 (Miss. 1992).

A prosecutor did not improperly comment on the defendant's failure to testify when he stated during closing argument: "That's what you have got before you, and that's all you have got before you. All the evidence in this case points to one thing and one thing only"; the prosecutor's comment related to the evidence presented in the trial by both the State and defense as a whole, rather than the failure of the defendant to take the stand. Rogers v. State, 599 So. 2d 930 (Miss. 1992).

In a capital murder prosecution in which the defense counsel had argued that "there is only one person who can tell you if a reasonable doubt exists insofar as this case, and that's each and every one of you," the prosecutor's rebuttal constituted an improper comment on the defendant's failure to testify where it included a statement that "they tell you, there's one man alive today who can tell you what happened, and I agree with that. There is one person who could tell you what happened and we have...a statement from him. We have a confession, an oral confession, we have a written confession." Such remarks directed the jury's attention to the failure of the defendant to take the stand and admit or deny the contents of the confession. Griffin v. State, 557 So. 2d 542 (Miss. 1990).

A prosecutor's statement in closing argument that "they" hadn't bothered to tell the jury what the defendant was doing at a certain location was not an impermissible comment on the defendant's failure to testify since it was proper for the prosecutor to question the defense's inability to successfully explain the defendant's presence in the area where the crime took place, and the prosecutor's use of the word "they" appeared to be a reference to the defendant's 2 attorneys rather than the defendant himself. Jimpson v. State, 532 So. 2d 985 (Miss. 1988).

Argument that comment by prosecutor, who stated he had observed defendant and saw no remorse in him whatsoever, was made on defendant's Fifth Amendment privilege against self-incrimination did not constitute reversible error when viewed in light of all evidence. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Cross-examination of accomplice was legitimate attempt by prosecutor to impeach his testimony and was not calculated to raise defendant's silence in jurors' minds, where comments were directed principally toward accomplice, and not toward defendant's failure to testify. Monroe v. State, 515 So. 2d 860 (Miss. 1987).

An accused who had failed to testify or to put on proof at his capital murder trial was not entitled to a mistrial because of remarks by prosecutor in closing argument asking jury to recall defense's assertion in opening statement as to witnesses to be called. West v. State, 485 So. 2d 681 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574 (1986).

35. — — Comment of counsel at sentencing phase of capital prosecution on refusal to testify, self-incrimination.

Prosecutor did not improperly comment on defendant's failure to testify during sentencing phase of capital murder trial when he made comments concerning defendant's credibility, where defendant had testified during guilt phase and stipulated to use of guilt phase testimony during sentencing phase. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prosecutor did not impermissibly comment on defendant's failure to take the stand during resentencing hearing in capital murder case when he attempted to question witness about defendant's confession given during his guilt phase testimony; trial court refused to allow prosecution to question witness as to defendant's earlier testimony, and at time, defendant had not informed trial court he would not testify during sentencing phase. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

A prosecutor's remarks during the penalty phase of a capital murder prosecution did not constitute an improper comment on the defendant's failure to testify where the prosecutor stated that the defendant "showed no compassion, but would send a lawyer up here and ask you for compassion," since the argument pointed out the lack of a mitigation defense presented by the defendant, and that he was reduced to sending his lawyer in to plead for his life after all else had failed. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

The prosecutor's closing argument in the guilt phase of a capital murder prosecution did not constitute an improper comment on the defendant's right to remain silent following arrest where the prosecutor, while discussing a county jail inmate's testimony as to statements made by the defendant while he was in the jail, referred to the relationship between the defendant and the witness, and described the circumstances under which the statements were made. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's closing argument in a capital murder case did not constitute a comment on the defendant's failure to testify at trial, in spite of the defendant's argument that the prosecutor's comments highlighted the fact that the only people alive who could have testified as to the events surrounding the murders were the defendant and his accomplice, where the prosecutor merely stated that the defendant and his accomplice saw to it that there were no eyewitnesses, and that "people who kill their victims and kill their eyewitnesses cannot be set free." Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the State's closing argument did not constitute a comment on the defendant's failure to take the witness stand in his own defense where the State made the following argument: "Do you think she was suffering? Do you think that's cruel and atrocious, and what's even more than that, what do you think was running through [defendant's] head as he sat through watching her gag on her own blood? What do you think he was thinking?" Thorson v. State, 653 So. 2d 876 (Miss. 1994).

An accused sentenced to death on a capital murder charge was denied a fair trial by prosecutor's comments in closing argument as to accused's failure to testify, and by defense counsel's attempted "explanation" in closing argument as to the reason his client had failed to testify. West v. State, 485 So. 2d 681 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574 (1986).

36. — — Nonjury trial, self-incrimination.

While a jury is the judge of the weight and worth of a confession admitted in evidence by a trial court in a criminal prosecution, the jury should not be permitted to determine whether such confession is admissible. Norwood v. State, 258 So. 2d 756 (Miss. 1972).

37. — — Instructions, self-incrimination.

Jury instruction that the jury could infer guilt of larceny or theft of property if there was no reasonable explanation for possession of recently stolen property was not an improper comment on defendant's right to remain silent. Riley v. State, 1 So. 3d 877 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

Rule requiring each attorney in a criminal case to number his jury instructions and file them with the clerk, and to submit to opposing counsel a numbered copy of the instructions so filed at least 24 hours prior to the time that the case is set for trial, was not an unconstitutional invasion of the defendant's right against self incrimination. Vaughn v. Creely, 310 So. 2d 703 (Miss. 1975).

38. — — Presumptions and burden of proof, self-incrimination.

Where the State has laid the "proper predicate" for admission of a defendant's confession, the onus is then on the defendant to provide other evidence or testimony on the issue of voluntariness to rebut the State's assertion. Haymer v. State, 613 So. 2d 837 (Miss. 1993).

Where a defendant objects to the prosecution's use of a confession at trial as evidence against him or her, the prosecution bears the burden of proving beyond a reasonable doubt each fact which is prerequisite to admissibility. Kirkland v. State, 559 So. 2d 1046 (Miss. 1990).

39. Speedy trial — In general.

Other than his assertion of prejudice, defendant offered no substantiation for his claim of prejudice; having conducted an analysis of the Barker factors, and considering the case in its totality, there was no actionable violation of defendant's constitutional right to a speedy trial. Clark v. State, 14 So. 3d 779 (Miss. Ct. App. 2009).

Defendant's claims for speedy-trial violations neither established a plain-error basis to justify further appellate review, nor evidenced a miscarriage of justice; regarding delay, the record reflected that defendant assented to the entry of nine separate "Agreed Orders of Continuance" and filed numerous pre-trial motions, and defendant did not suffer prejudice due to a change in a witness's testimony. Dora v. State, 986 So. 2d 917 (Miss. 2008), writ of certiorari denied by 555 U.S. 1142, 129 S. Ct. 1009, 173 L. Ed. 2d 302, 2009 U.S. LEXIS 780, 77 U.S.L.W. 3429 (2009).

Where defendant did not raise the issue below, an assertion that her speedy trial rights were violated in a manslaughter case was not heard on review since an appellate court was not equipped to be a fact finder. Miller v. State, 956 So. 2d 221 (Miss. 2007).

Defendant failed to raise the issue of denial of a speedy trial in his motion for a new trial; there was no trial court order to review, no findings on the record, no response from the State as to the pre-indictment delay; there was nothing to indicate that the State delayed bringing defendant to trial for any prejudicial or improper reason; and there was nothing in the record to indicate any prejudice to defendant by the delay; thus, there was simply nothing at all for the appellate court to review. Therefore, the pre-indictment speedy trial issue was not properly before the appellate court. Young v. State, — So. 2d —, 2004 Miss. LEXIS 588 (Miss. May 27, 2004), opinion withdrawn by, substituted opinion at 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

Where delays in a divorce case were caused by a former wife's illness and car accident, as well as the hospitalization of one of the husband's attorneys, the delay was necessary under Miss. Const. Art. 3, § 24; moreover, the husband had no right to a speedy trial. Stuart v. Stuart, 956 So. 2d 295 (Miss. Ct. App. 2006).

Where 614 days elapsed between defendant's arrest and the trial, the delay was presumptively prejudicial and triggered consideration of the other Barker factors; however while approximately 114 days could be charged to the State for its delay in collecting a DNA sample, good cause existed for the resulting delay and defendant's constitutional and statutory rights to a speedy trial were not violated. Johnson v. State, 885 So. 2d 72 (Miss. Ct. App. 2004), writ of certiorari denied by 883 So. 2d 1180, 2004 Miss. LEXIS 1332 (Miss. 2004).

Defendant's right to a speedy trial was not violated, as approximately 197 days elapsed between defendant's arrest and trial, a number well below the statutory limit of 270 days, and the greatest part of the "delay" between the commission of the felony and trial was directly and solely the consequence of defendant's flight; therefore, defendant's counsel was not ineffective for failing to file a motion to dismiss on speedy trial grounds. Jackson v. State, 864 So. 2d 1047 (Miss. Ct. App. 2004).

In an escape case, defendant was not denied his constitutional or statutory right to a speedy trial, because 899 of the 991 days that elapsed between the escape and the trial were attributable to defendant, and defendant suffered no prejudice as a result of the delay. Jenkins v. State, 881 So. 2d 870 (Miss. Ct. App. 2003), affirmed in part and reversed in part by, remanded by 888 So. 2d 1171, 2004 Miss. LEXIS 1268 (Miss. 2004).

Sole remedy for denial of defendant's right to speedy trial is dismissal of charges against him. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

State bears burden of bringing accused to trial in speedy fashion. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

A defendant's right to a speedy trial was not violated, even though 6 years elapsed between the date of indictment and the actual determination of the defendant's habitual offender status, since habitual offender status is not a crime in and of itself, but is merely a status which enhances the sentence imposed for the conviction of an offense, and, therefore, the determination of habitual offender status is not an "offense" to which the right to a speedy trial would apply. Gray v. State, 605 So. 2d 791 (Miss. 1992).

The proper remedy for denial of a defendant's right to a speedy sentencing is to vacate the sentence and release the defendant from custody. Trotter v. State, 554 So. 2d 313 (Miss. 1989), A.L.R. 4th 3333.

A 28-day delay in taking a defendant before a magistrate for a preliminary hearing did not deprive him of his right to a speedy trial under § 26 of the Mississippi Constitution or the Sixth Amendment of the Federal Constitution, and such a delay without prejudice is not sufficient to require a reversal of his conviction. McLelland v. State, 204 So. 2d 158 (Miss. 1967).

Although assuming, but not deciding, that an unexplained three and one half day delay in affording a defendant a preliminary hearing to be undue delay, there is no authority to the effect that such delay entitled the defendant to an outright discharge on the charge of armed robbery. Dunning v. State, 251 Miss. 766, 171 So. 2d 315 (1965), cert. denied, 386 U.S. 993, 87 S. Ct. 1310, 18 L. Ed. 2d 339 (1967).

The guaranty of a speedy trial does not preclude the state from a reasonable opportunity to examine and prosecute the charge. Ex parte Jefferson, 62 Miss. 223 (1884).

40. — — Statutory rights, speedy trial.

A defendant's statutory right to a speedy trial under § 99-17-1 was not violated, even though his trial occurred 460 days after his arrest, where the trial occurred only one day after his arraignment.

Additionally, the defendant's constitutional right to a speedy trial was not violated where the defendant moved for 2 continuances during the period between the indictment and the trial which resulted in 181 days of time lost, much of the remaining delay could be attributed to 5 changes in the defendant's attorney, the delay was for good cause to allow his counsel sufficient time to prepare for trial, there were no deliberate attempts by the State to cause a delay to hamper the defendant's ability to prepare a defense, and there was no showing of prejudice to the defendant. Wiley v. State, 582 So. 2d 1008 (Miss. 1991).

For constitutional purposes, the right to a speedy trial attaches and time begins to run with arrest. The statutory right to a speedy trial set forth in § 99-17-1 attaches with arraignment; calculation of statutory time requires exclusion of the date of arraignment and inclusion of the date of trial and weekends, unless the last day of the 270-day period falls on Sunday. Any delays in prosecution attributable to a defendant under either the constitutional or statutory scheme tolls the running of time. Any continuances for "good cause" will toll the running of time unless "the record is silent regarding the reason for delay," in which case "the clock ticks against the State because the State bears the risk of non-persuasion on the good cause issue." The statutory 270-day rule is satisfied once the defendant is brought to trial, even if that trial results in a mistrial. Handley v. State, 574 So. 2d 671 (Miss. 1990).

Compliance with § 99-17-1 does not necessarily mean that a defendant's constitutional right to a speedy trial has been respected. Smith v. State, 550 So. 2d 406 (Miss. 1989).

A defendant's right to a speedy trial was not violated since the § 99-17-1 270-day period was tolled from the time of the first continuance which was granted on the defendant's motion, until the date of the end of the second continuance in which the defense counsel actively participated. Arnett v. State, 532 So. 2d 1003 (Miss. 1988).

Section 99-17-1 requires only that indictments be tried within 270 days of arraignment, and, where the first trial results in a mistrial, the statute is not applicable to require that the retrial take place within 270 days of the first trial. Kinzey v. State, 498 So. 2d 814 (Miss. 1986).

The guarantee of a speedy and public trial is furthered by Code 1942, § 2473. Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745 (1947).

41. — — Administrative proceedings, speedy trial.

The balancing test used in criminal proceedings for determining whether the right to a speedy trial has been violated is not applicable in an attorney disciplinary action; although attorney disciplinary proceedings are quasi-criminal in nature, they are not governed by the same rules that are utilized in criminal proceedings. Barrett v. Mississippi Bar, 648 So. 2d 1154 (Miss. 1995).

Since attorney disciplinary proceedings are not criminal in nature, the complaint tribunal erred in applying the factors set forth. Mississippi Bar v. An Att'y, 636 So. 2d 371 (Miss. 1994).

42. — — Attachment of right, speedy trial.

Where defendant charged with murder was apprehended in Chicago, Illinois in December 2001, the State of Mississippi lacked jurisdiction over defendant until his extradition. Defendant's right to a speedy trial attached on July 16, 2002 when he was arrested by the Holmes County Sheriff's Department, Mississippi. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

The defendant's constitutional right to a speedy trial did not attach when he was taken into custody for violating his appeal bond, but at the later date on which he was indicted for possession of a deadly weapon as a convicted felon. Coleman v. State, 725 So. 2d 154 (Miss. 1998).

Constitutional right to speedy trial attaches at time of accused's arrest, indictment, or information. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

For constitutional purposes, defendant's right to speedy trial attaches at time of arrest. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Delay of 280 days from time defendant's constitutional right to speedy trial attached to time trial began was presumptively prejudicial for purposes of speedy trial analysis. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

In determining whether defendant's claim of constitutional speedy trial violation is justified, date of defendant's arrest is date right to speedy trial attaches. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

The constitutional right to a speedy trial attaches when a person has been accused. Smith v. State, 550 So. 2d 406 (Miss. 1989).

The speedy trial clock begins to tick from the moment the defendant is effectively accused of the offense. In cases not involving a detainer lodged against a defendant already incarcerated, this means the time of indictment. Fisher v. State, 532 So. 2d 992 (Miss. 1988), grant of habeas corpus rev'd, 997 F.2d 1095 (5th Cir. 1993).

The right to a speedy trial applies only after a person has been accused and, under some circumstances, one becomes an "accused" when arrested. Lightsey v. State, 493 So. 2d 375 (Miss. 1986).

43. — — Invocation of right, speedy trial.

Defendant was procedurally barred on direct appeal from raising the issue of whether defendant's right to a speedy trial was violated because, while defendant filed numerous motions on the issue, neither defendant nor, counsel set them for a hearing or requested a ruling. Dismissal without prejudice preserved defendant's ability to raise the issue in a motion for post-conviction relief in association with an ineffective assistance of counsel claim for failure to request a hearing on the motions. Ellis v. State, — So. 3d —, 2013 Miss. App. LEXIS 718 (Miss. Ct. App. Oct. 29, 2013), writ of certiorari denied by 2014 Miss. LEXIS 317 (Miss. June 26, 2014).

Defendant's right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 was not violated because despite the anxiety and hardship that defendant could have endured, he waited until two weeks before his initial trial date to assert his right to a speedy trial; although defendant's motion included a request for a speedy trial, the context and timing of the motion showed that he was actually seeking dismissal, not a trial. Ben v. State, 95 So. 3d 1236 (Miss. Aug. 23, 2012), writ of certiorari denied by 133 S. Ct. 1723, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2589, 81 U.S.L.W. 3555 (U.S. 2013).

Defendant's conviction for murder was appropriate because his argument that his right to a speedy trial was violated was procedurally barred because he did not raise his constitutional right to a speedy trial except in his brief on appeal. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

No violation of defendant's constitutional right to a speedy trial occurred where there was no evidence in the record to suggest that defendant had attempted to obtain a ruling on a motion asserting his right to a speedy trial; there was no prejudice to defendant's defense based on the testimony of the defense witnesses, who were clear in their recollection of what transpired on the night of the crime. Anderson v. State, 874 So. 2d 1000 (Miss. Ct. App. 2004).

In applying the facts to the totality of the circumstances, defendant's right to a speedy trial was not violated because the defense contributed to some of the delays accounted for and failed to object or assert the right to a trial until one month before the actual trial was held. Birkley v. State, 750 So. 2d 1245 (Miss. 1999).

Defendant has some responsibility to assert right to speedy trial, although state has duty to ensure that defendant receives speedy trial. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Defendant's failure to ask for speedy trial is not dispositive in speedy trial analysis, but must be weighed against other factors. Taylor v. State, 672 So. 2d

1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Although defendant is not required to demand speedy trial, his assertion of such right will weigh more heavily in his favor when determining whether his constitutional right to speedy trial has been violated. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Assertion of constitutional right to speedy trial need not be in writing. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A defendant was denied his constitutional right to a speedy trial where 610 days elapsed from the date of indictment to the date of trial, even though the defendant failed to assert his right to a speedy trial. Although a defendant may have some responsibility to assert his or her speedy trial claim, the primary burden is on the courts and the prosecutors to assure that cases are brought to trial. Thus, the defendant's failure to "consistently badger" the prosecution to proceed with his trial did not eliminate his claim that he was denied a speedy trial. Flores v. State, 574 So. 2d 1314 (Miss. 1990).

44. — — Factors considered, speedy trial.

Defendant's constitutional right to a speedy trial was not violated because, although there was a delay of 424 days, the case was complicated and required the use of experts for both sides, and a witness did actually identify defendant from a six-photo line-up a few days after the murder. Galloway v. State, 122 So. 3d 614 (Miss. 2013), writ of certiorari denied by 189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685, 82 U.S.L.W. 3685 (U.S. 2014).

Defendant's right to a speedy trial was not violated because the factors weighing in favor of defendant regarding the length and the reason for the delay were neutralized when defendant failed to assert her right, and because she failed to show any resulting prejudice from the 18-and-a-half month delay. McClendon v. State, 124 So. 3d 709 (Miss. Ct. App. 2013).

As a trial court, on remand, failed to give defendant a meaningful opportunity to present evidence of prejudice with respect to the Barker factors for his speedy trial claim, arising from a forfeiture action initiated by the county, the remand order was not complied with and the evidence could not be properly weighed. One 1970 Mercury Cougar v. Tunica County, 115 So. 3d 792 (Miss. 2013).

Defendant's right to a speedy trial was not violated because defendant's own requests for continuances delayed his trial date for almost three years, he neglected to assert his right to a speedy trial until almost a year after his arrest, and the delay did not result in any prejudice to the defense. Bateman v. State, 125 So. 3d 616 (Miss. 2013).

Defendant's convictions for aggravated assault and armed robbery were proper because his right to a speedy trial was not violated since the delay was neither intentional nor egregiously protracted,and there was an absence of actual prejudice to the defense. Johnson v. State, 68 So. 3d 1239 (Miss. June 30, 2011).

Defendant's convictions for murder and kidnapping were proper because he was not denied his constitutional right to a speedy trial. In part, although defendant claimed that he was prejudiced by the passage of time between his arrest and the trial because he could no longer recall the names of witnesses or the location of a particular alibi witness, defendant's counsel represented to the trial court that she had never actually spoken to that particular alibi witness, and she admitted that she did not attempt to interview or locate the witnesses at the time of defendant's arrest, over a year and a half before the trial; no explanation appeared in the record as to why defendant did not give his attorney the names or location of those witnesses at an earlier date and therefore, defendant's claims of prejudice were with merit since any prejudice was caused by defendant himself. Lipsey v. State, 50 So. 3d 341 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 13 (Miss. 2011).

Defendant's conviction for the sexual battery of his minor daughter was appropriate because he was not denied his constitutional right to a speedy trial since, while there was a delay in the trial, there was no evidence the State deliberately created the delay, nor did defendant object in any way to the delay until the case was set for trial a month later. Further, when defendant did object, he requested the charges be dropped and not that the case be heard sooner; there was also no prejudice to the defense due to the delay. McBride v. State, 61 So. 3d 174 (Miss. Ct. App. 2010), superseded by 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Defendant's conviction for armed robbery was appropriate because his speedy trial rights were not violated. It did not appear that the delay was done for the purposes of hampering or delaying the defense and defendant further did not show that he was prejudiced because he was unable to locate his girlfriend; the girlfriend's earlier statement to police served to implicate defendant rather than exonerate him. Jones v. State, 27 So. 3d 1172 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 75 (Miss. 2010).

Defendant's conviction for the possession of methamphetamine precursors was appropriate because he was brought to trial within 275 days of his waiver of an arraignment and there was good cause shown for some of the continuances that were duly granted. There was also nothing indicating that the State exercised a deliberate attempt to sabotage the defense by delaying the trial. Houser v. State, 29 So. 3d 813 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 135 (Miss. 2010).

Defendant was incarcerated for a lengthy time, but it was a result of his request for a mental exam and the various requests for continuances, plus he failed to point to any specific inquiry to his ability to prepare his defense; while not considering lightly that a delay did exist, the court recognized that most of the delay was attributable to defendant, he filed his motions for a speedy trial after the bulk of time had elapsed, and he failed to show that he suffered any actual prejudice due to the delay, such that the court could not find that his constitutional right to a speedy trial was violated. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's right to a speedy trial under U.S. Const. Amend. VI and XIV and Miss. Const. Art. 3, § 26 was not violated because despite the fact that more than 600 days had elapsed between defendant's arrest and his trial, the delay attributable to the Sate was for good cause while the delay attributable to defendant was not. In addition, although defendant asserted his right to a speedy trial, he failed to file a motion to sever his trial from that of his co-defendant and the prejudice factor had to be weighed against defendant. Johnson v. State, 9 So. 3d 413 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 221 (Miss. 2009).

Defendant's constitutional right to a speedy trial was not violated by the 603 days between his arraignment and his trial because most of the continuances requested by defense counsel were sought in order to prepare for trial, to allow extra time in light of newly appointed counsel to prepare for trial, to prepare for expert witnesses, to allow new counsel to be appointed because of failing health of defendant's co-counsel, or to obtain records of information needed in preparation for trial; defendant's murder trial was complicated and involved many difficult issues and required extensive expert testimony. During the time of preparation for defendant's trial, Hurricane Katrina struck, causing counsel to be uprooted from the area and eventually replaced due to their relocation, which further contributed to the delay. Smith v. State, 977 So. 2d 1227 (Miss. Ct. App. 2008).

Where almost three years elapsed before defendant's trial for armed robbery, kidnapping, and rape, he was not denied his constitutional right to a speedy trial. Defendant never demanded a speedy trial; most of the delays were for good cause or were caused by defendant; and he failed to show any prejudice. Burton v. State, 970 So. 2d 229 (Miss. Ct. App. 2007).

State was charged with 428 days of delay, which was a 14-month delay that exceeded the eight-month threshold for presumptive prejudice; however, defendant's constitutional right to a speedy trial was not violated because: (1) although defendant filed two motions to dismiss the indictment for failure to provide a speedy trial, that was not equivalent to requesting a speedy trial; (2) defendant's inability to work and support the defendant's family was not the type of suffering required to show that the trial was prejudiced; and (3) the defendant made no assertion that the delay prejudiced the trial. White v. State, 969 So. 2d 72 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

Under the Sixth and Fourteenth Amendments and Miss. Const. Art. 3, § 26, defendant's constitutional right to a speedy trial was not violated because, although there was a long delay before his trial: (1) defendant did not make a demand for a speedy trial until April 15, 2004, nearly 17 months after his arrest, six months after he was indicted, four months after his trial date had been set, and less than three weeks before the trial was scheduled to commence; (2) he then sought to postpone the case until August 16, 2004; and (3) there was no evidence of any actual prejudice suffered by defendant from the delay. Boone v. State, 964 So. 2d 512 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 515 (Miss. 2007).

Defendant's right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 was not violated, even though a 580-day delay was presumptively prejudicial, because there was good reason for the delay due to an officer's deployment to Iraq, defendant failed to assert his rights, and there was no prejudice shown other than incarceration. Bonds v. State, 938 So. 2d 352 (Miss. Ct. App. 2006).

In a capital murder case, the right to a speedy trial under the Sixth Amendment and the Mississippi Constitution was not violated by a 16-month delay between arrest and the date of trial; although that was presumptively prejudicial, a weighing of the applicable factors showed that there was no violation since the delay was caused by court unavailability and the need for time to complete the investigation, and there was no prejudice shown outside of incarceration itself since the defense was not impaired, no witnesses were rendered unavailable due to the delay, and there was no showing of a loss of evidence. Booker v. State, — So. 2d —, 2006 Miss. App. LEXIS 635 (Miss. Ct. App. Aug. 29, 2006), opinion withdrawn by, substituted opinion at 5 So. 3d 411, 2008 Miss. App. LEXIS 77 (Miss. Ct. App. 2008).

Defendant's right to a speedy trial was not violated because, while a delay did exist, defendant failed to assert his right to a speedy trial, did not object to any delays, other than filing the day before trial a motion to dismiss for failure to provide a speedy trial, and failed to show that he suffered any actual prejudice due to the delay. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Where defendant was indicted on July 16, 2002 for murder, his trial did not begin until May 1, 2003. His constitutional right to a speedy trial was not violated, because he was not prejudiced by the delay. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

Defendant was arrested on July 5, 2000, indicted one year later, and his trial commenced on April 2, 2002; because defendant was released on bond shortly after his indictment there was no oppressive pretrial detention after he was indicted. Further, at least part of the delay to trial, following his indictment, was attributable to the two continuances granted at defendant's request; thus, there was no merit to defendant's denial of a speedy trial claim as to the period of time following his indictment. Young v. State, 891 So. 2d 813 (Miss. 2005).

Defendant was arrested on July 5, 2000, indicted one year later, and his trial commenced on April 2, 2002. For purposes of the pre-indictment delay of 366 days, there was nothing in the record or in defendant's brief to indicate (1) that defendant made any effort to request an attorney, seek bail, or demand a speedy trial prior to June 2001; (2) that the State delayed bringing defendant to trial for any prejudicial or improper reason; or (3) any prejudice to defendant by the delay; thus, defendant's right to a speedy trial was not violated by the pre-indictment delay. Young v. State, 891 So. 2d 813 (Miss. 2005).

From the date of arrest to the date of defendant's trial, approximately 22 months elapsed, and that presumptive prejudice required the appellate court to consider other Barker factors relating to defendant's right to a speedy trial. Other reasons for the delay were: (1) plea negotiations; (2) change of counsel; (3) the fact the State had to wait results from the crime lab after plea negotiations failed; and (4) a preferred trial setting in another case. However, when considered as a whole, the reasons for delay favored neither party, defendant was not prejudiced by his pre-trial incarceration, his alleged demands for speedy trial had generally been in the form of motions to dismiss, and his rights under the Sixth Amendment and Miss. Const. Art. III, § 26 were not violated. Grant v. State, 913 So. 2d 316 (Miss. Ct. App. 2005).

Although the time between defendant's arrest and his trial for attempted kidnapping was substantial, a portion of the delay was excluded from the "270 day rule" provided in Miss. Code Ann. § 99-17-1 as being attributable to defendant and he failed to show how his case was prejudiced by the delay in that he did not show that his pretrial incarceration was oppressive, that he suffered anxiety, or that his defense was impaired. Therefore defendant's right to a speedy trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Miss. Const. Art. 3, § 26 was not violated. Hersick v. State, 904 So. 2d 116 (Miss. 2004).

Defendant's embezzlement conviction was proper where his speedy trial rights were not violated because, by falsely agreeing to repay the owner, defendant avoided pursuing an indictment against him, and thus, the delay until August 2001 was a neutral factor Further, defendant did not diligently pursue a speedy trial. Crimm v. State, 888 So. 2d 1178 (Miss. Ct. App. 2004).

Where defendant was held in jail for 325 days before being indicted, and was held in jail for 589 days between his arrest and trial, defendant's speedy trial claim was without merit; while the length of delay was great, the State's failure to obtain timely testing was not done to purposefully disadvantage defendant, and defendant's ability to defend against the charges was not affected. Forrest v. State, 863 So. 2d 1056 (Miss. Ct. App. 2003).

Although defendant's trial was delayed, defendant failed to assert his right to a speedy trial, did not object to any delays other than filing the week before trial a motion to dismiss for failure to provide a speedy trial, and failed to show he had suffered any actual prejudice due to the delay; thus, defendant's constitutional right to a speedy trial was not violated. Mims v. State, 856 So. 2d 518 (Miss. Ct. App. 2003), writ of certiorari denied by 859 So. 2d 1017, 2003 Miss. LEXIS 522 (Miss. 2003).

A delay of approximately 14 months between movant's arrest and movant's guilty plea was presumptively prejudicial, the record contained no evidence of the reason for delay, which weighed against the State, movant asserted counsel failed to advise movant of the right and that counsel was ineffective, and the prejudice factor weighed in movant's favor; thus, the trial court erred in denying movant's postconviction relief motion on the issue without a hearing, and the matter was remanded for an evidentiary inquiry. Robinson v. State, 920 So. 2d 1009 (Miss. Ct. App. 2003).

Factors to be considered in determining whether defendant's right to speedy trial was violated are length of delay, reason for delay, defendant's assertion of right to speedy trial, and prejudice to defendant resulting from delay. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Analysis of whether defendant was deprived of right to speedy trial must turn on facts of particular case, quality of evidence available on each factor, and, in absence of evidence, identification of party with risk of non-persuasion; no sole factor is dispositive. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Once constitutional right to speedy trial has attached, Supreme Court, in determining whether right has been denied, must examine length of delay, reason for delay, defendant's assertion of right to speedy trial, and prejudice resulting to defendant from delay, in light of all circumstances, including conduct of prosecution and accused. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Court must balance four factors in determining whether defendant's claim of constitutional speedy trial violation is justified: length of delay, reason for delay; whether defendant has timely asserted right to speedy trial and whether defendant has been prejudiced by delay. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether defendant's claim of constitutional speedy trial violation is justified, no single factor is dispositive, but court must consider totality of circumstances, including any additional relevant circumstances beyond 4 enumerated factors, in making that determination. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

For purpose of constitutional speedy trial analysis, delay which is presumptively prejudicial to defendant will not require reversal in and of itself but will require that remaining factors in determining whether claim of constitutional violation is justified be examined closely. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

For purpose of constitutional speedy trial analysis, as period of delay between defendant's arrest and trial increases, importance of delay factor also increases. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

For purpose of constitutional speedy trial analysis, where delay between arrest and trial is not long enough to be considered presumptively prejudicial, court does not need to examine remaining factors used to determine whether constitutional speedy trial violation has occurred. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Balance is struck in favor of rejecting defendant's speedy trial claim if delay is neither intentional nor egregiously protracted, and where there is complete absence of actual prejudice. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In a constitutional speedy trial analysis, prejudice to the defendant may take several forms: (1) delay may prejudice the outcome of the defendant's case; (2) prejudice may take the form of harm to the defendant's personal interests, such as the debilitating effect of delay on the defendant's financial, societal, and emotional circumstances; and (3) lengthy pretrial incarceration may be unnecessarily oppressive and may pose societal disadvantages, though a defendant's assertion of prejudice attributable solely to incarceration, with no other harm, typically is not sufficient to warrant reversal. Ross v. State, 605 So. 2d 17 (Miss. 1992).

When the constitutional right to a speedy trial attaches, the court, in order to determine whether the defendant's right has been denied, will examine 4 factors: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice resulting to defendant because of the delay. All 4 factors must be considered together, and no individual factor may completely dispose of the issue. Lightsey v. State, 493 So. 2d 375 (Miss. 1986).

Delay alone is not sufficient to support a finding that the right to a speedy trial has been denied. Smith v. State, 489 So. 2d 1389 (Miss. 1986).

45. — — Time of demand for trial, speedy trial.

Defendant's conviction for the sexual battery of his minor daughter was appropriate because he failed to raise his statutory right to a speedy trial specifically under Miss. Code Ann. § 99-17-1. Additionally, when he raised his constitutional right to a speedy trial, it was well past the 270-day requirement of the statute. McBride v. State, 61 So. 3d 174 (Miss. Ct. App. 2010), superseded by 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Defendant's first motion to dismiss was filed over two years after he was indicted and his motion for a speedy trial was first filed 10 days prior to seeking a continuance and next filed after a trial date had been set; the court found that this weighed against defendant. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's conviction for possession of cocaine, more then 10 grams, but less than 30 grams, in violation of Miss. Code Ann. § 41-29-139(c)(1)(D), was appropriate because his right to a speedy trial was not violated, in part because there was no actual prejudice to defendant as a result of the delay between arrest and trial. Further, defendant was aware of the possibility that charges would be brought against him as a result of his arrest and he did not seek any resolution of the charges until after he was served with the indictment in June 2006. Williams v. State, 5 So. 3d 496 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 135 (Miss. 2009).

Defendant's right to a speedy trial did not automatically warrant reversal of defendant's conviction for an alleged violation of the right; rather, a balancing test was conducted, and moreover, defendant's demand for a dismissal of the charge based on an alleged violation of the right to a speedy trial was not the same as the demand for a speedy trial. Guice v. State, 952 So. 2d 129 (Miss. 2007), writ of certiorari denied by 552 U.S. 1042, 128 S. Ct. 645, 169 L. Ed. 2d 515, 2007 U.S. LEXIS 12594, 75 U.S.L.W. 3274 (2007).

In speedy trial analysis, defendant's failure to bring denial of speedy trial issue up until trial, as well as defendant's motion for continuance, which could be considered as contrary to any concerns about speedy trial, weighed in favor of state. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Without evidence of absent witness' departure date or expected testimony, accused could not show prejudice from delay in commencement of trial, a factor in speedy trial analysis; moreover, even if accused could have shown prejudice due to absent witness, he would have been barred from doing so, as he raised prejudice from absent witness for first time on appeal. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Although accused was presumptively prejudiced by 280-day delay before trial, he was not denied right to speedy trial, since he failed to ask for speedy trial until trial, he moved for continuance before trial, and he failed to show prejudice from the delay. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Late filing by defendant asserting his right to speedy trial is not fatal to defendant's claim of violation of constitutional right to speedy trial. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Filing of motion to dismiss for denial of defendant's right to speedy trial 3 days prior to trial date was not fatal to defendant's claim, but weighed less heavily than an earlier assertion of his right would have done in analysis of whether his constitutional right to speedy trial was violated. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A defendant was not denied his right to a speedy trial, even though 266 days elapsed from the time of his arrest to the time of his first trial which ended in a mistrial, 305 days elapsed from his arrest to his second trial which resulted in a conviction, the delay was attributable to the State, and the defendant filed a motion for a speedy trial 15 days after indictment, where he did not file a motion to dismiss for lack of a speedy trial until the day before the second trial, and he failed to show any actual prejudice. Rhymes v. State, 638 So. 2d 1270 (Miss. 1994).

A defendant was denied his constitutional right to a speedy trial, even though he did not assert his right to a speedy trial until 5 days before trial began, where 370 days elapsed between the date he was arrested and the date his trial began and, because the defendant was convicted in federal court on the charge of making a false statement in the acquisition of a firearm 279 days after his arrest in the case in question, the delay resulted in the defendant being sentenced as an habitual offender. Smith v. State, 550 So. 2d 406 (Miss. 1989).

The fact that a Mississippi petitioner was indicted at the January 1962 term and not brought to trial until January of 1967, did not deny his constitutional right to a speedy trial, despite his contention that the state should have obtained his release for the purpose of trial from prisons where he was held, where it appeared that with one possible exception he was imprisoned at all times when the state court was in session from the time of arrest until his trial, where he did not at any time demand a trial, although represented by counsel, and where it appeared that he was not prejudiced by the delay, except for a speculation that he might otherwise have received a sentence concurrent with one served from 1964 to 1966. McCrory v. Cook, 329 F. Supp. 83 (N.D. Miss. 1971), aff'd, 454 F.2d 1173 (5th Cir. 1972).

The claim of an accused that he had been denied a speedy trial would not be denied on the ground that the accused had not requested a trial between the date of his indictment and his trial, where the accused was given no notice of the indictment until he was notified to appear for trial, and hence there was no reason for him to request a speedy trial. Bell v. State, 220 So. 2d 287 (Miss. 1969).

46. — — Delay attributable primarily to defendant, speedy trial.

Defendant's right to a speedy trial was not violated because defendant neither alleged prejudice to the defense of the charge against defendant, nor did defendant demonstrate that defendant had suffered anxiety from the charge. Furthermore, the record reflected that the majority of the delay was attributable to defendant as the trial was twice continued due to defense counsel's illness, and defendant signed both continuance orders, waiving the right to a speedy trial. Jackson v. State, 121 So. 3d 313 (Miss. Ct. App. 2013), writ of certiorari denied by 2014 Miss. LEXIS 260 (Miss. May 22, 2014).

Defendant's right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 was not violated because the bulk of the delay was due to the state crime lab's forensic and DNA testing, which was critical to the case, and the prejudice was minimal since the fading memories of potential, unnamed witnesses did not impair defense; despite the anxiety and hardship that defendant could have endured, he waited until two weeks before his initial trial date to assert his right to a speedy trial. Ben v. State, 95 So. 3d 1236 (Miss. Aug. 23, 2012), writ of certiorari denied by 133 S. Ct. 1723, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2589, 81 U.S.L.W. 3555 (U.S. 2013).

By pleading guilty, an inmate had waived his constitutional right to a speedy trial. Moreover, delays which were attributable to a defendant did not count toward the 270-day requirement under Miss. Code Ann. § 99-17-1, and Miss. Code Ann. § 99-1-5 provided that prosecution for an offense was not barred when process could not be served; here, the reason for any delay in sentencing was that there was a significant period of time in which the trial court was unable to serve the inmate with his indictment. Edmondson v. State, 17 So. 3d 591 (Miss. Ct. App. 2009).

Court found that the delays were for good cause or mainly caused by defendant; although it took approximately two years for a competency examination to be completed, the court could not count that time against the State because defendant requested the examination, plus he also requested a continuance. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's constitutional right to a speedy trial was not violated where the state established good cause for the trial delay; any delay that defendant suffered was caused by defendant's criminal actions in Indiana, being incarcerated in another state, and the extradition process. Hall v. State, 984 So. 2d 278 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 288 (Miss. 2008).

Trial court had not erred in denying defendant's motion to suppress his confession, because any delay was brought about by defendant, and he waived any rights he had by the postponement because he initiated the postponement of the initial hearing by asking to speak to the deputies on his way to the hearing and telling them that he wanted to make a statement. Defendant then signed a Miranda rights waiver. Wilson v. State, 923 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 151 (Miss. 2006).

Trial court carefully and patiently examined the testimony and other evidence and provided defendant with ample opportunity to provide evidence that the delay was not attributable to him or good cause; defendant failed to suggest any evidence, potential witness, or case theory which escaped his reach because of the delay, and there was no basis to hold that the delay in the proceedings impaired defendant's defense of the case. Stark v. State, 911 So. 2d 447 (Miss. 2005).

Where defendant was tried 538 days after arraignment, and 264 days of the delay could be attributed against the State, there was no statutory violation under the guidelines set forth in Miss. Code Ann. § 99-17-1. Further, the delay could be attributed to continuances requested upon the motion of defendant's attorneys, substitution of counsel, plea negotiations, ongoing discovery, and potentially the trial date being lost due to a crowded docket, and applying the balancing test to the four factors listed in Barker, and the conduct of the State and defendant, defendant's constitutional right to a speedy trial was not denied. Summers v. State, 914 So. 2d 245 (Miss. Ct. App. 2005).

Defendant failed to establish that the constitutional right to a speedy trial was violated as, though the length of time was presumptively prejudicial, most of the delays were attributed to defendant or his counsel, defendant failed to show that he had failed to demand his right to a speedy trial until shortly before the trial began, and he was not prejudiced by the delay as emotional stress caused by the delay did not constitute prejudice. Wesley v. State, 872 So. 2d 763 (Miss. Ct. App. 2004).

Where there was considerably more than 270 days between the date that arraignment was waived and the beginning of trial, there was no violation of the statutory right to a speedy trial where although the trial judge himself may have taken more time to review the records than was absolutely necessary, defendant's seeking that review and the trial court's granting it were sufficient reasons to consider that part of the delay to have been the responsibility of defendant himself. Peters v. State, 864 So. 2d 983 (Miss. Ct. App. 2004).

Defendant's conviction of armed robbery was affirmed where the speedy trial, improper testimony and impeachment, jury instruction, and weight of the evidence issues that she raised on appeal had no merit; defendant's right to a speedy trial under the U.S. Const. amend. VI and XIV and Miss. Const. Art. 3, § 26 were not violated because the State should not be penalized for additional delays after defendant's counsel withdrew, her motion to dismiss for failure to provide a speedy trial was not prompt, and she failed to demonstrate that actual prejudice resulted from the delay. Jones v. State, 846 So. 2d 1041 (Miss. Ct. App. 2002), writ of certiorari denied by 846 So. 2d 229, 2003 Miss. App. LEXIS 583 (Miss. Ct. App. 2003).

Continuances requested by defendant, including continuance to allow defense counsel additional time for discovery after defendant changed attorneys in immediate days before trial for no compelling reason, would be charged to defendant in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A defendant's constitutional right to a speedy trial was not violated, even though the length of the delay was 636 days, where the bulk of the delay was caused by the defendant's frequent changes of counsel and his reneging on a plea agreement, the multitude of pretrial motions filed on the defendant's behalf further contributed to the delay, the defendant made no assertion of his right other than a motion to dismiss the charges after the fact, and the defendant could not show tangible prejudice but relied only on the anxiety caused by incarceration and pending charges. Wagner v. State, 624 So. 2d 60 (Miss. 1993).

A defendant was not denied his statutory or constitutional rights to a speedy trial, even though he was arrested on February 13, 1989, arraigned May 5, 1989, and his trial began March 5, 1990, where the defendant filed 15 motions before he was brought to trial which substantially contributed to the delay, the record supported the State's position that it could not try the case until the issues of change of venue and admissibility of forensic DNA analysis had been resolved, and the defendant did not contend that the delay either diminished his defense or strengthened the State's evidence, but stated only that he suffered "a great deal of anxiety." Polk v. State, 612 So. 2d 381 (Miss. 1992).

A defendant's constitutional and statutory rights to a speedy trial were not violated, even though the delay between the defendant's arrest and trial was 378 days and the delay between arraignment and trial was 370 days, where only one of the delays-a continuance requested by the State solely for its prosecutorial tactical advantage-was attributable to the State, and, after calculating the delays caused by the defendant, he came to trial 164 days after his arrest and 156 days after his waiver of arraignment. Ross v. State, 605 So. 2d 17 (Miss. 1992).

A defendant was not deprived of his constitutional right to a speedy trial, even though he was tried 603 days after his arrest, where only the 162-day delay from the arrest to the indictment was chargeable against the State, the defendant did not assert his right to a speedy trial until 35 days prior to trial, and he failed to show prejudice as a result of the delay. Handley v. State, 574 So. 2d 671 (Miss. 1990).

Defendants did not suffer a deprivation of the right to a speedy trial, even though there was a 414-day delay between the date the defendants were arrested and the date of their trial, where a substantial part of the reason for the delay was that the defendants took no steps to secure counsel, and the delay did not operate to their substantial prejudice since there was no evidence of prejudice at trial and the defendants' arrest resulted in their parole revocation and immediate incarceration to complete prior sentences, so that the defendants' lives were not "put on hold" solely as a result of the delay. Jaco v. State, 574 So. 2d 625 (Miss. 1990).

Defendant was not denied right to a speedy trial where, although almost 7 years elapsed between his indictment on charges of murder and aggravated assault and his arraignment, substantially all of the delay was due to defendant's confinement in a state mental institution pursuant to court order, issued shortly after the indictment, finding defendant insane and not competent to stand trial, and trial was set in less than 6 weeks after the court was notified by institution's staff of defendant's competence to stand trial. Smith v. State, 489 So. 2d 1389 (Miss. 1986).

A lapse of five years between a defendant's indictment and trial did not deny him a speedy trial where the facts established that he had defaulted on his bail bond, that officials had made every reasonable effort to locate him and bring him back to the county for trial, that the defendant did not make any request between time of indictment and time of trial for a speedy trial, and that when he was finally apprehended he was granted a speedy trial. McCrory v. State, 223 So. 2d 625 (Miss. 1969).

47. — — Presumptively prejudicial delay, speedy trial.

Defendant was arraigned on August 18, 2005 and his trial finally occurred on February 21, 2008; since the delay exceeded eight months, it was presumptively prejudicial and the cause of the delay had to be analyzed under the remaining factors. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Where 837 days elapsed between the date of appellant's arrest and the date of trial, appellant's speedy trial rights were not violated, because although the 837-day delay was presumptively prejudicial, appellant never asserted the right to a speedy trial and appellant made no allegation of prejudice caused by the delay. Brunson v. State, 944 So. 2d 922 (Miss. Ct. App. 2006).

Defendant's constitutional and statutory rights to a speedy trial on drug charges were not violated. The 742-day delay between indictment and trial was presumptively prejudicial, but defendant failed to actively pursue his right to a speedy trial, and he was not actually prejudiced. Alexander v. State, 875 So. 2d 261 (Miss. Ct. App. 2004).

Defendant was not denied his right to a speedy trial, even though the 14-month delay between the placement of the detainer and defendant's trial date was presumptively prejudicial, because defendant did not file a motion to dismiss for the lack of a speedy trial until one year after his arrest, and there was no evidence to support defendant's claim of lost witnesses or his claim that the delay negatively affected the conditions of his confinement under his previous sentence. Clayton v. State, 946 So. 2d 796 (Miss. Ct. App. 2006), writ of certiorari dismissed by 947 So. 2d 960, 2007 Miss. LEXIS 64 (Miss. 2007).

Constitutional right to a speedy trial was not denied, although a rape trial commenced more than two years after defendant's arrest, because there was good cause for the delay and no showing of actual prejudice. Watson v. State, 848 So. 2d 203 (Miss. Ct. App. 2003), affirmed by 2003 Miss. App. LEXIS 623 (Miss. Ct. App. June 17, 2003).

Although the length of the delay in defendant's trial was presumptively prejudicial, after applying a Barker analysis, the appellate court determined that the defendant failed to show actual prejudice caused by the delay in defendant's actual trial for assault and kidnapping. Russell v. State, 832 So. 2d 551 (Miss. Ct. App. 2002), writ of certiorari denied by 832 So. 2d 533, 2002 Miss. App. LEXIS 782 (Miss. Ct. App. 2002).

In speedy trial analysis, delay of 8 months is presumed prejudicial. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Incarceration before trial is not alone enough prejudice to warrant reversal of conviction on ground that defendant was denied speedy trial. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In speedy trial analysis, defendant was not prejudiced by his inability to talk with potential alibi witnesses, due to his incarceration prior to trial; record mentioned names of no potential alibi witnesses who had suffered memory loss or who could not be found, and defense counsel could have traced leads at defendant's direction. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In determining whether constitutional right to speedy trial has been denied, delay is triggering mechanism and must be presumptively prejudicial or analysis is halted. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

For speedy trial analysis, prejudice to accused encompasses both actual prejudice in defending case and prejudice from inordinate delay. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Accused may suffer prejudice due to delay, a factor in speedy trial analysis, in form of oppressive pretrial incarceration, anxiety and concern, and impairment of defenses. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Delay of 409 days between arrest of defendant on charge of capital rape and commencement of trial was presumptively prejudicial, and triggered examination of remaining factors to determine whether violation of defendant's constitutional right to speedy trial had occurred. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, defendant may be prejudiced by fact that he has been detained before trial, that he has suffered anxiety as result of delay, or that his defense has been impaired by delay. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, defendant suffers no prejudice from detention when he is out on bail. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, where incarceration is only ground raised by defendant as basis for prejudice, reversal generally will not be required. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether defendant has been prejudiced by delay between arrest and trial such that violation of his constitutional right to speedy trial is implicated, impairment of defendant's defense may occur as result of witnesses dying or disappearing or of loss of memory on part of witnesses. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether defendant has been prejudiced by delay between arrest and trial such that violation of his constitutional right to speedy trial is implicated, anxiety on part of defendant is presumed from mere fact of delay even where defendant does not complain that he has suffered anxiety. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A trial within approximately 90 days of the attachment of a speedy trial right does not amount to a presumptively prejudicial delay. Livingston v. State, 525 So. 2d 1300 (Miss. 1988).

A conviction of false pretense in the selling of an automobile known to be stolen, would be reversed and the defendant discharged from confinement, where he had been continually available for prosecution, although in federal custody part of the time, where all the time his identity was known as well as the facts of the crime, but his prosecution did not take place until two years after issuance of the warrant for his arrest on the charge, and after records were no longer available, one of his witnesses was dead and another had left the state, the facts constituting a denial of his constitutional right to a speedy trial. Bell v. State, 220 So. 2d 287 (Miss. 1969).

48. — — Tolling of time, speedy trial.

Delay caused by actions of defendant, such as continuance, tolls running of speedy trial period for that length of time, and is subtracted from total amount of delay. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Under speedy trial analysis, any delays which are attributable to accused toll the running of the clock; however, time of delay is assessed against state if state fails to show good cause for such delay. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Constitutional speedy trial clock is tolled for period of time attributable to delay caused by defendant; period of delay attributable to defendant is subtracted from total days of delay. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Any defendant-prompted delay, regardless of merit, tolls the constitutional speedy trial clock; the speedy trial remedy is meant to address the harm visited on the defendant because of the State's delay in bringing the defendant to trial. Ross v. State, 605 So. 2d 17 (Miss. 1992).

In determining whether a defendant has been denied his or her right to a speedy trial, a continuance granted to the defendant is counted differently from a continuance granted to the State. Any delay as a result of action by the State without "good cause" causes the time to be counted against the State. A delay caused by the actions of the defendant, such as a continuance, tolls the running of the time period for that length of time, and this time is subtracted from the total amount of the delay. Wiley v. State, 582 So. 2d 1008 (Miss. 1991).

49. — — Delay attributable primarily to state, speedy trial.

Where defendant waited six-years to file a motion for post-conviction relief, counsel's ineffective assistance in pursuing a speedy trial claim was not an exception to the time bar. While the State offered no explanation for 410 days of delay, defendant failed to show actual prejudice. Thomas v. State, 933 So. 2d 995 (Miss. Ct. App. 2006), writ of certiorari denied by 933 So. 2d 982, 2006 Miss. LEXIS 372 (Miss. 2006).

Although the State failed to prove good cause for the delay in bringing defendant to trial, he did not suffer prejudice as a result of the delay, and where the record did not reflect that defendant ever asserted his right to a speedy trial, his contention that his case should have been dismissed lacked merit. Burton v. State, 914 So. 2d 288 (Miss. Ct. App. 2005).

Period from defendant's arraignment to his trial was within the statutorily required 270 days, Miss. Code Ann. § 99-17-1, but compliance with the statute did not mean that defendant's constitutional right to a speedy trial had been respected; however, the State made its requests for continuances because it needed to secure the testimony of an essential witness. Without the witness's testimony, the State had no evidence showing that the victim was shot, killed, placed in garbage bags, and thrown into a river; because the State requested its continuances for good cause, because the delays were not egregiously protracted, and because defendant failed to show actual prejudice, defendant's right to a speedy trial was protected. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Defendant argued that his trial attorney was ineffective in failing to ask the trial court for funds to hire a DNA expert; however, he did not explain what exculpatory evidence might discovered if a DNA expert were hired but merely claimed that a DNA expert favorable to his case should have been hired to counter the testimony of the experts offered by the State. Because defendant did not claim that the outcome of the case would be different if additional DNA experts had testified, his ineffective assistance claim failed. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Any delay as result of action by state, without good cause, causes time to be counted against state in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Bad motive on part of prosecution significantly affects balancing test in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Delay of murder trial at request of state until after defendant's aggravated assault trial would be charged to state in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A defendant's constitutional right to a speedy trial was not violated where the defendant was tried 230 days after his arrest, the delay was due to the State's reasonable and legitimate motion for a continuance predicated on the unavailability of a material witness, the defendant's assertion of his right to a speedy trial was made 173 days prior to trial in conjunction with his objection to the State's request for a continuance, and there was no actual prejudice to the defendant in his defense. Box v. State, 610 So. 2d 1148 (Miss. 1992).

A defendant's constitutional right to a speedy trial was violated, even though the defendant made several motions for continuances and did not make a demand for a speedy trial, where there was a delay of approximately 3 ½ years between the date the grand jury returned the indictment and the date of the trial, the State procrastinated in requesting blood, fingerprint and hair samples, the State failed to take appropriate measures to get the defendant moved to Mississippi for trial, the State failed to provide discovery, and there were 8 continuances for which the record stated no reason or justification. Vickery v. State, 535 So. 2d 1371 (Miss. 1988).

Where the state knows the identity of the accused, has the accused in custody, obtains a confession, and holds the accused in a penitentiary for a period of over eight years, during which time the accused has suffered many disadvantages resulting from the delay, then the delay is vexatious, capricious and oppressive, and the accused has been denied a speedy trial as contemplated by the Constitution. Jones v. State, 250 Miss. 186, 164 So. 2d 799 (1964).

50. — — Delay not attributable to defendant or state.

Under plain error review, defendant's speedy trial rights were not violated by the 496-day delay in bringing him to trial because, even though the delay was presumptively prejudicial and the record reflected no reason for the delay, no prejudice was apparent from the record. It was unlikely that defendant was prejudiced by the absence of his accessory, as it was substantially unlikely that the accessory would have testified that he, rather than defendant, was the shooter. Muise v. State, 997 So. 2d 248 (Miss. Ct. App. 2008).

Defendant was not denied his right to a speedy trial where a total of 810 days elapsed from the date of defendant's arrest to the date on which the trial began, because defendant requested continuances prior to moving for a speedy trial, the State was granted continuances for DNA analyses and to find a key witness, after DNA tests were ordered, there were several motions filed by defendant and the State, and thus good cause was shown related to matters beyond the control of the State. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

Defendant's conviction for murder was proper where his speedy trial right was not violated because the State's motions for continuances were predicated on the fact that DNA testing had not been completed. Additionally, he failed to prove any prejudice. Wright v. State, 915 So. 2d 527 (Miss. Ct. App. 2005).

There was no violation of defendant's constitutional right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 or his statutory right to a speedy trial under Miss. Code Ann. § 99-17-1 because although the four-year delay between his arraignment and his trial was unusual, most of the delay was not attributable to the State or defendant, but rather to a crime lab backlog and the appointment of new counsel. Also defendant failed to show he was prejudiced by the delay where he failed to provide the name of an alleged exculpatory witness. Manix v. State, 895 So. 2d 167 (Miss. 2005).

Over four years expired between defendant's arrest and trial for murder, but defendant was out on bond after the first year, made no demand for a speedy trial, failed to show any prejudice to the defense, or that the State intentionally delayed the investigation in its search for critical eyewitnesses and other evidence. Defendant's right to a speedy trial was not violated under the Sixth and Fourteenth Amendments to the United States Constitution, or Miss. Const. Art. III, § 26. Moore v. State, 837 So. 2d 794 (Miss. Ct. App. 2003).

Trial court did not err in denying petitioner's motion for post-conviction relief where he failed to prove his assertions that he was denied his right to a speedy trial and that he received ineffective assistance from counsel; there was no evidence in the record of the starting date of petitioner's incarceration, but the record showed that 89 days elapsed between indictment and trial which the appellate court found was quite reasonable. Hill v. State, 827 So. 2d 743 (Miss. Ct. App. 2002).

Trial court did not err in denying defendant's motion to dismiss for violation of his speedy trial right where he was incarcerated for a presumptively prejudicial nine months from his arrest to his trial, State made mistake in original indictment, the county had only two terms of court each year, his incarceration was due to a different charge, and his witnesses were still available at time of trial. Hicks v. State, 812 So. 2d 179 (Miss. 2002).

Delays caused by 2 changes in defense counsel would not be charged against state in speedy trial analysis. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, delay between arrest and trial caused by withdrawal of defendant's attorney which entails allowing new attorney reasonable time to become familiar with case and prepare for trial cannot be weighed against state because it is beyond state's control. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

A capital murder defendant was not denied his constitutional right to a speedy trial, even though 434 days elapsed between his arrest and the trial, and the defendant asserted his right to a speedy trial at his initial appearance and by pretrial motions, where some of the delay was due to the defense counsels' conflicts, the judge to whom the case had been assigned for 7 months was murdered, there was a complete "turn-over" in the district attorney's office, there was no showing that the State made a willful effort to delay the trial or that it was negligent in doing so, and the delay did not cause any prejudice to the defense. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

A defendant was not denied his constitutional right to a speedy trial, even though 449 days elapsed between his arrest and the date of the hearing adjudicating his motion to dismiss the charges, and there was a 6 ½ month delay between arrest and indictment which was attributed to the crime lab and court congestion, where a 5-month delay was attributable to the defendant and his change of counsel, 8 months of the delay occurred during a period in which there was no demand for a speedy trial and in which the defendant was held on other unrelated charges, and the defendant's testimony did not mention the existence of prejudice. State v. Magnusen, 646 So. 2d 1275 (Miss. 1994).

A defendant was not denied his right to a speedy trial, even though there was a 23-month delay from the date of arrest to the date of trial and a portion of the delay was attributable to official neglect with respect to completion and delivery of a lab report, where the defendant was indicted within 15 months of his arrest, and he failed to show any actual prejudice as a result of the delay. Perry v. State, 637 So. 2d 871 (Miss. 1994).

A defendant's constitutional right to a speedy trial was not violated, even though the length of the delay was 281 days and was therefore presumptively prejudicial, where the case involved 9 counts of burglary and one count of conspiracy and was therefore a "complex, serious" case rather than an "ordinary street crime," the delay appeared to be reasonable and not unduly lengthy, and the defendant failed to substantiate his claim of prejudice resulting from the delay. Jackson v. State, 614 So. 2d 965 (Miss. 1993).

A simple delay between the date of an offense and the date of the indictment is not per se reversible error, particularly when the reason for the delay is for the purpose of concealing the identity of an undercover agent for a reasonable period of time so that he or she may continue to work effectively as an agent. Thus, a defendant was not denied his right to a speedy trial where a 10-month delay from the time of the criminal act to the charge and arrest was caused by the State's pursuance of a continuing undercover operation. Dedeaux v. State, 519 So. 2d 886 (Miss. 1988).

Defendant was not denied constitutional right to speedy trial despite asserting that right, when he was tried approximately 33 months after his indictment, where defendant was incarcerated in New York state prison which would not let defendant be moved to Mississippi for trial, and district attorney fulfilled his duty to make diligent, good-faith effort to have defendant returned to Mississippi for trial; defendant also made no allegation in either trial court or on appeal that he lost witnesses or was otherwise prejudiced in trial of his case. Hughey v. State, 512 So. 2d 4 (Miss. 1987).

Where crime with which defendant was charged was committed in April 1971, defendant was indicted by the grand jury in September 1971, defendant was returned to Mississippi in August 1972 following his extradition for an out-of-state trial, and in September 1972, the court offered to try the defendant or pointed out that if he demanded a special venire the case would have to be continued, because the term of court was about to expire, and it could not be extended due to a conflicting term in the same court district, and the case was then set for trial at the next term of court in March 1973, the defendant was not denied a speedy trial. Craig v. State, 284 So. 2d 57 (Miss. 1973).

51. — — Crowded docket, speedy trial.

Defendant's conviction was affirmed because while it was clear that defendant was not tried within 270 days as required under Miss. Code Ann. § 99-17-1, it was also clear that the reason for the delay was the congested trial docket. Moreover, defendant showed no prejudice to his ability to mount a defense as a result of the delay. Johnson v. State, 69 So. 3d 10 (Miss. Ct. App. 2010), affirmed by 68 So. 3d 1239, 2011 Miss. LEXIS 335 (Miss. 2011).

The defendant was not denied his constitutional right to a speedy trial where the delay of the trial was caused by a congested docket and, although the defendant raised his motion to dismiss two months prior to the actual scheduled date for the trial, he suffered no prejudice. Biggers v. State, 741 So. 2d 1003 (Miss. Ct. App. 1999).

A defendant was not denied his constitutional right to a speedy trial, even though 574 days elapsed from the date of his arrest to the date of trial and he properly asserted his right to a speedy trial, where the delay was caused by an overcrowded trial docket and the county's system of assigning each case to a particular judge as that case proceeded up to and through the trial process, and the defendant demonstrated no actual prejudice. McGhee v. State, 657 So. 2d 799 (Miss. 1995).

A defendant was not denied his constitutional right to a speedy trial, even though the length of the delay between the defendant's arrest and his trial was 334 days and the defendant asserted his right to a speedy trial in a timely manner, where most of the delay was attributable to ordinary lag from crowded dockets and court terms, and the defendant did not even attempt to show any particular prejudice resulting from the delay but merely maintained that he had increased anxiety due to the delay. Hurns v. State, 616 So. 2d 313 (Miss. 1993).

A defendant's right to a speedy trial was violated where 301 days elapsed between the day of arraignment and the day of the trial, and the case was continued twice by court order stating that "all cases not otherwise disposed of are hereby ordered continued to the next regular term of court." Although docket congestion is "good cause" for delay in certain circumstances, the State never sought a continuance for this or any other reason, but instead relied on the "mass continuances" routinely made at the end of each court term. Yarber v. State, 573 So. 2d 727 (Miss. 1990).

52. — — Reindictment, speedy trial.

Prosecution may not circumvent accused's demand for speedy trial by seeking new indictment for same offense and then proceeding upon new indictment. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Delay in trial caused when state reindicted defendant twice in good faith weighed less heavily against state in speedy trial analysis than if state had acted in bad faith. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A defendant's right to a speedy trial was not violated, even though the defendant was tried for capital murder more than 270 days after his original arraignment on an indictment for murder less than capital, where the defendant was reindicted for capital murder and was tried well within the 270-day rule from the time of the arraignment on the capital murder charge. Galloway v. State, 574 So. 2d 1 (Miss. 1990).

53. — — Guilty plea, speedy trial.

Defendant was procedurally barred from raising the argument that defendant was denied the right to a speedy trial because, at the plea hearing, the circuit judge informed defendant that defendant was waiving the right to a speedy and public trial, and defendant indicated that defendant understood. Furthermore, defendant signed three orders resetting the cause for trial, and each order stated that defendant waived the right to a speedy trial. Avery v. State, 95 So. 3d 765 (Miss. Ct. App. Aug. 14, 2012), writ of certiorari denied by 109 So. 3d 567, 2013 Miss. LEXIS 122 (Miss. 2013).

Defendant failed to show a violation of his right to a speedy trial, because defendant waived his right to a trial when he pled guilty. Trice v. State, 992 So. 2d 638 (Miss. Ct. App. 2007), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 538 (Miss. 2008).

Although defendant argued that he was deprived of his right to a speedy trial, a valid guilty plea operated as a waiver of all non-jurisdictional defects or rights incidental to trial and this included a defendant's right to a speedy trial. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

Inmate's petition for post-conviction relief on grounds that his counsel was ineffective for failing to inform him of his right to a speedy trial was denied, as the record showed he had been advised of his right to a speedy trial, and by his guilty plea he waived his constitutional and statutory rights to a speedy trial. Turner v. State, 864 So. 2d 288 (Miss. Ct. App. 2003), writ of certiorari denied by 864 So. 2d 282, 2004 Miss. LEXIS 35 (Miss. 2004).

Inmate's right to a speedy trial under U.S. Const. Amend. VI and Miss. Const. Art. III, § 26 was waived when the inmate entered a guilty plea to the charges. Battaya v. State, 861 So. 2d 364 (Miss. Ct. App. 2003).

A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial, including the right to a speedy trial, whether of constitutional or statutory origin. Anderson v. State, 577 So. 2d 390 (Miss. 1991).

A delay of 4 years and one month in sentencing a defendant following his guilty plea violated his constitutional right to a speedy trial where the State gave no good reason for the delay and the defendant had fulfilled the "probation-like" conditions of deferral of his sentencing. Trotter v. State, 554 So. 2d 313 (Miss. 1989), A.L.R. 4th 3333.

54. — — Plea negotiations, speedy trial.

Inmate's petition for post-conviction relief on grounds that his counsel was ineffective for failing to inform him of his right to a speedy trial was denied, as the record showed he had been advised of his right to a speedy trial, and by his guilty plea he waived his constitutional and statutory rights to a speedy trial. Turner v. State, 864 So. 2d 288 (Miss. Ct. App. 2003), writ of certiorari denied by 864 So. 2d 282, 2004 Miss. LEXIS 35 (Miss. 2004).

Plea negotiations that lasted 360 days would not be counted against state in speedy trial analysis; defendant participated or at least acquiesced in negotiations and received some benefit from them. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

For speedy trial analysis, delays from attempts to negotiate plea agreement were not attributable to accused, since there was no evidence in record as to whether defendant acquiesced to these plea negotiations. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, delays caused by plea negotiations are for good cause and have effect of tolling speedy trial clock, although such negotiations should be substantiated by documentation. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

In determining whether violation of defendant's constitutional right to speedy trial has occurred, delay due to changes in defendant's attorneys and defendant's reneging on plea agreement weigh against defendant. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

55. — — Burden of proof, speedy trial.

Accused is not required to put forth affirmative showing of prejudice to prove his right to speedy trial was violated; nevertheless absence of prejudice weighs against finding of violation. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Where a defendant contended that his statutory and constitutional rights to a speedy trial were violated because he was tried more than 600 days after his arrest and arraignment, the State bore the burden of positively demonstrating that the backlog of drug cases in the court system and the state crime lab, which were alleged to be the reasons for the delay, actually caused the delay in that particular case. McGee v. State, 608 So. 2d 1129 (Miss. 1992).

56. — — Sufficiency of evidence, speedy trial.

Defendant was released on bond shortly after his indictment; there was no oppressive pretrial detention after he was indicted; additionally, at least part of the delay prior to trial, following defendant's indictment, was attributable to the two continuances granted at defendant's request. Therefore, there was no merit to defendant's denial of a speedy trial claim as to the period of time following his indictment. Young v. State, — So. 2d —, 2004 Miss. LEXIS 588 (Miss. May 27, 2004), opinion withdrawn by, substituted opinion at 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

Applying the Barker test, the appellate court held that although more than eight months passed from the date of defendant's arrest to the date of trial, the trial judge was correct in his determination that there was no speedy trial right violation as the reason for delay showed sufficient good cause based on a delay in DNA testing and an overcrowded docket, defendant asserted his right to a speedy trial late in the process, and there was no actual prejudice. Felder v. State, 831 So. 2d 562 (Miss. Ct. App. 2002).

The trial court erred in finding that the death of an alleged witness had caused prejudice where the sole evidence on this point consisted of the assertions of the defendant and his attorney, and those assertions did not qualify as credible evidence. State v. Woodall, 801 So. 2d 678 (Miss. 2001).

The defendant's right to a speedy trial was not violated, notwithstanding a 731 day delay between arrest and trial where 515 days of delay were attributable to the defendant's continuances and changing of attorneys, the defendant did not assert his right until very late in the process and the defense asked for and was granted two continuances after he attempted to assert his right, and the only prejudicial effect alleged caused by the delay was the defendant's incarceration for nearly two years without a trial. Sharp v. State, 786 So. 2d 372 (Miss. 2001).

The defendant's constitutional right to a speedy trial was not violated, notwithstanding a 970 day delay from arrest to trial, because (1) the defendant failed to provide any examples of the failure of the state to provide timely discovery material and frequently requested or consented to a number of continuances, (2) the defendant made little attempt to expedite the proceedings against him and, when he finally asserted his right to a speedy trial, it was not done in a timely fashion, and (3) the defendant failed to provide any specific example of how his defense was hampered by delay. Mitchell v. State, 792 So. 2d 192 (Miss. 2001), writ of certiorari denied by 535 U.S. 933, 122 S. Ct. 1308, 152 L. Ed. 2d 218, 2002 U.S. LEXIS 1623, 70 U.S.L.W. 3577 (2002).

The defendant was not denied his constitutional right to a speedy trial, notwithstanding a delay of almost two years and 11 months between arrest and trial and that the state offered no explanation for the delay, because the defendant failed to assert his right to a speedy trial and failed to demonstrate any actual prejudice, or the probability, as opposed to possibility, of actual prejudice. Smith v. State, 812 So. 2d 1045 (Miss. Ct. App. 2001).

The defendant was not denied his right to a speedy trial notwithstanding that more than eight months elapsed between his arrest and trial, where (1) the major portion of the delay was attributable to the fact that the first indictment against the defendant was dismissed because a witness recanted a statement that would have shown the defendant's guilt, (2) the defendant did not assert his right to a speedy trial until one week before trial, and (3) the only prejudice asserted by the defendant was the anxiety he suffered while incarcerated and awaiting trial. Estes v. State, 782 So. 2d 1244 (Miss. Ct. App. 2000).

The defendant's constitutional right to a speedy trial was not violated notwithstanding that his trial occurred more than eight months after his arrest, where (1) the main reason for the overall delay in bringing the case to trial was the state's negligence in preparing the indictment which had to be corrected twice, (2) the defendant never moved for a speedy trial and never requested a trial date and, instead, moved to dismiss on speedy trial grounds approximately one and one-half years after his arrest, and (3) the defendant experienced no prejudice due to the delay. Fulgham v. State, 770 So. 2d 1021 (Miss. Ct. App. Oct. 31, 2000).

The defendant's right to a speedy trial was not violated notwithstanding a 14-month delay between his arrest and trial, as (1) the greater part of the delay was caused by the defendant through his numerous continuances and changing of legal counsel, (2) although the defendant filed a motion for a speedy trial approximately four months before his trial, in the interim he filed three motions for continuance and his motion for speedy trial was not heard by the trial court until the day of trial, and (3) the defendant failed to show prejudice caused by the delay. Bell v. State, 769 So. 2d 247 (Miss. Ct. App. 2000).

The defendant was not denied his constitutional right to a speedy trial, notwithstanding a delay of 14 months and the prompt assertion of his right to a speedy trial, where (1) the delay was caused by docket congestion, ongoing discovery, and other causes beyond the control of the state, and (2) although the defendant remained incarcerated during the delay, such delay did not prejudice his defense. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

The defendant was denied his right to a speedy trial, notwithstanding a total delay of 22 months where (1) the bulk of the delay rested with the defendant through continuously swapping legal counsel and signing continuances, (2) although he filed two motions pro se which asserted his right to a speedy trial, his attorneys either withdrew them on his behalf or waived them by agreeing to continuances after asserting such motions, and (3) there was no prejudice because the defendant failed to point to any specific place in the record where a witness's memory was affected and did not even point out a witness's lack of detail in answering a question posed by either side. Whitaker v. State, 757 So. 2d 1060 (Miss. Ct. App. 2000).

The state observed the defendant's right to a speedy trial where (1) the time period between arrest and trial was about 11 months, (2) the delay was caused, in part, by a congested court docket, (3) the defendant asserted his right to a speedy trial about nine months after his arrest, and (4) no prejudice was caused by the delay. Jones v. State, 1999 Miss. App. LEXIS 613 (Miss. Ct. App. Nov. 9, 1999), opinion withdrawn by, substituted opinion at 756 So. 2d 852, 2000 Miss. App. LEXIS 76 (Miss. Ct. App. 2000).

The defendant's right to a speedy trial was not violated where (1) the case was twice continued, first by agreement of the parties, and, next due to a conflict with other trials, (2) there was no actual prejudice to the defendant other than his continued incarceration, and (3) the defendant did not demand a speedy trial until two months before trial when he made a motion to dismiss for failure to try. Rhyne v. State, 741 So. 2d 1049 (Miss. Ct. App. 1999).

The defendant's right to a speedy trial was not violated where (1) the length of the delay was 390 days, (2) the defendant did not raise the speedy trial issue until his motion to dismiss was made on the day of the trial, and (3) the defense was not prejudiced in any way by the delay, notwithstanding the contention that the victim's recollection would have been fresher and she would not have "misidentified" the defendant if he had been tried more promptly. Evans v. State, 742 So. 2d 1205 (Miss. Ct. App. 1999).

Defendant was not denied right to speedy trial by delay of 1,027 days between arrest and start of trial; delays were caused by plea bargaining, 3 continuances, 2 changes of defense counsel, motion for change of venue, and requests by defense for additional discovery and trial preparation. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Defendant was not denied his constitutional right to speedy trial, considering totality of circumstances; total delay from date of arrest to date of trial was 409 days and thus was presumptively prejudicial, total period of delay after subtracting delays attributable to defendant was 211 days, defendant claimed violation of his constitutional right to speedy trial 3 days before trial, and defendant made no showing of actual prejudice other than his incarceration. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

An aggravated assault defendant was not denied his constitutional right to a speedy trial, even though there was a delay of more than 25 months between the date of his arrest and his trial and the State blamed part of the delay on an overcrowded docket which weighed against the State, where the defendant requested a continuance of an earlier trial date, the victim had to undergo several surgical treatments and it was several months before he was physically able to proceed with the case, the defendant did not raise the speedy trial issue until more than one and ½ years after his arrest, and the defendant failed to show any material prejudice as a result of the delay. Stogner v. State, 627 So. 2d 815 (Miss. 1993).

A defendant was not denied his constitutional right to a speedy trial, even though 475 days elapsed between his arrest and his trial, where extradition of the defendant caused 9 days of the delay, a substantial portion of the delay (119 days) was due to a continuance granted to the defendant on the date the case was originally set for trial, approximately 12 months of the delay was not attributable to either the defendant or his attorney, the defendant did not assert his right to a speedy trial until after he had been granted the continuance on the date originally scheduled for trial, and the defendant's claim that he was prejudiced by the delay because he lost touch with certain alibi witnesses was diminished by the facts that minimum effort was made by the defendant or his investigator to locate or contact witnesses who had moved, the lost witnesses would have been available to testify on the date originally set for trial, and no mention of this matter was made in the defendant's motion for a new trial filed a week after the verdict was rendered. Noe v. State, 616 So. 2d 298 (Miss. 1993).

A defendant was denied his constitutional right to a speedy trial where 2 ½ years elapsed between the time of the defendant's arrest and his trial, the defendant caused 11 months of the delay while the State caused one year and 9 months of the delay without good cause, the defendant asserted his right to a speedy trial one year prior to his trial, and the defendant was prejudiced as a result of the delay in bringing him to trial as the only witness alleged to have connected the defendant to the crime died before the defendant was brought to trial and another witness admitted that her memory was not as good at the time of trial as it had been previously. Jenkins v. State, 607 So. 2d 1137 (Miss. 1992).

A defendant was not denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article 3, § 26 of the Mississippi Constitution, even though approximately 11 months transpired between the defendant's arrest and the commencement of his trial, where the State twice offered to try the case after each of the defendant's 2 motions for speedy trial and the defendant twice declined, and the defendant made no showing of actual prejudice. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

A defendant's statutory right to a speedy trial was not violated, even though 338 days elapsed between the defendant's original arraignment and the first day of his trial, where the defendant was granted a 63-day continuance during that time, and the case was continued for 37 days due to a congested docket. Additionally, the defendant's constitutional right to a speedy trial was not violated, even though 456 days elapsed between the time the defendant was arrested and the first day of his trial, where a significant part of the delay was attributable to the defendant, the balance of the delay was attributable to mere negligence and court congestion, and the defendant failed to assert his right to a speedy trial until the day the trial was scheduled. Adams v. State, 583 So. 2d 165 (Miss. 1991).

Defendant was not denied her constitutional right to speedy trial, although delay was lengthy, where there were numerous reasons for delay, including defendant's efforts to fight extradition and congested court dockets; further, defendant did not assert right to speedy trial until little over one month before trial and had failed to show any prejudice other than her continuous incarceration. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

57. — — Retrial, speedy trial.

A defendant was denied his constitutional right to a speedy retrial where there was a 288-day delay which was presumptively prejudicial, the prosecution offered only the court's docket pages as evidence, there was no evidence in the record justifying the delay or rebutting the presumption of prejudice, and the defendant had made a demand for a speedy retrial on October 13, 1987 and the prosecution did nothing until the defendant moved to dismiss in February of 1988. State v. Ferguson, 576 So. 2d 1252 (Miss. 1991).

A 6-month delay between a mistrial and a retrial was not "presumptively prejudicial," and therefore the defendant's constitutional right to a speedy trial was not violated by the delay. Handley v. State, 574 So. 2d 671 (Miss. 1990).

A defendant was not denied his right to a speedy trial, even though his retrial did not commence until 383 days after the reversal of his original conviction, where part of the delay could be attributed to the logistics of a change in venue, the defendant apparently did not assert his right to a speedy trial, and there was no prejudice, particularly since it was in the defendant's best interest that the retrial be delayed as both parties searched to secure the attendance of a witness whom the defendant claimed was critically important to have as a live eyewitness at trial; the delay did not violate § 99-17-1 since the 270-day rule does not apply to retrials. Mitchell v. State, 572 So. 2d 865 (Miss. 1990).

Defendant's speedy trial rights were not violated by his retrial approximately 352 days after mistrial where some of the delay was caused by overcrowded dockets necessitating continuances, the defendant failed to assert his right until approximately 3 weeks before his retrial was scheduled to begin, and defendant failed to show prejudice resulting from the delay. Kinzey v. State, 498 So. 2d 814 (Miss. 1986).

Where, in a murder prosecution, three trials of the defendant were initiated within two years of the crime, one ending in a mistrial and two resulting in convictions, but both convictions were reversed for improper instructions or improper argument by the prosecutor, and the defendant alleged harassment by the state, the defendant would not be released and the prosecution terminated, the sequence of events in the proceedings not constituting a denial of the defendant's rights to due process and a speedy trial. Smith v. State, 220 So. 2d 313 (Miss. 1969).

58. — — Waiver, speedy trial.

Defendant waived his speedy trial claim, even though he made a written motion to dismiss on speedy trial grounds, because he never brought that motion for a hearing and he never obtained specific findings from the trial court. Muise v. State, 997 So. 2d 248 (Miss. Ct. App. 2008).

Motion for post-conviction relief was properly denied because appellant inmate's guilty plea to manslaughter under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 was voluntary in nature where he testified that he was guilty, he was satisfied with his attorney, and that he understood the charges against him. Moreover, the entry of a voluntary plea waived speedy trial and confession-related issues. Pool v. Pool, 989 So. 2d 920 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 383 (Miss. 2008).

Where defendant had already filed one post-conviction relief motion raising the same issues, a successive writ was barred under Miss. Code Ann. § 99-39-23(6); at any rate, his guilty plea waived any speedy trial issue, and defendant was not allowed to recast the issue under the guise of ineffective assistance of counsel. Myers v. State, 976 So. 2d 917 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 112 (Miss. 2008).

Failure by defendant to assert his constitutional right to speedy trial does not constitute waiver of such right. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Motion for post-conviction relief was denied in a case where defendant's suspended sentence for statutory rape was revoked because he waived issues relating to a speedy trial and defects in an evidence sample due to a guilty plea, there was no evidence that an indictment was manufactured, and the revocation of the suspended sentence was permitted under Miss. Code Ann. § 47-7-34 and Miss. Code Ann. § 47-7-37 where defendant had already served a portion of a five-year sentence after the guilty plea was entered. Davis v. State, 954 So. 2d 530 (Miss. Ct. App. 2007).

Inmate's petition for post-conviction relief was denied because he waived the right to challenge on the basis of speedy trial or a defect in the indictment under Miss. Const. Art. VI, § 169 when he entered a guilty plea. Burch v. State, 929 So. 2d 394 (Miss. Ct. App. 2006).

59. Fair trial — In general.

The state asked the victim's daughter what impact her mother's death had on her family's life, to which she replied that it was really horrible, it was on the family's mind all the time, she thought about her mother every birthday and Mother's Day, her five-year-old did not have a grandmother, and that 23 years was a long time to go through that; the daughter's testimony was not designed to incite the jury, but described the impact that losing her mother had on her family, and thus the trial court did not err in denying defendant's motion for a mistrial, which did not violate his due process rights. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Appellate court found no merit to defendant's claim that he did not receive a fair trial on the ground that the State failed to provide him with a copy of the original police report where the only alteration made to the police report was the addition of the word "recovered" written next to the entry regarding the victim's credit card. The trial court allowed defendant additional time to restructure his cross-examination of the officer who wrote the report. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Court rejected defendant's claim that he was denied a fair and impartial trial because, while the court found it troubling that five jurors served on the jury in which the witness had testified as a victim, and then served on defendant's jury, where the witness testified as the State's primary rebuttal witness, the court found no reversible error. In absence of a showing on voir dire that a juror was biased, the mere fact that the witness had testified in the jurors' presence as to another crime did not render the panel incompetent. Burnside v. State, 912 So. 2d 1018 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 679 (Miss. 2005).

Appellate court could not find any reversible error in defendant's trial for tax evasion, as such, defendant's claim that the cumulative errors in the trial deprived in of a fair trial lacked merit. King v. State, 897 So. 2d 981 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 224 (Miss. 2005).

Defendants were not denied a fair trial when the prosecution was allowed to put on evidence of a prior inconsistent statement; defense counsel questioned the detective about the content of the witness's statements and defendants could not complain that they did not receive a fair trial because the prosecution was allowed to question the detective about the content of the witness's statement. Powell v. State, 878 So. 2d 144 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 962 (Miss. 2004).

Defendant's right to a fair trial was not violated when a trial judge rephrased a question posed by the prosecution for purposes of clarity because the act did not show bias or a deliberate attempt to influence the jury; therefore, there was no reason to grant a motion for a new trial. Quinn v. State, 873 So. 2d 1033 (Miss. Ct. App. 2003), writ of certiorari denied by 873 So. 2d 1032, 2004 Miss. LEXIS 597 (Miss. 2004).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder where the sexual molestation was integrally related to her murder such that one could not coherently present the facts of her demise without reference to it, and it described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

Defendant was not denied a fair trial due to the presence of security at trial, because, although a witness was scared by the presence of many armed guards, she did not say that she testified any differently because of the presence of the guards. Russell v. State, 849 So. 2d 95 (Miss. 2003).

In a prosecution for murder, an exclamation from the audience by the victim's mother that the defendant "cold blooded killed my child" did not prejudice the defendant's right to a fair trial where the victim's mother was immediately escorted from the courtroom after her outburst, and the judge then properly admonished the jury to disregard the incident and questioned the jurors to determine whether they could disregard the comments. Bell v. State, 631 So. 2d 817 (Miss. 1994).

As applied to criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice and in order to declare a denial of it court must find that absence of that fairness fatally infected the trial. Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

Where fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had. Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

In addition to the right to be tried by fair, unprejudiced individual jurors, guided by the evidence the right to fair trial means the right to be tried in an atmosphere in which public opinion is not saturated with bias, hatred and prejudice against the defendant. Seals v. State, 208 Miss. 236, 44 So. 2d 61 (1950).

Every man is entitled to fair and impartial trial by jury uninfluenced by anything except competent evidence and all reasonable doubts should be resolved in favor of accused. Outlaw v. State, 208 Miss. 13, 43 So. 2d 661 (1949).

One accused of crime is entitled to another trial when his constitutional right to fair and impartial trial has been violated, regardless of fact that evidence on first trial may have shown him to be guilty beyond every reasonable doubt, and until he has had a fair and impartial trial within the meaning of Constitution he is not to be deprived of his liberty by sentence in state penitentiary. Scarbrough v. State, 204 Miss. 487, 37 So. 2d 748 (1948).

A fair and impartial trial guaranteed by this section includes a reasonable opportunity to prepare for trial. Cruthirds v. State, 190 Miss. 892, 2 So. 2d 145 (1941).

The section primarily relates to trials of the guilt or innocence of the accused. Whether it relates to hearing of applications for continuances, quaere? Lipscomb v. State, 76 Miss. 223, 25 So. 158 (1899).

60. — — Juveniles, fair trial.

A juvenile has the same right to due process as an adult has under the Constitution of the United States and the state Bill of Rights. Dependents of Roberts v. Holiday Parks, 221 So. 2d 92 (Miss. 1969).

61. — — Indigent defendants, fair trial.

A trial court's failure to provide an indigent criminal defendant with a transcript of the defendant's first trial which resulted in a mistrial denied the defendant the right to a fair trial, and therefore was reversible error. Fielder v. State, 569 So. 2d 1170 (Miss. 1990).

There was no denial of equal protection of the law or of due process in the imprisonment of an indigent, who, after pleading guilty to a misdemeanor charge, was sentenced to a jail term and to pay a fine, and who after serving her jail term was unable to pay the fine because of her indigency, and remained in jail to work out her fine. Wade v. Carsley, 221 So. 2d 725 (Miss. 1969).

62. — — Publicity, fair trial.

The defendant was not denied a fair trial when the trial court refused to quash the venire on the basis that, of the entire venire of 47 jurors selected for service, 16 had been exposed to pretrial publicity, where those 16 jurors were removed from the venire. Baldwin v. State, 732 So. 2d 236 (Miss. 1999).

An accused's right to a fair trial and the press and public's right of access to criminal proceedings must be balanced when determining whether access to legal proceedings should be restricted. The press and public are entitled to notice and a hearing before a closure order is entered, and any submission in a trial court for closure, either by a party or by the court's own motion, and be it a letter, written motion, or oral motion, either in chambers or open court, must be docketed, as notice to the press and public, in the court clerk's office for at least 24 hours before any hearing on such submission, with the usual notice to all parties. The requirement should not be taken to mean that a greater notice period may not be afforded where feasible. Preferably, the submission should be a written motion if time and circumstances allow. A hearing must be held in which the press is allowed to intervene on behalf of the public and present argument, if any, against closure. The movant must be required to advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceedings, and it must make findings adequate to support the closure. In considering the less restrictive alternatives to closure, the court must articulate the alternatives considered and why they were rejected. The court must then make written findings of fact and conclusions of law specific enough that a reviewing court can determine whether the closure order was properly entered. A transcript of the closure hearing should be made public and if a petition for extraordinary relief concerning a closure order is filed in the Supreme Court, it should be accompanied by the transcript, the court's findings of fact and conclusions of law, and the evidence adduced at the hearing upon which the judge based the findings and conclusions. These requirements cannot be avoided by an agreement between the defendant and the State that proceedings and files should be closed. Gannett River States Pub. Co. v. Hand, 571 So. 2d 941 (Miss. 1990).

Circuit Court's closure order in capital murder case was reasonable regulation of time, place, and manner of newspaper's enjoyment of its First Amendment right; desire of press to inform public about important criminal proceedings can result in publication of matter that can deprive defendant of his right to fair trial; access of press to trial and pretrial processes may be qualified, and record amply supported Circuit Court's finding that unrestricted access to trial process would result in substantial likelihood of defendant being denied fair trial; additionally, newspaper was not being denied access to pre-trial proceeding in perpetuity, because closure order expired once jury was sequestered and trial began; once that point was reached, newspaper would be granted access to complete transcript of all closed, pre-trial proceedings. Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

63. — — Identification of accused, fair trial.

As to an in-court identification in a capital murder and aggravated assault case, due process was satisfied since the factors under Neil v. Biggers, 409 U.S. 188, 196, 34 L. Ed. 2d 401 (1972), were all established; the surviving victim had an opportunity to view defendant as she was pleading for her life, and she was certain of the identification due to the fact that she had known defendant for 15 years, went to school with him, and lived close to him. Sanders v. State, 939 So. 2d 842 (Miss. Ct. App. 2006).

Defendant's argument on appeal was that there was no personal in-court identification of him as one of the men who participated in the robbery. However, the judge had recessed court for lunch and defendant failed to return to court on his bond, and upon a motion by the State, trial proceeded in his absence; because defendant chose not to return for his trial, he could not complain that he was not personally identified in court, where it was a consequence of his own voluntary act. McCoy v. State, 881 So. 2d 312 (Miss. Ct. App. 2004).

Victim's in-court identification of defendant did not deny him a fair trial where the victim did not identify defendant as the man who robbed him, but simply observed that defendant's build was similar to that of the taller man; this observation did not rise to the level of an identification. Powell v. State, 878 So. 2d 144 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 962 (Miss. 2004).

In-court identifications by the eyewitnesses were not impermissibly tainted by the pre-trial identification procedure as the evidence included defendant's statement to the police, a videotape that recorded the robbery, and the testimony of the witnesses to the crime. Murphy v. State, 868 So. 2d 1030 (Miss. Ct. App. 2003), writ of certiorari denied by 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

In a capital murder case, the trial court did not err in denying defendant's motion to suppress the lineup as it was proper and not tainted or suggestive. When the lineup was considered in light of the Biggers factors, it was evident that the eyewitness's view of the shooter was brief but he was paying very close attention once he realized that a shooting had taken place, he accurately described defendant, he was absolutely certain of defendant's identity when he saw him in the lineup, and the lineup took place a little over 24 hours after the shooting. Howell v. State, 860 So. 2d 704 (Miss. 2003), writ of certiorari dismissed by 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371, 18 Fla. L. Weekly Fed. S 105 (2005).

Although a photographic display, in which the defendant was the only one pictured with bare arms prominently displaying his tattoo, was suggestive, an in-court identification by the witness who identified the defendant from the photographs was not precluded where the witness had ample opportunity to observe the assailant during the crime, where she described accurate details based on that observation, where she immediately identified the defendant on viewing the display, and where the display was conducted only 6 days after the crime. Nicholson v. State, 523 So. 2d 68 (Miss. 1988).

In a forgery prosecution, a witness' reviewing of a photograph of the forgery suspect taken by a store security system at the time that the suspect cashed the forged check did not impermissibly taint the witness' in-court identification of the defendant so as to render it inadmissible. Such photographs may properly be used to refresh the recollection of an eyewitness since they show the person who actually committed the crime as opposed to some possible suspect in the police files. George v. State, 521 So. 2d 1287 (Miss. 1988).

A photographic display identification procedure was not suggestive where the defendant's photograph was on the top of a stack given to the witness, where the witness identified the top photograph as that of the defendant, and where he refused to look at any other pictures. Wash v. State, 521 So. 2d 890 (Miss. 1988), overruled on other grounds, Wharton v. State, 734 So. 2d 985 (Miss. 1998).

64. — — Mental competence of defendant, fair trial.

The trial of a defendant, when his mind is so clouded that he cannot remember and intelligently relate what occurred at the time of the commission of the alleged offense, is a denial of due process and contrary to public policy, and when it appears to the trial court that there is a probability that defendant is incapable of making a rational defense, the trial should not proceed until defendant's mental condition has been investigated and it appears he is sufficiently rational to make a defense. Williams v. State, 205 Miss. 515, 39 So. 2d 3 (1949).

65. — — Plea bargaining, fair trial.

Post-conviction relief was properly denied in a burglary case because the trial court did not clearly err in denying appellant's request for specific performance of an alleged oral plea agreement, as appellant did not argue that he promised any additional servitude to the prosecution that he detrimentally relied upon, the record did not mention any agreement to only sentence appellant to 10 years in prison, and the circuit court had the discretion to reject any suggestion in sentencing that the prosecution presented. Christie v. State, 915 So. 2d 1073 (Miss. Ct. App. 2005).

Where defendant rejected a plea bargain that had offered a more lenient sentence for the sale of cocaine, and upon conviction at trial was sentenced to a greater sentence of 30 years in the custody of the Mississippi Department of Corrections, with the last 15 years suspended under prescribed conditions, there was no constitutional violation where the trial court had stayed aloof from the plea bargaining process and based its decision on a pre-sentence report, and where defendant's sentence was within the statutory guidelines. Rogers v. State, 891 So. 2d 268 (Miss. Ct. App. 2004).

Trial court is prohibited from imposing heavier sentence upon defendant because he has exercised his constitutional right to trial by jury than sentence offered defendant in plea bargaining process. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Imposition by trial court of heavier sentence than that which was offered in plea bargaining process is not abuse of discretion and violates no right of defendant where lenient sentence is proposed in pretrial plea bargain negotiations, where after rejecting same defendant is found guilty by jury, where before imposition of sentence trial judge is presented with evidence of aggravating circumstances relevant to sentencing not known to him at time of original plea bargain negotiations, where in fact trial judge imposes heavier sentence than was proposed at time of plea bargain and in fact bases imposition of heavier sentence upon information of aggravating circumstances of which he has been newly made aware, and where heavier sentence has not been imposed upon accused in whole or in part as penalty for his exercise of his constitutional right to trial by jury. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Sentence of life imprisonment for crime of capital rape was appropriate for defendant convicted of raping 6-year-old child, despite act that defendant had been offered 5-year sentence during plea negotiations prior to trial; court was not involved in plea negotiations, did not impose heavier sentence merely because defendant exercised his constitutional right to jury trial, and merely followed statutory sentencing dictates. Johnson v. State, 666 So. 2d 784 (Miss. 1995).

Trial court's imposition of 10 year prison sentence and a $10,000 fine on a defendant convicted of conspiracy to sell cocaine, who contended that he had had an opportunity to plead guilty to the charge for which he was convicted, and in return receive a recommendation for a 3 year sentence with no fine, was not a proscribed enhancement of sentence because defendant exercised his right to a jury trial where the record reflected that the trial judge, who was unaware of the guilty plea negotiation remained circumspect and unbiased. Temple v. State, 498 So. 2d 379 (Miss. 1986).

It is impermissible for a trial judge to enhance a sentence because the defendant refused a plea bargain and put the state and court to the trouble of trial by jury. Pearson v. State, 428 So. 2d 1361 (Miss. 1983).

66. — — Conduct of trial, fair trial.

Defendant was not denied a fair trial by the trial judge initially leaving defendant in restraints and then removing the restraints because there was no evidence that defendant was prejudiced by temporarily appearing before the jury in restraints, especially in light of the judge's instructions to the jury that the restraints were immaterial to the charges before them. Jones v. State, 130 So. 3d 519 (Miss. Ct. App. 2013), writ of certiorari denied by 131 So. 3d 577, 2014 Miss. LEXIS 65 (Miss. 2014).

Defendant's failure to contemporaneously object to the admission of bad act evidence at trial, as required by Miss. R. Evid. 103, effectively waived the issue on appeal, and in light of governing case law, the court did not find that the State's attempted introduction of the evidence substantially affected defendant's right to a fair trial when defendant failed to object. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

Although defendant asked the court to apply the plain error doctrine, the court did not find that the State's line of questioning as to what prior convictions defendant had substantially affected his right to a fair trial when he openly admitted that he had a record of multiple convictions. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

Defendant's confession as to a possession of cocaine count did not materially prejudice his right to a fair trial on a sale or transfer of cocaine count because a jury was instructed to consider each count separately and substantial evidence supported defendant's conviction on the sale count. Armstead v. State, 978 So. 2d 642 (Miss. 2008).

Defendant was denied the right to a fundamentally fair trial because defendant was entitled to have the jury determine whether someone else committed the capital murder in that the only direct evidence that defendant was involved was his sister's allegations that defendant killed her husband and defendant's disputed confession; further, defendant had no motive other than to please his sister, and the sister had the means, the motive, and the opportunity to kill her husband, and the trial court's exclusion of evidence clearly prejudiced defendant's right to a fair trial. Edmonds v. State, 955 So. 2d 787 (Miss. 2007), writ of certiorari denied by 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868, 76 U.S.L.W. 3287 (2007).

In a manslaughter case, defendant's right to a fundamentally fair trial was denied because the trial court refused to allow the admission of the testimony of two police officers under Miss. R. Evid. 404(a)(2) where there was sufficient testimony to create a jury issue as to whether the victim was the aggressor in the incident that led to his death; the officers' testimony was relevant to show prior incidents so that the jury could have placed itself in defendant's shoes at the time of the incident. Miller v. State, 956 So. 2d 221 (Miss. 2007).

Defendant's right to a fair trial was not violated by introducing evidence of prior DUI convictions during the guilt phase of a trial because they were an element of the crime of DUI third offense; the state was required to prove all the essential elements of the crime charged. Smith v. State, 950 So. 2d 1056 (Miss. Ct. App. 2007).

Supreme Court of Mississippi reversed defendant's conviction for murder and granted him a new trial; the circuit court denied defendant a fair trial by allowing the victim's wife to invoke the Fifth Amendment, admitting unreliable expert testimony, and denying defendant's right to present evidence concerning the victim's tumultous relationship with his wife to show her motive to kill the victim. Edmonds v. State, — So. 2d —, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386 (Miss. Ct. App. 2006).

Where defendant was charged with aggravated assault, an eyewitness to the shooting was permitted to testify that the declarant said that defendant had a gun, and then jumped out of the car and ran for shelter; the hearsay statement was both an excited utterance and a present sense impression, and defendant's right to a fair trial was not violated by the admission of the statement. Wheeler v. State, 943 So. 2d 106 (Miss. Ct. App. 2006).

In a case involving capital murder and aggravated assault, defendant was not deprived of a fair trial since the trial court did not abuse its discretion by allowing the prosecutor to ask leading questions; moreover, there was nothing to substantiate defendant's claims of judicial or prosecutorial misconduct. Sanders v. State, 939 So. 2d 842 (Miss. Ct. App. 2006).

In a case involving capital murder and aggravated assault, defendant was not deprived of a fair trial based on the introduction of several crime scene photographs since they had evidentiary value due to the fact that they clarified the testimony of witnesses, gave the jury a visual depiction of the crime scene, and showed the cause of the victims' deaths. Sanders v. State, 939 So. 2d 842 (Miss. Ct. App. 2006).

State Supreme Court rejected defendant's claim that he was deprived of his right to a fair trial because some jurors saw him shackled, as the issue was not raised by defendant on his direct appeal. Doss v. State, 882 So. 2d 176 (Miss. 2004), writ of certiorari denied by 544 U.S. 1062, 125 S. Ct. 2513, 161 L. Ed. 2d 1113, 2005 U.S. LEXIS 4399, 73 U.S.L.W. 3693 (2005).

It was basically unfair for the trial court in a prosecution for murder to force defendant to offer his testimony and that of his witnesses to the jury after a fatiguing day in court and at a time when both counsel and jury were exhausted; moreover, due process of law necessitated a forum for defendant to present his case within reasonable hours and under reasonable circumstances. Parker v. State, 454 So. 2d 910 (Miss. 1984).

67. — — Expert witnesses, fair trial.

Trial court abused its discretion and violated a juvenile defendant's due process rights when it refused to grant funds for the retention of a post-traumatic-stress-disorder (PTSD) expert to assist the juvenile in preparing his imperfect self-defense theory. The juvenile established a need for the expert testimony to assist the jury in understanding how PTSD might have affected the juvenile's thought process at the time he shot and killed his father. Evans v. State, 109 So. 3d 1044 (Miss. 2013).

In an aggravated assault case, an orthopedic surgeon should have been qualified as an expert witness under Miss. R. Evid. 702 and not been allowed to give a lay opinion under Miss. R. Evid. 701 because he was acting in his professional capacity when he testified that a broken bone was caused by high-energy force. However, the error was harmless because it did not deny a substantial right or render the trial fundamentally unfair; photographs of the injuries suffered by defendant's girlfriend were shown, and the girlfriend testified that defendant forced her out of the car, threw her down, kicked her, and stomped on her back. O'Neal v. State, 977 So. 2d 1252 (Miss. Ct. App. 2008).

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

In a capital murder case, the trial court's refusal to grant defendant's motion for funds to obtain expert assistance was properly denied and did not constitute a violation of his due process rights because: (1) on cross-examination, a doctor's testimony rebutted the state's argument that the victim could have retained consciousness for 10-20 minutes as the doctor stated that she might have been unconscious within 30 seconds after manual strangulation or might never have regained consciousness after the blow to the back of her head; and (2) a second doctor's affidavit, stating that the state's investigation of the crime scene and the examination of the victim were problematic, presented nothing in the form of concrete reasons that an independent expert would benefit defendant. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

In a capital murder case, the trial court's refusal to grant defendant's motion for funds to obtain mental health expert's assistance to determine if he was exempt from execution under the Eighth Amendment because of his mental retardation was properly denied and did not constitute a violation of his due process rights because defendant did not show a substantial need for an independent expert because: (1) based on his intelligence quotient tests, one doctor already determined that defendant was mentally retarded; and (2) a second doctor stated in her affidavit that she thought defendant was mentally retarded, and that further testing and a complete social history was necessary to accurately ascertain whether defendant was in fact mentally retarded. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

In a capital murder case, the trial court's refusal to grant defendant's motion for funds to obtain mental health expert's assistance to present mitigating circumstances to the jury was properly denied and did not constitute a violation of his due process rights because he did not show a substantial need for assistance because a review of the record revealed that the jury was presented with mitigating evidence covering all the relevant mitigating factors that defendant sought to show at trial. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Trial court did not err in failing to appoint an independent medical examiner where defendant appeared to base his argument on a hope that another medical expert would find another cause of death rather than having any specific evidence to support his defense. Conley v. State, 948 So. 2d 462 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a capital murder case because the issue of whether defendant was denied a fair trial based on alleged falsehoods and misrepresentations by an expert was procedurally barred since it was capable of being raised on direct appeal; moreover, even if it was not, it was not reasonably likely that the statements affected the judgment of the jury, even if they were false, because ample evidence was presented regarding the expert's credibility or lack thereof. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

A murder defendant was not denied a fair trial by the denial of his motion for a court-appointed psychologist, in spite of the defendant's argument that he was thereby prevented from properly presenting his theory of defense related to his state of mind when he was assaulted by the victim, where the State offered no expert testimony regarding the defendant's state of mind, the defendant did not testify as to his state of mind, and the record did not "even hint at a defense of this nature." Green v. State, 631 So. 2d 167 (Miss. 1994).

A murder defendant was not denied a fair trial because his motion for a court-appointed expert criminalist was denied, in spite of the defendant's argument that he was thereby prevented from properly presenting his theory of defense of accidental discharge of the pistol used to kill the victim, where the State did not present any expert and the defendant elicited testimony from witnesses to support his defense of accidental discharge. Green v. State, 631 So. 2d 167 (Miss. 1994).

68. — — Arguments of counsel, fair trial.

Considerable prejudice resulted from the prosecutor's inappropriate statements to the jury and the supreme court was unable to say, beyond a reasonable doubt, that such prejudice was overcome by the evidence; thus, defendant's sentence and conviction were reversed and remanded to the trial court for a new trial. Brown v. State, 986 So. 2d 270 (Miss. 2008).

Prosecutor's statement that the victim had been punished enough and it was up to the jury was not so inflammatory that the trial court judge should have objected on his own, and defendant's claims that the arguments were meant to inflame the jury were procedurally barred because defendant made no timely objections to the statements. Davis v. State, 992 So. 2d 1190 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 529 (Miss. 2008).

Defendant complained that the prosecutor's comments during closing arguments violated the Fifth Amendment and Miss. Const. Art. 3, § 26, but the court found that the statement was not a comment on defendant's right not to testify against himself; the statement did not lead the jury to infer anything about the reasons why defendant did not testify at trial and thus the statement did not rise to the level of serious dimension that would have allowed defendant to overcome the procedural bar, and because defendant did not object, he waived this issue. Davis v. State, 992 So. 2d 1190 (Miss. Ct. App.

2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 529 (Miss. 2008).

Statements by the prosecutor during cross-examination of a witness and during his closing statements did not warrant a mistrial because the remark had not created negative inferences based upon defendant's choice to exercise his right not to testify. It was clear from the context of the sentences that the prosecutor was referring to the attorneys and not defendant. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Defendant's right to a fair trial was not denied where the prosecutor's statements, while rambling and tending to bring in extraneous considerations, largely were focused on the need to consider that drugs were dangerous and possession should be a crime; the evidence offered to support conviction was of a person signing for delivery of marijuana, without any evidence that he was otherwise involved in the drug trade; the challenged arguments were not in the "send a message" category and the statements did not interfere with the fairness of the trial. Shanks v. State, 951 So. 2d 575 (Miss. Ct. App. 2006).

Defendant argued that the prosecution's attack on defense counsel implied that he presented a deceptive argument to the jury and violated defendant's due process rights by denying him the right to a fair and impartial trial; although Miss. Unif. Cir. & County Ct. Prac. R. 3.02 prohibited attorneys from attacking the opposing attorney during closing arguments, because the trial court sustained defendant's objection to the prosecutor's first statement, the error, if any, was cured or harmless beyond a reasonable doubt. Baker v. State, 930 So. 2d 399 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 497 (Miss. 2006).

Prosecutor's statement during closing argument that defense counsel hadn't spent any time on trying to support defendant's story about what happened was not improper. Green v. State, 887 So. 2d 840 (Miss. Ct. App. 2004).

In a capital murder case, the prosecution's use of biblical imagery and references to the victim's old age and frailty was fair comment and did not constitute prosecutorial misconduct. Dycus v. State, 875 So. 2d 140 (Miss. 2004), vacated by, remanded by 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212, 73 U.S.L.W. 3528 (2005).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A trial court's limitation of closing argument to 15 minutes in the sentencing phase of a capital murder prosecution did not violate the defendant's constitutional right to a fair trial where the defendant made no proffer as to what he would have argued had he been given additional time, and he raised no objection to the time limit at the time of trial. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present ring on her finger," and asking the jury not to forget the victim "because she deserves justice" did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim's family is not prohibited, as such evidence may be relevant to the jury's decision as to whether the death penalty should be imposed. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

69. — — Instructions to jury, fair trial.

In a murder case, defendant's right to a fair trial was not violated when the jury was not instructed on manslaughter under Miss. Code Ann. § 97-3-47 because there was nothing to support a claim that a shooting was accidental where defendant pointed a gun at the victim and shot her from four feet away; moreover, the evidence indicated that defendant acted with malice where defendant and the victim were arguing so much that the victim's daughter was praying for her life prior to the shooting. Page v. State, 989 So. 2d 887 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 439 (Miss. 2008).

Defendant's right to a fair trial was not violated by a jury instruction given in a capital murder case because it was not required to include a finding on deliberate design since there was no intent to kill required when a person was slain in the course of a robbery. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

Defendant complained that a prosecutor's closing argument statement inferred that he might have been sexually inappropriate with the victim in the past; however, looking at the record of the entire trial, the actions of the State did not constitute prosecutorial misconduct and, even if the statements were erroneous, the error was unquestionably harmless. Lastly, the jury was properly instructed that comments from the attorneys were not to be regarded as evidence when the jury deliberated on its verdict; thus, defendant was not denied his constitutional right to a fundamentally fair trial because of prosecutorial misconduct at closing argument. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

70. — — Quotient verdict, fair trial.

Where evidence disclosed that jury after twenty-three hours of deliberations stood 11 to 1 for verdict of guilty of murder when bailiff stated to jury that judge told him he had until next convening of court to wait until they reached verdict and that as far as he was concerned they could stay there until they rotted and that shortly thereafter the jury returned a verdict of guilty, such conduct constituted a coercive inference on the jury prejudicial to the defendant, it being immaterial whether the judge actually made such statement. McCoy v. State, 207 Miss. 272, 42 So. 2d 195 (1949).

71. — — Disparity in sentences, fair trial.

Disparity between defendant's 45 year sentence, imposed after trial and conviction of armed robbery, and the 25 year term imposed upon a triggerman, who had pled guilty to the same robbery, required remanding of case for sentencing hearing to enable circuit judge to state for the record appropriate reasons for the disparity in the two sentences. McGilvery v. State, 497 So. 2d 67 (Miss. 1986).

It is absolutely impermissible for trial judge to impose heavier sentence based in whole or in part upon defendant's exercise of constitutionally protected right to trial by jury; however, where record reveals without doubt that sentence is based solely upon defendant's prior convictions or presentencing report, appellate court will not disturb trial court's discretion in sentencing notwithstanding intemperate comments by trial judge indicating displeasure with defendant's exercise of right to trial by jury. Gillum v. State, 468 So. 2d 856 (Miss. 1985).

72. — — Jury trial.

Inmate's right to present issues to a jury expired when he pleaded guilty to the charges. Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 559 U.S. 1078, 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (2010).

Because the offense of stalking under Miss. Code Ann. § 97-3-107(1) (Rev. 2006), with which defendant was being charged, was punishable by up to one year in jail, defendant had a right to a jury trial, a circuit court had no discretion to deny him that right and the circuit court erred in refusing defendant's request for a jury trial. Ude v. State, 992 So. 2d 1213 (Miss. Ct. App. 2008), remanded by 93 So. 3d 891, 2012 Miss. App. LEXIS 189 (Miss. Ct. App. 2012).

Prerequisite to presentation of claim of denial of constitutional rights due to denial of challenge for cause was showing that defendant exhausted all of his peremptory challenges and that incompetent juror was forced to sit on jury by trial court's erroneous ruling. McGowan v. State, 706 So. 2d 231 (Miss. 1997).

Although criminal defendants in Mississippi generally have no right to be sentenced by the jury, where a specific statute provides such a guarantee, such as § 99-19-101, which requires that the jury perform the weighing of aggravating and mitigating factors, Article 3, §§ 14 and 26 of the Mississippi Constitution operate together to elevate the statutory right to one of constitutional significance which the Supreme Court of Mississippi cannot abridge by applying harmless error analysis, whether by disregarding entirely the invalid circumstance or by applying a limiting construction; thus, a murder defendant's motion for leave to file a post-conviction petition would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, and the case would be remanded to the circuit court for new sentencing hearings. Wilcher v. State, 635 So. 2d 789 (Miss. 1993).

In determining whether a person cited for contempt has the right to a jury trial, which determination must be based on whether the contempt is to be treated as a serious or a petty offense, the court must look to the maximum sentence which could be imposed under the statute if a maximum penalty has been set, and if no maximum penalty has been set, the court should look to the penalty actually imposed as the best evidence of the seriousness of the offense. McGowan v. State, 258 So. 2d 801 (Miss. 1972), cert. denied, 409 U.S. 1006, 93 S. Ct. 430, 34 L. Ed. 2d 298 (1972).

A defendant who, in a trial without a jury was found guilty of contempt for violating an injunction prohibiting him from conducting the unlawful business of keeping and selling intoxicating liquor on certain premises, and was sentenced to 5 months imprisonment and a fine of $750, was not entitled to a jury trial, but was entitled to have his fine reduced to $500. McGowan v. State, 258 So. 2d 801 (Miss. 1972), cert. denied, 409 U.S. 1006, 93 S. Ct. 430, 34 L. Ed. 2d 298 (1972).

It was error to deny an accused, who took the stand in his own defense, permission to present his version of the circumstances surrounding the taking of his alleged confession, even though the court had, in a preliminary hearing out of the presence of the jury, determined that the confession was admissible, the accused having the right to have the jury pass upon the factual issues as to the truth and the voluntariness of the confession, and upon the credibility of witnesses thereto and the weight to be given their testimony. Anderson v. State, 241 So. 2d 677 (Miss. 1970).

Where a defendant, found to have committed constructive contempt, was sentenced to six months confinement, and to pay a $500 fine, the offense of which he was convicted was petty, and the court did not commit error in refusing to grant the defendant a trial by jury. Hinton v. State, 222 So. 2d 690 (Miss. 1969).

In a prosecution for rape, the trial court did not err in accepting accused's plea of guilty and fixing his punishment at life imprisonment without impaneling a jury, and no constitutional right of the accused was violated thereby. Bullock v. Harpole, 233 Miss. 486, 102 So. 2d 687 (1958).

73. Impartial jury — In general.

Defendant's right to a fair and impartial jury was not violated by an alleged relationship between one juror and a witness for the State because none of the facts asserted by defendant with regard to the relations between the juror and the police officer, who was the witness, could be found in or supported by the record. Hill v. State, 4 So. 3d 1063 (Miss. Ct. App. 2009).

In a capital murder case, the inmate alleged that a deputy made improper comments to the jury amounting to unauthorized communications with jurors, which prejudiced his case, but the deputy's statement was too innocuous to be prejudicial and the statement alone did not indicate what it was in reference to or the context in which it was made and, even if it were made in reference to the inmate's case, the statement did not show prejudice to the inmate; thus, the inmate's right to trial by a fair and impartial jury was not violated. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the unsworn statements of one juror showing that the juror was predisposed to voting for death without weighing mitigating factors was countered with an affidavit from the juror that the juror considered all of the evidence in the case and the unsworn statement of the second juror did not state that the juror was silent during voir dire, that she lied about her views on mitigating evidence, that the juror was unwilling to consider mitigating factors, or that she had a predisposition to the death penalty that she did not disclose during voir dire; thus, the inmate's claim that the two jurors were predisposed to voting for the death penalty was unsupported and the inmate was not deprived of his right to a fair and impartial jury under the Sixth and Fourteenth Amendments or Miss. Const. Art. 3, §§ 14 and 26. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

A capital murder defendant was not denied a fair trial because he was forced to use his last peremptory challenge to remove a juror who was allegedly potentially biased since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury so long as the jury that sits is impartial, and the defendant did not show that an incompetent juror was forced to sit on the jury. Mettetal v. State, 615 So. 2d 600 (Miss. 1993).

The right to a trial by a fair and impartial jury is guaranteed by Mississippi Constitution Article III, § 14, § 26, and § 31. Hudson v. Taleff, 546 So. 2d 359 (Miss. 1989).

The right to a trial by an impartial jury is guaranteed in all prosecutions by the federal constitution and the state constitution. Adams v. State, 220 Miss. 812, 72 So. 2d 211 (1954).

Where funds to pay special prosecutor, in prosecution for murder were raised by public subscription defendant's request for list of contributors to aid in selection of jury should have been granted, but it was not reversible error to refuse since each prospective juror could have been asked if he had contributed. Seals v. State, 208 Miss. 236, 44 So. 2d 61 (1950).

The defendant has the right to a fair and impartial jury to try his case. Ferriday v. Selser, 5 Miss. (4 Howard) 506 (1840).

74. — — Validity of statutes, impartial jury.

Hines v. Lockhart, 105 So. 449 (Miss. 1925).

The literacy and age requirements of § 13-5-1 do not violate the constitutional rights of accused persons to be tried by an impartial jury. The literacy requirements of the statute are constitutional, and the statute does not bar persons over 65 years of age from serving on a jury, but merely grants those individuals the privilege to claim an exemption should they desire not to serve. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

The right of a defendant, under the section, to an "impartial jury" is not infringed by the statute (Code 1906, § 2685), which provides that "any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, if it appear to the satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct; but any juror shall be excluded if the court be of opinion that he cannot try the case impartially, etc." Green v. State, 72 Miss. 522, 17 So. 381 (1895).

The legislature cannot encroach upon the qualification of jurors so as to endanger their impartiality. Logan v. State, 50 Miss. 269 (1874).

75. — — Venire, impartial jury.

There was no evidence of prejudicial effect on the jury by the judge's comments concerning the drug court where the defense did not object once the jury was empaneled and the jury indicated it would fairly decide the case on the facts and law presented; defendant presented no evidence that the judge's comments had a prejudicial effect on the jury except for the fact that they ultimately found him guilty, and the content of the remarks made by the judge were merely informative and could not be deemed inflammatory. Flake v. State, 948 So. 2d 493 (Miss. Ct. App. 2007).

A murder defendant was not denied a fair trial by virtue of the fact that 9 of the 42 members of the regular and special venire panels had relatives who had been murdered where 7 of the members of the venire who had had relatives murdered did not serve on the jury and the defense had sufficient peremptory challenges remaining to remove the other 2 jurors if they so desired. Shell v. State, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

A plaintiff in a medical malpractice case was denied her right to an impartial jury where there were over 40,000 persons in the county from which a jury could have been drawn and the plaintiff was limited to a jury pool of 25, 48 percent of which were connected in some way to the defendant doctor, because of the "statistical aberration" of the makeup of the venire and the strong likelihood that the opportunity for undue influence over other jurors in the case was too great. Hudson v. Taleff, 546 So. 2d 359 (Miss. 1989).

Contention that impartiality of veniremen selected to try defendant was reasonably questioned when it became apparent that there were many close associates of law enforcement on it was without merit where only one juror who had relation to law enforcement official actually served on final jury; court will not reverse simply because member or members of jury are somehow connected with law enforcement officials. Lockett v. State, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Archer v. State, 140 Miss. 597, 105 So. 747 (1925).

76. — — Persons disqualified from jury duty, impartial jury.

In a capital murder case, excusing a juror who responded affirmatively when asked if any jurors could not read or write did not violate defendant's constitutional right to an impartial jury; the requirement of Miss. Code Ann. § 13-5-1 that a juror be able to read and write is a reasonable and nondiscriminatory regulation that operates equally against all persons tried by juries. Dycus v. State, 875 So. 2d 140 (Miss. 2004), vacated by, remanded by 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212, 73 U.S.L.W. 3528 (2005).

Both circuit clerks and sheriffs qualify as "interested officials" for purpose of rule that participation of interested officials in juror selection violates due process, since both are officers of the court who have duties in the impaneling of juries. Nicholson ex rel. Gollott v. State, 672 So. 2d 744 (Miss. 1996).

A member of an indicting grand jury may not serve on the defendant's petit jury. The accuser may not also be the trier of fact since such a practice is inconsistent with the constitutional requirement of an impartial jury. Hood v. State, 523 So. 2d 302 (Miss. 1988).

Defendant was denied right to fair trial where one member of jury had been witness for prosecution in pretrial hearing concerning motion for change of venue, juror having testified that defendant could receive fair trial in county; trial court erred in refusing defendant's motion for either mistrial or that juror in question be stricken and alternative substituted. Davis v. State, 512 So. 2d 1291 (Miss. 1987), cert. denied, 485 U.S. 913, 108 S. Ct. 1088, 99 L. Ed. 2d 247 (1988).

Normally person engaged in law enforcement, or related by blood or marriage to one engaged in law enforcement, is not per se excluded from jury service in criminal case; however, in highly unusual fact situation in which 12 of 39 veniremen considered by court and not excused for cause are either police officers or related by blood or marriage to current or former police officers, and in which uniformed officer serves as foreman, defendant is denied trial by impartial jury. Mhoon v. State, 464 So. 2d 77 (Miss. 1985).

Donahue v. State, 142 Miss. 20, 107 So. 15 (1926).

77. — — Disabled jurors, impartial jury.

In a criminal prosecution, having a deaf person on a jury would constitute a denial of the accused's rights to due process of law and to a trial before a fair and impartial jury. Weaver v. State, 497 So. 2d 1089 (Miss. 1986), habeas corpus denied, 896 F.2d 126 (5th Cir. 1990), reh'g denied (5th Cir. 1990), cert. denied, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990).

State v. Chambliss, 142 Miss. 256, 107 So. 200 (1926), citing, McHenry v. State, 91 Miss. 562, 44 So. 831 (1907).

78. — — Disqualification for cause, impartial jury.

Where a juror in a sexual battery case admitted that she knew many of the witnesses who were going to be called to testify, the trial court did not abuse its discretion under Miss. Const. Art. 3, § 26 by failing to dismiss the juror for cause. The juror did not have a close personal relationship with the witnesses, but only knew them as members of the community; the juror confirmed that she could be fair and impartial. Smith v. State, 989 So. 2d 973 (Miss. Ct. App. 2008).

A juror in a criminal prosecution should have been struck for cause where his sister was employed as an assistant district attorney. Hartfield v. Hartford Life & Accident Ins. Co., 656 So. 2d 104 (Miss. 1995).

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

A prerequisite to presentation of a claim of a denial of constitutional rights due to denial of a challenge for cause is a showing that the defendant had exhausted all of his or her peremptory challenges and that the incompetent juror was forced to sit on the jury due to the trial court's erroneous ruling. Mettetal v. State, 602 So. 2d 864 (Miss. 1992).

The denial of a challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror. Thus, a trial court's refusal to remove 6 jurors for cause did not deprive the defendant of a fair trial where only one of the 6 actually served on the jury and she was not challenged at a time when the defense had 12 peremptory challenges, the defense still had one challenge left as well as an alternate challenge at the completion of the selection process, and the defense counsel never raised any objection to the other 5 jurors. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

79. — — Pre-trial publicity, impartial jury.

There is no constitutional right to have a jury mirror any particular community; thus, a capital murder defendant, who was granted a change of venue because of pretrial publicity, was not improperly denied a second change of venue to a county in which the racial makeup more closely reflected that of the county where the crime occurred where the jury that tried the defendant was selected in a nondiscriminatory manner, and there was no evidence that the jurors were not impartial. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

80. — — Voir dire, impartial jury.

Trial court did not err when it allowed the State to ask jurors if they could convict a thug for shooting a thug during voir dire because although Miss. Unif. Cir. & County Ct. Prac. R. 3.05 prohibited the posing of hypothetical questions to the venire panel during voir dire that required a juror to pledge a particular verdict, the State asked a hypothetical question about thugs and did not specifically request a verdict during voir dire. Anderson v. State, 1 So. 3d 905 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 15 (Miss. 2009).

Defendant was not denied an impartial jury by alleged inaccurate responses during voir dire where the juror at issue was asked if he had ever worked as an employee of a law enforcement office agency, whether it was state, federal, prison, jail system, or some kind of correctional institute, because the dispute over whether the juror worked as a guard was irrelevant, as he worked in some capacity, and that was all the question asked. Russell v. State, 849 So. 2d 95 (Miss. 2003).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), postconviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

One is not an impartial juror within this section who, on his voir dire, conceals facts which make him incompetent; such incompetency exists when a juror heard facts from a witness whom he believed, inducing a fixed opinion. Dulion v. Harkness, 80 Miss. 8, 31 So. 416, 92 Am. St. R. 563 (1902).

81. — — Capital punishment, impartial jury.

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

Personal opposition to capital punishment is not a constitutional impediment to juror service so long as the juror is able to set aside his or her personal belief and fairly consider all sentencing options under the law; it was therefore error for a trial court to refuse defense counsel an opportunity to further voir dire potential jurors who had expressed reluctance to vote for the death penalty. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution did not deprive the defendant of a jury composed of a fair cross section of the community. Minnick v. State, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

When sixty-five percent of jurors examined to try defendant accused of murder say that they either have fixed opinions which cannot be changed by evidence or that they are so biased or prejudiced against him that they cannot give him a fair trial, it is impossible for accused to obtain fair and impartial trial in county and motion for change of venue should be granted. Seals v. State, 208 Miss. 236, 44 So. 2d 61 (1950).

82. — — Racial discrimination in jury selection, impartial jury.

Use of the word "shall" in Miss. Code Ann. § 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01 implies that the trial court has no discretion in the number of peremptory strikes given to each side; therefore, a trial court did not err by refusing to allow defendant additional peremptory strikes under § 99-17-3 and Rule 10.01 after five were denied due to an improper attempt to exclude Caucasian males from the jury in a statutory rape and sexual battery case. Jones v. State, 951 So. 2d 568 (Miss. Ct. App. 2006).

Defendant used his first five peremptory strikes against white jurors, thereby giving rise to a reasonable inference of purposeful discrimination, although defendant offered a race-neutral reason for striking the juror at issue, asserting that he was 77 years old and knew a witness. However, defendant also struck a second white juror on the basis he was close in age to the 37 year-old victim, while leaving a black juror on the jury who was in that age range; given the fact that one of the reasons for striking the elderly juror (he simply knew who the State witness was), was clearly shown to be pretextural, and the other reason, age, was also found to be pretextual in the case of the second white juror, in light of the deference given to trial judges' factual findings in Batson challenges, the appellate court was not willing to find that the trial court erred in finding that age, though being a race-neutral reason, was also pretextural as to the elderly juror. Williams v. State, 909 So. 2d 1233 (Miss. Ct. App. 2005).

Trial court overruled defendant's Batson challenge because two white jurors were challenged by the State and the State had two remaining peremptory challenges that it did not exercise, which would indicate that the State did not attempt to exclude jurors on a racial basis. Because defendant failed to establish a prima facie case that the State had excluded jurors on the basis of race, there was no need for the State to present race-neutral reasons for its peremptory strikes. Moore v. State, 914 So. 2d 185 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 745 (Miss. 2005).

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In defendant's trial for the sale of cocaine, the prosecutor's reasons for striking two potential jurors, based on age and marital status in one instance, and because a juror had had regular contact with defendant in a second instance, were sufficiently race-neutral to survive defendant's Batson challenges. Rogers v. State, 891 So. 2d 268 (Miss. Ct. App. 2004).

Trial court did not err in declaring a mistrial in an armed robbery case because, by the time a Batson challenge was raised, other jurors in the case had already been dismissed; jeopardy did not attach because the record indicated that the jury had not been sworn, despite a trial court's order that stated otherwise. Gaskin v. State, 873 So. 2d 965 (Miss. 2004).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. Colosimo v. Senatobia Motor Inn, Inc., 662 So. 2d 552 (Miss. 1995), reh'g denied.

The Batson rule applies to both a prosecutor's and a defendant's peremptory challenges. Griffin v. State, 610 So. 2d 354 (Miss. 1992).

A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in the defendant's case; a defendant may establish a prima facie case of purposeful discrimination in selection of the jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Griffin v. State, 607 So. 2d 1197 (Miss. 1992).

A white defendant had standing to object to the State's use of 5 of its 6 peremptory challenges to strike black jurors; however, the defendant failed to establish a prima facie case of discrimination where the State offered race neutral reasons for striking each individual black juror and the defendant's attorney offered no evidence to rebut the State's reasons for striking the jurors. Green v. State, 597 So. 2d 656 (Miss. 1992).

A defendant failed to establish a prima facie case of racial discrimination in jury selection, even though the defendant was black and the prosecution exercised preemptory challenges to eliminate 3 black jurors, where the jurors were excluded because they were acquainted with the defendant; while excluding jurors on the ground that they were acquainted with the defendant might have had a discriminatory effect since the defendant's acquaintances were primarily black, the law does not proscribe the mere incidental exclusion of blacks from a jury. Govan v. State, 591 So. 2d 428 (Miss. 1991).

A murder defendant's argument that the jury was patently flawed because the jury was white and the defendant was black was without merit. The mere fact that a jury is white and a defendant is black does not violate Batson, but rather it is the racially discriminatory exercise of peremptory challenges to strike black jurors from the jury that violates the Batson rule. Sudduth v. State, 562 So. 2d 67 (Miss. 1990).

No prima facie case of racial discrimination was shown in the prosecution's use of peremptory challenges, even though the prosecutor exercised 5 of his 7 peremptory challenges against black jurors, where the victim of the crime charged and the defendant were black, the prosecutor and the defendant had several challenges left, numerous potential black jurors were left uncalled, and one black juror was in the jury box. Dennis v. State, 555 So. 2d 679 (Miss. 1989).

Although a peremptory challenge cannot be exercised for a racially discriminatory reason, this does not preclude the exercise of a peremptory challenge for a non-race-based reason that objective and fair-minded persons might regard as absurd. Chisolm v. State, 529 So. 2d 635 (Miss. 1988).

A black defendant made a prima facie showing of purposeful discrimination in the selection of a jury where the jury — including one alternate juror — was composed of 10 white persons and 3 black persons, and where the prosecution exercised 12 peremptory challenges, 7 of which were used to exclude black persons from the jury. Chisolm v. State, 529 So. 2d 630 (Miss. 1988).

Absence of black jurors on jury panel after peremptory challenge by state of only black person who has been called as prospective juror does not violate defendant's right to impartial jury and equal protection where no request has been made for evidentiary hearing and there is nothing to indicate willful, systematic exclusion of black persons from jury. Belino v. State, 465 So. 2d 1043 (Miss. 1985).

83. — — Race-neutral selection of jury, impartial jury.

Trial court did not err when it allowed the State to use peremptory strikes on five African American venire members and denied defendant's Batson challenges because the State provided a racially neutral reason for the challenged strike and defendant failed to rebut the State's explanations. Defendant was charged with possession of cocaine and three of the potential jurors that were removed by the State's challenges were involved with drugs, one had problems with the prosecutor, and one had voted not guilty in another strong case. Watson v. State, 991 So. 2d 662 (Miss. Ct. App. 2008).

Defendant's right to a fair trial under Batson was not violated by the prosecutor's use of peremptory strikes because a large number of potential jurors knew defendant, defendant's mother, defendant's family, potential witnesses in the case, or the attorneys; the other peremptory challenges by the state were used against a juror whose son was a witness, two jurors who were close friends of the family, and another juror who had a close family member prosecuted by the same district attorney's office. Fisher v. State, 989 So. 2d 893 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 429 (Miss. 2008).

In a capital murder case, there was no violation of Batson based on the striking of African-American jurors because the prosecution gave race-neutral reasons, which included inattention, failure to render a death sentence in a prior case, residence in a high crime area, and employment as a counselor at a mental health facility. White v. State, 964 So. 2d 1181 (Miss. Ct. App. 2007).

If exercising ten of 11 peremptory challenges against African-American members of a venire did not suffice as a prima facie case of purposeful discrimination when one-third of the panel was African-American, then it was difficult to imagine what would; therefore, in a robbery case, the state should have been ordered to provide race-neutral reasons for its use of peremptory challenges because a prima facie case was shown by defendant. Scott v. State, 981 So. 2d 979 (Miss. Ct. App. 2007), reversed by 981 So. 2d 964, 2008 Miss. LEXIS 230 (Miss. 2008).

Defendant failed to prove that the State used its peremptory strikes in a discriminatory manner as defendant (1) failed to preserve the record for the voir dire; and (2) did not show the racial composition of the venire, the jury, or the county. However, the record showed that the State used peremptory strikes against three African-Americans and that four African-Americans were seated on the jury, but, on those bare facts, defendant did not show a reasonable inference of purposeful discrimination or that the State attempted to systematically remove African-Americans from the venire; therefore, defendant's Batson challenge failed. Jones v. State, 904 So. 2d 149 (Miss. 2005).

Defendant did not show a violation of Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), in a capital murder trial by the exclusion of two African-American prospective jurors because race-neutral reasons were offered by the prosecution; even though the reasons given were later determined to be invalid since drug charges against one juror had been dismissed and the other juror was misidentified, this was not enough to warrant a reversal. Booker v. State, — So. 2d —, 2006 Miss. App. LEXIS 635 (Miss. Ct. App. Aug. 29, 2006), opinion withdrawn by, substituted opinion at 5 So. 3d 411, 2008 Miss. App. LEXIS 77 (Miss. Ct. App. 2008).

As to defendant's Batson challenge, the prosecutor's reason for peremptorily striking the only black juror on the panel, because he was unemployed, was sufficiently race-neutral, notwithstanding defendant's arguments that the number of unemployed blacks was disproportionate to the number of unemployed whites. Tyler v. State, 911 So. 2d 550 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 600 (Miss. 2005).

Trial court did not violate defendant's right to a fair trial in accepting the State's race-neutral reasons for excluding black jurors; one potential juror had possibly concealed her knowledge of the defendant, one juror appeared to be mentally slow, another was believed to be an alcoholic, and one did not respond to any voir dire questions. Harris v. State, 901 So. 2d 1277 (Miss. Ct. App. 2004), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 279 (Miss. 2005).

Where the evidence showed that the reasons the prosecution in a robbery case struck several jurors included hostile demeanor, acquaintance with the defense team, employment status, and a last name associated with other criminal defendants, a trial court properly overruled a Batson challenge. Gaskin v. State, 873 So. 2d 965 (Miss. 2004).

In an aggravated assault case, there was no error in the trial court's decision that the State provided race-neutral reasons for its peremptory challenges, based on the response by two jurors to a question of whether any family member or close friend had ever been charged with a crime, and another juror's friendship with defendant. Robinson v. State, 870 So. 2d 669 (Miss. Ct. App. 2004).

In a capital murder case, the trial court did not err in allowing the State to exercise its peremptory challenges on two black members of the venire as race-neutral reasons for striking them were provided: neither were forthcoming about their arrest records and the underlying crime took place in front of a house belonging to one of the jurors. Howell v. State, 860 So. 2d 704 (Miss. 2003), writ of certiorari dismissed by 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371, 18 Fla. L. Weekly Fed. S 105 (2005).

A prosecutor's race-neutral explanation for peremptorily striking a potential juror need not rise to the level of justifying the exercise of a challenge for cause. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge-that the juror indicated she would have difficulty finding suitable child care during the trial-was sufficiently race-neutral. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The trial court in a capital murder prosecution erred by not requiring the State to give racially-neutral reasons for exercising peremptory challenges against 7 out of 13 black jurors on the venire, even though there was no showing that the defendant was of a minority class, and therefore the case would be remanded for a hearing on whether the Batson criteria were violated by the State's exercise of its peremptory challenges. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

The reasons proffered by the State for using 5 of its 7 peremptory challenges against black jurors were sufficient to withstand a Batson challenge where the reasons given were (1) the juror had a brother in the penitentiary; (2) the juror had attended high school with the defendant; (3) the juror wore dark glasses in the courtroom; (4) the juror was employed in a company in which there had been a riot which was quelled by the police; and (5) the juror shared a last name with many persons in the penitentiary and the prosecutor believed he was related to an inmate, and the defense made no attempt to show that the reasons proffered were pretextual, of disparate impact, or not true. Henderson v. State, 641 So. 2d 1184 (Miss. 1994).

Some acceptable race-neutral reasons for challenging a juror are: (1) involvement in criminal activity; (2) unemployment; (3) employment history; (4) relative of juror involved in crime; (5) low income occupation; (6) juror wore gold chains, rings and watch; and (7) dress and demeanor. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

The State's reasons for using 4 of its 5 peremptory challenges against black jurors were sufficiently race-neutral where the first juror had a pending civil lawsuit, the second juror had worked with a defense witness and the prosecution objected to his age and demeanor, the third juror had previously sat on 2 criminal juries which resulted in one "not guilty" verdict and one mistrial, and the prosecutor was unable to make eye contact with the fourth juror while the juror continuously made eye contact with the defendant. Harper v. State, 635 So. 2d 864 (Miss. 1994).

A trial judge is required to make an on-the-record factual determination that each reason proffered by the State for exercising a peremptory challenge is, in fact, race neutral; this requirement is to be prospective in nature. Hatten v. State, 628 So. 2d 294 (Miss. 1993).

The State successfully rebutted a black defendant's Batson challenge to the State's exercise of peremptory challenges to eliminate four black venire members where 2 of the venire members were challenged because they were of an age to be employed and had no occupation, and the other 2 were challenged because they were acquainted with the defendant or her family. Porter v. State, 616 So. 2d 899 (Miss. 1993).

The reasons given by a district attorney for exercising a peremptory challenge to excuse a black juror were sufficiently race-neutral where the district attorney stated that the juror was a truck driver "which may or may not mean he's a transient," the juror wore overalls with a black T-Shirt in the courtroom, and he was unmarried and did not have children "which shows that he doesn't have a stake in the community like somebody that's established." Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

84. — — Gender discrimination, impartial jury.

Defendant's convictions for two counts of armed robbery were improper due to the prosecutor's clear gender discrimination in jury selection. The State was not permitted to keep a person off of the jury simply because of that person's gender. McGee v. State, 953 So. 2d 241 (Miss. Ct. App. 2005), reversed by 2006 Miss. LEXIS 469 (Miss. Aug. 31, 2006).

85. — — Trial conduct, impartial jury.

In defendant's capital murder case, defendant's right to a fair trial was not violated where the momentary, inadvertent and fleeting sight of defendant in shackles by potential jurors, while being transported into the courtroom, absent prejudice shown, did not require a mistrial. Spicer v. State, 921 So. 2d 292 (Miss. 2006), writ of certiorari denied by 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022, 75 U.S.L.W. 3233 (2006).

A defendant's right to a fair trial by an impartial jury was not prejudiced by the fact that the defendant was brought shackled into the hallway outside the courtroom while some of the jurors were in the hallway, where the defendant was not brought into the courtroom until the shackles were removed, the incident was a technical violation which was not intentional but was coincidental to the jury being out in the hallway, and no evidence was presented to show that the defendant was seen shackled by some of the jury members. Wiley v. State, 582 So. 2d 1008 (Miss. 1991).

86. — — Sequestration, impartial jury.

A trial court in a capital murder prosecution did not abuse its discretion by refusing to grant the defendant's motion for individual sequestered voir dire of the entire venire where the court asked the collective venire about the effect of pretrial publicity or information received about the case, and the court later asked if there was any reason that a juror felt that he or she could not be fair and impartial, and anyone who responded affirmatively was questioned individually in chambers. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In a homicide prosecution, it was reversible error to allow the jury to disperse in capital cases, even though this was done with the consent of the defendant, since in a capital case, an accused has a right to trial by a duly constituted court which includes a jury whose verdict is beyond question; no consent of a defendant in such situation should be binding on him for he may really be unwilling to permit the jury to separate but might consent for fear that his refusal would prejudice the jury against him. Wilson v. State, 248 So. 2d 802 (Miss. 1971).

87. — — Misconduct of jury, impartial jury.

Defendant was denied fair trial in murder prosecution when trial court provided jury with law dictionary and directed its attention to definition of premeditation;

dictionary's definition of 'premeditation' contained cross reference to definition of 'malice aforethought' that was inconsistent with state law, and no safeguards were taken to keep jurors from looking into other portions of the dictionary. Collins v. State, 701 So. 2d 791 (Miss. 1997).

Where extraneous influence was introduced into jury's deliberations by court and not by accident or some outside party, presumption is raised that prejudice flows from injection of such extraneous influence. Collins v. State, 701 So. 2d 791 (Miss. 1997).

A defendant was denied his constitutional right to a fair trial by an impartial jury in the sentencing phase of a capital murder prosecution where, upon conclusion of the guilt phase but before the sentencing phase began, the jury prematurely deliberated and sent a note to the judge indicating their decision that the defendant should be sentenced to death. Rather than questioning the jurors in order to determine whether each of them could remain impartial during the sentencing phase, the judge merely instructed the jurors to "refrain from further deliberations," which was insufficient to insure that the defendant's right to a fair hearing was not prejudiced. Holland v. State, 587 So. 2d 848 (Miss. 1991).

Counsel failed to preserve sufficient record from which it could be determined whether mistrial should have been granted where defense counsel brought alleged outside influence of jurors to court's attention through motion for mistrial, but offered little proof in support of this motion; alleged outside influence consisted of juror reporting to bailiff during course of trial concerning rumors regarding defendant's being visited by another prisoner in her cell while the 2 were incarcerated, statement allegedly having been made in front of all other male jurors; court noted that whenever there was question regarding outside influence of jury, trial judge himself ought to examine jury carefully to ensure that its deliberations were based on evidence produced at trial and not extraneous matters. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

A conversation between a juror and a material witness in a prosecution, the witness being a deputy sheriff and jailer, and having served as a courtroom deputy, just after the witness had testified for the state, was reversible error, where the defendant had, prior to the introduction of evidence, moved the court to direct police officers, including the instant witness, to remove themselves from close proximity to the jury box, and had moved for a mistrial immediately after the observed conversation, both of which requests were denied. Perkins v. State, 244 So. 2d 414 (Miss. 1971).

88. — — Review, impartial jury.

In a case involving the possession of precursors used in the manufacture of a controlled substance, because there was no indication that a Batson challenge was raised during the jury selection process, any such claim was waived on appellate review. Fillyaw v. State, 10 So. 3d 986 (Miss. Ct. App. 2009).

In a statutory rape case, defendant's challenge under Batson was not heard on appellate review because this issue was not raised at trial; the trial court did not have the opportunity to make findings necessary to preserve the issue for appellate review. Roles v. State, 952 So. 2d 1043 (Miss. Ct. App. 2007).

Defendant's challenge based on Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), in a capital murder case was without merit because he did not raise the challenge at trial; therefore, the trial court did not have the opportunity to make the required fact-findings for an appellate court to review. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

Court's decision on qualifications of jurors in criminal case is open to review only on appeal. Lewis v. State, 153 Miss. 759, 121 So. 493 (1929).

89. Nature and cause of accusation — In general.

Because defendant's indictment failed to charge the essential elements of armed robbery, the circuit court lacked subject matter jurisdiction over the offense of armed robbery, but the indictment properly charged defendant with the crime of simple robbery; however, defendant's guilty plea was involuntary because he was not informed of the true nature and consequences of the charge. Garner v. State, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

To be informed of the crime of which the accused is charged is one of the fundamental rights guaranteed by the Constitution. Murray v. State, 266 So. 2d 139 (Miss. 1972), cert. denied, 411 U.S. 907, 93 S. Ct. 1534, 36 L. Ed. 2d 196 (1973), reh'g denied, 411 U.S. 959, 93 S. Ct. 1929, 36 L. Ed. 2d 419 (1973).

A defendant is entitled to a plain statement of charge against him and it is fundamental that the affidavit must set forth the essential elements of the offense sought to be charged. May v. State, 209 Miss. 579, 47 So. 2d 887 (1950).

Conviction cannot be sustained unless indictment is in conformity with law, purpose of which is to enable defendant to make defense of former acquittal or conviction on record in subsequent trial for same offense. Cooksey v. State, 175 Miss. 82, 166 So. 388 (1936).

90. — — Validity of statutes, nature and cause of accusation.

Section 1362 of the code 1906 providing that it shall be sufficient in an indictment for perjury to set forth the substance of the offense charged, does not dispense with the necessity of averring the substance of the issue on which perjury is charged to have been committed, and therefore does not violate this section. State v. Silverberg, 78 Miss. 858, 29 So. 761 (1901).

91. — — Purpose, nature and cause of accusation.

Constructive criminal contempt judgments against a process server, a notary, and the owner of a process service company (accuseds) were vacated as a chancellor violated the accuseds' due process rights under Miss. Const. Art. III, § 26 since he failed to recuse himself after initiating the proceedings, and failed to issue summonses notifying the accuseds of the criminal nature of the charges against them under Miss. R. Civ. P. 81(d). In re McDonald, 98 So. 3d 1040 (Miss. Oct. 4, 2012).

The provision as to the nature and cause of the accusation is intended to secure to the accused such a specific description of the offense as will enable him to make preparation for his trial, and also such identification of the offense that he may be insured against a subsequent prosecution therefor. Noonan v. State, 9 Miss. (1 S. & M.) 562 (1844); Murphy v. State, 24 Miss. 590 (1852); Garrard v. State, 25 Miss. 469 (1852); Riggs v. State, 26 Miss. 51 (1853); Norris v. State, 33 Miss. 373 (1857); Newcomb v. State, 37 Miss. 383 (1859); Williams v. State, 42 Miss. 328 (1868); Riley v. State, 43 Miss. 397 (1871); Thompson v. State, 51 Miss. 353 (1875).

92. — — Necessary accusations, nature and cause of accusation.

In a case involving burglary of a nondwelling, an indictment failed to allege all of the essential elements of the crime; only the first element of the crime was cited in the indictment because there was no mention of any valuables kept in the house or a citation to the particular crime that defendant allegedly intended to commit. Therefore, the indictment was void as violative of the federal and state constitutional provisions relating to the right to notice of criminal charges. Gales v. State, 131 So. 3d 1238 (Miss. Ct. App. 2013).

Four indictments charging defendant with the unlawful delivery of amphetamines, two charging delivery on one date and two charging delivery on another date and all of which failed to designate the person to whom delivery was made, were inadequate to appraise the defendant of the charges arising on the particular day for which he was being tried and, consequently, to enable him to plead double jeopardy. Taylor v. State, 295 So. 2d 735 (Miss. 1974).

Indictment for bigamy must set forth something in nature of allegation with reference to time, place and circumstance of former marriage, or it must name person with whom former marriage is alleged to have been contracted. Wash v. State, 206 Miss. 858, 41 So. 2d 29 (1949).

Indictment charging that defendant did wilfully, unlawfully, feloniously, knowingly and bigamously marry one named female, a married woman, knowing at time that she was married and had living husband is fatally defective in that it does not charge time, place or circumstances of former marriage of woman nor does it give name of her living husband. Wash v. State, 206 Miss. 858, 41 So. 2d 29 (1949).

An indictment for larceny should describe the property alleged to have been taken with reasonable certainty, so that the description will enable the court to determine that the property in question is the subject of larceny, show the jury that such property is that upon which the indictment is founded, reasonably inform the accused of the instance meant in conformity with the constitutional guaranty in that respect so that he may properly prepare his defense, and be such that the judgment rendered after trial upon the indictment may be pleaded in bar of a subsequent prosecution for the same offense. Rutherford v. State, 196 Miss. 321, 17 So. 2d 803 (1944).

Indictment was sufficient to charge crime of accessory after the fact to crime of murder, although it did not allege specific acts committed by defendant. State v. Needham, 182 Miss. 663, 180 So. 786, 116 A.L.R. 1100 (1938).

Information for contempt was not void because of failure to state venue. Prine v. State, 143 Miss. 231, 108 So. 716 (1926).

An indictment must allege that the accused "did" the acts constituting the offense sought to be charged. Cook v. State, 72 Miss. 517, 17 So. 228 (1895).

Venue must be alleged. Thompson v. State, 51 Miss. 353 (1875).

It is essential that venue shall be averred and proven. Thompson v. State, 51 Miss. 353 (1875).

93. — — Specificity, nature and cause of accusation.

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. Batiste v. State, 121 So. 3d 808 (Miss. 2013).

Defendant's capital murder conviction under Miss. Code Ann. ' 97-3-19(2)(e) was reversed where his indictment was insufficient to charge him with capital murder or burglary because it failed to assert the underlying offense that comprised the burglary; it also failed to charge him with murder or manslaughter where it omitted the term "unlawfully" or the phrase "without the authority of law." Jackson v. State, — So. 3d —, 2010 Miss. LEXIS 170 (Miss. Apr. 1, 2010).

Indictment charging a person with money laundering under Miss. Code Ann. § 97-23-101(1)(b)(ii)(1) was required to specify the "unlawful activity" from which the illegal proceeds were alleged to have derived, and violation of this requirement may be cured only where the prosecution demonstrated that it otherwise provided timely notice to defendant of the alleged illegal activity, and that the notice clearly and sufficiently provided defendant a fair opportunity to prepare a defense to the charges; the omission of the "specified unlawful activity" in defendant's indictment was harmless error which did not render the trial fundamentally unfair. Tran v. State, 962 So. 2d 1237 (Miss. 2007), writ of certiorari denied by 553 U.S. 1054, 128 S. Ct. 2472, 171 L. Ed. 2d 769, 2008 U.S. LEXIS 4212, 76 U.S.L.W. 3619 (2008).

Eyewitness testimony of multiple witnesses was sufficient evidence that homicide committed by defendant, an armed late arriver to a nightclub fight, was not self-defense, and defendant was not prejudiced by the failure of the original indictment to state a specific overt act by which the homicide was committed, particularly where the indictment was amended to read "by shooting with a pistol." Jones v. State, 856 So. 2d 285 (Miss. 2003).

While Code 1942, § 2459 provides the exception as to descriptions of property in indictments for larceny by allowing the same to be described in general terms where the charge is for larceny of money or evidences of debt, the chapter on criminal procedure does not otherwise abrogate the common law rule requiring the description of personal property in an indictment for larceny to be reasonably definite and certain. Rutherford v. State, 196 Miss. 321, 17 So. 2d 803 (1944).

Indictment in grand larceny prosecution charging defendant with theft of "a quantity of clover seed," of the value of "more than $25 in lawful money," was so vague, uncertain and indefinite as to give defendant no intimation regarding amount of clover seed which he was accused of stealing and was subject to demurrer. Rutherford v. State, 196 Miss. 321, 17 So. 2d 803 (1944).

Constitution secures to defendant only right to be advised of nature of charge against him, and not right to have set forth facts relied on to sustain charge. State v. Needham, 182 Miss. 663, 180 So. 786, 116 A.L.R. 1100 (1938).

Description in indictment for grand larceny in theft of automobile as "one certain Ford automobile, two-door make, of the property of Ben Stevens and of the value of more than $25.00" was sufficient. Jackson v. State, 173 Miss. 776, 163 So. 381, 100 A.L.R. 789 (1935).

Failure of indictment to inform defendant of names of persons to whom sales of liquor were made was not in violation of Constitution. Buford v. State, 146 Miss. 66, 111 So. 850 (1927).

94. — — Amendment of indictment or information, nature and cause of accusation.

In a sexual battery case, the indictment was properly amended by the removal of the phrase "without her consent," because the defense to the charge did not change, and although defendant might have asserted that he was surprised, his surprise could not be characterized as unfair; the net effect of the amendment was that defendant only had to defend one claim, rather than two. Lee v. State, 944 So. 2d 35 (Miss. 2006).

Indictment explicitly stated that defendant was being charged with motor vehicle theft under Miss. Code Ann. § 97-17-42; there was no evidence presented that defendant was surprised or that he did not not know, to his prejudice, that he was being prosecuted under § 97-17-42 for motor vehicle theft; therefore, there being no prejudice or surprise, the trial judge did not abuse his discretion in permitting an on-the-record amendment of the indictment. Mixon v. State, 921 So. 2d 275 (Miss. 2005).

The constitutional provision requiring that an accused be advised of the offense charged, does not prohibit an amendment which does not deprive the accused of any substantial right necessary to the ends of justice. Gillespie v. State, 221 Miss. 116, 72 So. 2d 245 (1954).

An amendment may be made to state truly and describe accurately the particular and identical offense for which the grand jury indicted. Gillespie v. State, 221 Miss. 116, 72 So. 2d 245 (1954).

Where there was a clerical mistake in an indictment for murder as to deceased's Christian name, permitting of the amendment to the indictment prior to trial did not prejudice the defendant inasmuch as the offense charged in the indictment was not changed. Gillespie v. State, 221 Miss. 116, 72 So. 2d 245 (1954).

95. — — Included lesser offenses, nature and cause of accusation.

Indictment for murder includes all lower grades of felonious homicide, including manslaughter, and failure of state to elect between murder and manslaughter does not leave defendant ignorant of charge in violation of Sixth Amendment of United States Constitution and § 26 of Mississippi Constitution. Kelly v. State, 463 So. 2d 1070 (Miss. 1985).

96. — — Sufficiency, nature and cause of accusation.

Dismissal of an indictment charging defendant with being a felon in possession of a weapon and reversal of the conviction thereunder were required because the indictment failed to specify which, if any, of the four types of prohibited knives defendant was alleged to have possessed in violation of defendant's federal and state constitutional rights. Thomas v. State, 126 So. 3d 877 (Miss. 2013).

Any error that resulted from an allegedly insufficient indictment for felony driving under the influence causing death or disfigurement, in violation of Miss. Code Ann. § 63-11-30(5) (Supp. 2010), was harmless because defendant had fair notice and an opportunity to prepare a defense. While the indictment did not allege a specific basis for defendant's negligence, the appellate court specifically stated that it was not making a finding of insufficiency. Regardless, any finding of insufficiency would have been harmless because discovery showed the possibility to two specific negligent acts: driving on the wrong side of the road and speeding. Taylor v. State, 94 So. 3d 298 (Miss. Ct. App. 2011), writ of certiorari denied by 96 So. 3d 732, 2012 Miss. LEXIS 371 (Miss. 2012).

Indictment for fondling and sexual battery was not defective for failing to provide the specific dates that the offenses occurred, as the state had narrowed the time frame sufficiently to put defendant on notice of the nature and cause of the charges against him. Hodgin v. State, 964 So. 2d 492 (Miss. 2007).

Defendant was properly convicted of sexually battery by digital penetration where sufficient proof showed that defendant was provided notice that he was being charged with sexual battery, and the variance between the language of the indictment and proof at trial was not a fatal error under Miss. Const. Art. 3, § 26. Burrows v. State, 961 So. 2d 701 (Miss. 2007).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. Neal v. State, 936 So. 2d 463 (Miss. Ct. App. 2006).

In an indecent exposure, reckless driving, and malicious mischief case, defendant did not receive inadequate notice of the nature and cause of the accusations against him as all three affidavits quoted the relevant language of the applicable statutes and there was no requirement that the formal name or statutory section be listed. As a result, all three of the affidavits were facially sufficient. Johnson v. State, 879 So. 2d 1057 (Miss. Ct. App. 2004).

Defendant was properly apprised of the nature and cause of a homicide by an indictment, despite the fact that the manner and method of the crime were not disclosed; the jury instructions sufficiently informed the jury that the act committed by defendant involved asphyxiation. Starns v. State, 867 So. 2d 227 (Miss. 2003).

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. State v. Shaw, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003), opinion withdrawn by, substituted opinion at 880 So. 2d 296, 2004 Miss. LEXIS 1027 (Miss. 2004).

Confession of defendant, stating charge to be assault and battery with intent to kill his wife, made and signed at a time when the wife was still living, did not constitute a misrepresentation of the charges against defendant in violation of defendant's constitutional right to be informed of the nature of the charges against him, since the way defendants are constitutionally informed of criminal offenses against them is by means of the affidavit, information, or indictment, and not information from officers under the circumstances involved. Coleman v. State, 46 So. 2d 75 (Miss. 1950).

Admission of evidence in prosecution for rape of child under twelve years of age that defendant had committed other like offenses against victim constituted violation of this section in requiring defendant to be prepared to answer for several separate and distinct capital offenses upon a trial under a single indictment where there has been no previous conviction. English v. State, 206 Miss. 170, 39 So. 2d 876 (1949), overruled on other grounds, Otis v. State, 418 So. 2d 65 (Miss. 1982).

Conviction of assault and battery with hands and fists was erroneous under indictment charging assault with pistol with intent to kill. Harrell v. State, 148 Miss. 718, 114 So. 815 (1927).

97. — — Instructions, nature and cause of accusation.

It was improper to convict defendant of using her mother's money without her consent in violation of the Mississippi Vulnerable Adults Act of 1986, Miss. Code Ann. § 43-47-19 because although the indictment sufficiently informed defendant of the crime and the conduct the grand jury believed constituted the crime, the trial court erroneously issued a jury instruction that materially conflicted with the indictment's language; the wording of the indictment suggested that the grand jury believed defendant's use of the money was improper only if the money was used without the mother's consent, but at trial, the State produced no evidence that defendant had used her mother's money without her consent, and several witnesses testified that she, in fact, had obtained her mother's consent. Decker v. State, — So. 3d —, 2011 Miss. LEXIS 296 (Miss. June 16, 2011), opinion withdrawn by 2011 Miss. LEXIS 324 (Miss. June 30, 2011).

Under the constitutions of both the United States and the State of Mississippi and under § 99-19-5, a jury instruction on child fondling should not have been given where the indictment charged only forcible rape since child fondling is not a necessarily included offense of forcible rape and, therefore, the indictment did not sufficiently notify the defendant that he might face a charge of child fondling. Hailey v. State, 537 So. 2d 411 (Miss. 1988).

98. — — Time to raise issue, nature and cause of accusation.

Insufficiency of bigamy indictment may be raised for first time on appeal when indictment is fatally defective for failure to set forth time, place and circumstance of former marriage, or name of person with whom former marriage is alleged to have been contracted. Wash v. State, 206 Miss. 858, 41 So. 2d 29 (1949).

99. Compulsory process—In general.

Criminal statute and rule of evidence rendering convicted perjurer incompetent to testify in criminal proceeding violated provision of state constitution entitling defendant to compulsory process, as evidentiary rule gave district attorney discretion as to whether to render particular witness incompetent by prosecuting him for perjury or preserve his competence by declining to prosecute known perjury. Fuselier v. State, 702 So. 2d 388 (Miss. 1997).

Where extraneous influence was introduced into jury's deliberations by court and not by accident or some outside party, presumption is raised that prejudice flows from injection of such extraneous influence. Collins v. State, 701 So. 2d 791 (Miss. 1997).

A defendant's constitutional right to compulsory process for obtaining witnesses in his favor was violated where the trial court quashed the defendant's subpoenas to a district attorney and 2 deputy sheriffs who allegedly had first-hand knowledge of incidents that had happened at the county jail which would have been relevant to the defense of duress, since without their testimony the defendant had no defense to the charge of conspiracy to commit a jail escape. Hentz v. State, 542 So. 2d 914 (Miss. 1989).

Fact that evidentiary rules may restrain testimony to be given by witness called by accused does not, in itself, violate accused's right to process to call witness. Holmes v. State, 483 So. 2d 684 (Miss. 1986).

Trial court's refusal to summon prisoners to testify in capital murder case, as requested by defendant, does not violate defendant's right to compulsory process where testimony by prisoners would be inadmissible hearsay. Gray v. State, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see Willie v. State, 585 So. 2d 660 (Miss. 1991).

An accused has a constitutional right to summon his attorney as a witness, which cannot be denied on the ground of embarrassment to the attorney or violation of court etiquette. Gradsky v. State, 243 Miss. 379, 137 So. 2d 820 (1962).

100. — — Administrative proceedings, compulsory process.

Since Bar disciplinary proceedings are inherently adversarial proceedings of a quasi-criminal nature, in the course of those proceedings there is secured to the accused attorney the right to due process of law, and within such secured due process right is the right of the accused attorney to have access to compulsory process for obtaining attendance of witnesses at critical stages of the proceedings. Attorney K. v. Mississippi State Bar Ass'n, 491 So. 2d 220 (Miss. 1986).

Disciplinary proceedings against an attorney before the Committee on Complaints were held in violation of the attorney's due process rights secured by United States and Mississippi constitutions and by Mississippi Code § 73-3-307, where, at a critical stage, no subpoena was issued, despite the attorney's verbal and written request therefor, to secure the attendance of the chancery judge whom the attorney had allegedly deceived, and the judge, who was a crucial witness, did not appear before the Committee. Attorney K. v. Mississippi State Bar Ass'n, 491 So. 2d 220 (Miss. 1986).

101. — — Child witnesses, compulsory process.

A judge's refusal to permit a criminal defendant's children to testify did not violate federal and state constitutional provisions entitling a defendant to access to witnesses where the judge provided the defendant with an opportunity show a "colorable need" for calling the children to testify and the defendant failed to show such a need. Edwards v. State, 594 So. 2d 587 (Miss. 1992).

102. — — Expert witnesses, compulsory process.

In a prosecution for forgery, the trial court's refusal to provide defendant, an indigent, with funds to procure a handwriting expert to counter testimony of the state's expert witness was not a denial of defendant's state or federal constitutional right to process for such witness where defendant's guilt or innocence was scarcely, if at all, dependent on the state's expert witness; the determination of whether the state owes an indigent the duty of providing an expert as part of due process must be made on a case by case basis. Davis v. State, 374 So. 2d 1293 (Miss. 1979).

103. — — Character witnesses, compulsory process.

Defendant in capital murder case is not entitled to compulsory process, attendance fees, and travel expenses for out of state prospective character witnesses, particularly in case in which only thing presented to judge as to testimony of proposed witnesses is summary by counsel, not sworn to, as to what witnesses might testify. Johnson v. State, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

104. — — Continuances, compulsory process.

Trial court erred in denying defendant's motion for a continuance to subpoena his coindictee; the trial court's conclusory reasoning, that the coindictee would exercise his Fifth Amendment privilege to avoid testifying, was without legal basis to deny defendant his right to call a witness, and defendant's Sixth Amendment right to compulsory process to call a witness was not recognized. An accused was allowed to call a witness even though the witness, if called, would have invoked the Fifth Amendment. Hannah v. State, 111 So. 3d 1196 (Miss. 2013).

Continuance was not warranted in a capital murder case because defense counsel was aware of one witness before trial and failed to issue a subpoena, and as to a second witness, defendant's rights under the Sixth Amendment and Miss. Const. Art. 3, § 26 were not violated since there was no colorable need for the presence of the witness; moreover, defendant did not show that it was impossible or impracticable to secure an affidavit from the witness. King v. State, 962 So. 2d 124 (Miss. Ct. App. 2007).

A continuance to obtain attendance of an absent witness at a criminal trial is permissively refused where the witness, clearly implicated in the crime charged, could not have been required to testify. Averitt v. State, 246 Miss. 49, 149 So. 2d 320 (1963), appeal dismissed, cert. denied, 375 U.S. 5, 84 S. Ct. 51, 11 L. Ed. 2d 38 (1963), reh'g denied, 375 U.S. 936, 84 S. Ct. 328, 11 L. Ed. 2d 268 (1963).

In the absence of showing on the record that subpoenaed witness was present at the trial of a murder prosecution, it was error to deny accused's application for continuance, and reviewing court could not consider a certified copy of subpoena issued for the witness and affidavit of sheriff to the effect that witness was present at the trial where such papers were not part of the record. Whit v. State, 85 Miss. 208, 37 So. 809 (1905).

105. Right to be present at trial—In general.

The manner in which the trial court instructed a jury to continue deliberations was not error because an inmate had a full opportunity to demonstrate prejudice and failed to do so. Thus, the unrecorded oral ex parte communication did not deny him a fundamentally fair trial. Tyler v. State, 19 So. 3d 663 (Miss. 2009).

Statute governing trial in absence of accused does not offend dictates of State Constitution, which sets forth rights to confront accusers and to be present at trial. Jackson v. State, 689 So. 2d 760 (Miss. 1997).

The trial court in a capital murder prosecution did not err in permitting 3 off-the-record bench conferences and a jury instruction conference to be conducted when the defendant was not present where the defendant was represented by counsel at every critical stage of the proceedings, and he was not prejudiced by his absences at the conferences. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Trial judge who questions jurors in privacy of chambers in order to encourage them to speak openly regarding contact by someone attempting to influence them in favor of criminal defendant, and to prevent jurors who have not been contacted from being tainted by knowledge of contact violates right of defendant or defendant's counsel to be present at examination. Strickland v. State, 477 So. 2d 1347 (Miss. 1985).

While it would be the better practice to have the accused present when a special venire is drawn, the drawing of a special venire for a robbery prosecution, in the absence of the defendant and his counsel, was not reversible error, particularly where the defendant did not claim that he was prejudiced or that his case was not heard by an impartial jury, the drawing of a special venire not being a part of the actual trial. Kendall v. State, 249 So. 2d 657 (Miss. 1971), cert. denied, 404 U.S. 1040, 92 S. Ct. 725, 30 L. Ed. 2d 733 (1972).

Accused tried for misdemeanor in his absence when physically unable to attend trial is deprived of his constitutional right to be present, to be heard in his own behalf and to be confronted by witnesses against him. Jones v. State, 204 Miss. 284, 37 So. 2d 311 (1948).

Absence of accused from courtroom when order sustaining motion for special venire was entered was harmless where accused was in jail, his counsel did not inform court of intention to rely on such absence, and there was no showing of unfairness in drawing of special venire, or that accused was not tendered an impartial jury. Ford v. State, 170 Miss. 459, 155 So. 220 (1934).

All evidence, whether of living witnesses or inanimate objects, must be produced before the jury in the presence of the accused and the court. The legislature cannot authorize a jury to visit the scene of the crime unaccompanied by the accused and the court. Foster v. State, 70 Miss. 755, 12 So. 822 (1893).

106. — — Misconduct of defendant, right to be present at trial.

Although the trial judge did not verbally warn a defendant that he would be removed from the courtroom for disruptive conduct, the defendant received adequate warning that he would be removed for continued disruptive conduct where he was removed after an initial outburst, he was allowed to cool down, and no proceedings were had in his absence. These occurrences amounted to a warning since the defendant was not unaware that his disruptive conduct was the reason for his first removal and that continued disruption would result in a second removal. Bostic v. State, 531 So. 2d 1210 (Miss. 1988).

Where, during a state criminal trial, the defendant's behavior was clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint, and prior to his removal he was repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct, the record demonstrated that the defendant would not have been dissuaded by the trial judge's use of his criminal contempt powers, and he was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner, under the circumstances the defendant lost his right guaranteed by the Sixth and Fourteenth Amendments of the federal constitution to be present throughout his trial. Illinois v. Allen, 51 Ohio Op. 2d 163, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), reh'g denied, 398 U.S. 915, 90 S. Ct. 1684, 26 L. Ed. 2d 80 (1970).

107. — — Waiver, right to be present at trial.

Defendant's constitutional right to confront his accusers and be present and sentencing were not violated when defendant was convicted and sentenced in absentia of felony third-offense domestic violence, Miss. Code Ann. § 97-3-7(3), because defendant voluntarily waived his sentence at trial and sentencing, pursuant to Miss. Code Ann. § 99-17-9, by willfully failing to attend; defendant spoke with his attorney the morning of trial and indicated he was attending but defendant never showed up. Robinson v. State, 66 So. 3d 198 (Miss. Ct. App. June 28, 2011).

In murder trial where defendant was in custody, he had right to waive his presence at the hearing of a motion for new trial. Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950).

In trial for misdemeanor, accused may, by his own fault or misconduct, waive his right to be present. Jones v. State, 204 Miss. 284, 37 So. 2d 311 (1948).

Defendant was entitled to waive right to be present on hearing of motion for new trial in felony prosecution, where it was not shown that he was prejudiced thereby. Odom v. State, 172 Miss. 687, 161 So. 141 (1935).

108. Confrontation of witnesses — In general.

There was no Confrontation Clause or hearsay violation in an officer's testimony because the officer did not testify that the two people who identified defendant as the shooter were eyewitnesses, the officer did not convey any statements or assertions made by the two anonymous people, either directly or indirectly, and the officer did not reveal the substance of the conversations; the officer stated that defendant became a suspect during the course of her investigation, but it was clear that her investigation involved much more than a conversation with these two people. Thus, it was not apparent that the testimony at issue was hearsay or that the unnamed people could be classified as accusers. Keithley v. State, 111 So. 3d 1202 (Miss. 2013).

Because the constitutional errors did not prejudice the outcome of the trial, there was no manifest miscarriage of justice and no reversible error. Burdette v. State, 110 So. 3d 296 (Miss. 2013).

In defendant's trial for capital murder, while the trial court erred in allowing a letter to be read during sentencing because defendant had no opportunity to cross-examine the author of the letter, in light of the totality of the evidence presented during the sentencing phase, the error was harmless. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011), remanded by 2013 Miss. LEXIS 109 (Miss. Feb. 14, 2013).

In a grand larceny case, the self-authenticating pen-packs were not inadmissible as a violation of the Confrontation Clause as the certificate on the pen-packs indicated that the custodian of records swore that the documents were true and correct copies, not that defendant actually committed any act. Accordingly, the "matter asserted" was that the pen-packs were accurate copies of official records, not that defendant was, in fact, a habitual offender, making the pen-packs admissible. Frazier v. State, 907 So. 2d 985 (Miss. Ct. App. 2005).

In a robbery case, where defendant's co-defendant had been acquitted and his co-defendant chose "not to testify," the full text of the co-defendant's statement to the police that was admitted into evidence clearly reflected that no specific individual was facially implicated by same. Based on the benign character of the co-defendant's statement in the individual case, and the assuredly disruptive impact that the retroactive application of Crawford v. Washington, 541 U.S. 36, (2004) would undoubtedly have created in the form of innumerable appeals, the appellate court held that Crawford (which barred testimonial out-of-court statements by witnesses under the Confrontation Clause, unless witnesses were unavailable and defendants had prior opportunity to cross-examine them), was not be applied retroactively in defendant's appeal. Bynum v. State, 929 So. 2d 324 (Miss. Ct. App. 2005), affirmed by 929 So. 2d 312, 2006 Miss. LEXIS 261 (Miss. 2006).

Where defendant asserted self defense in what he alleged was the accidental killing of his former girlfriend when he allegedly was confronted by her male friend, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership. However, in a second instance, the State elicited the same information on redirect examination that defendant was barred from eliciting on cross-examination, in regard to whether the male friend had also been a suspect early in the investigation; in the former respect, the error was harmless given the overwhelming weight of the evidence against defendant, and in the latter respect, defendant's right to confrontation was not violated as he suffered no prejudice. Raiford v. State, 907 So. 2d 998 (Miss. Ct. App. 2005).

Where defendant was prosecuted after a controlled drug buy involving an informant and other officers, defendant was not prejudiced as the result of the admission of one officer's statement on the audiotape where that officer did not testify at trial. That officer's statement was not the incriminating evidence from the tape, defendant was able to cross-examine each and every witness the State offered, and there was no violation of defendant's constitutional rights of confrontation and cross-examination; further, the statement qualified as a present sense impression and was not inadmissible hearsay. Burton v. State, 875 So. 2d 1120 (Miss. Ct. App. 2004).

In defendant's capital murder case, a court properly allowed an expert to testify on behalf of a coworker where the witness had been involved in the lab analysis, and the testimony did not concern an essential element of the crime. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

In noncriminal cases involving allegations of child abuse by the parent, the right of confrontation should be accorded to the accused parent. Bailey v. Woodcock, 574 So. 2d 1369 (Miss. 1990).

The right of confrontation does not require the prosecution to introduce certain witnesses or to call all witnesses who are competent to testify. Harrison v. State, 534 So. 2d 175 (Miss. 1988).

A defendant's right to the testimony of a witness extends only to the limit of the witness' right against self-incrimination. Smith v. State, 527 So. 2d 660 (Miss. 1988).

Where a rape victim was 86 years old, and was hospitalized for some time after the rape, and upon her release from the hospital was not able to return to her home, it was reasonable for the police to take the defendant to the victim's hospital room for identification, and such confrontation was not so unnecessarily suggestive and conducive to irreparable mistaken identification, as to be a denial of due process. Davis v. State, 255 So. 2d 916 (Miss. 1971), cert. denied, 409 U.S. 855, 93 S. Ct. 191, 34 L. Ed. 2d 99 (1972).

Accused tried for misdemeanor in his absence when physically unable to attend trial is deprived of his constitutional right to be present, to be heard in his own behalf and to be confronted by witnesses against him. Jones v. State, 204 Miss. 284, 37 So. 2d 311 (1948).

Constitutional provision entitling accused, in "criminal prosecutions," to be present and confronted by witnesses against him, was inapplicable to habeas corpus proceeding, since such proceedings are not "criminal prosecutions," but are civil proceedings. Shawver v. Fraser, 111 Fla. 585, 150 So. 519 (1933).

Admitting verdict of coroner's jury finding death was by violent means was prejudicial error, because it denied defendant right to be confronted by witnesses. McGee v. State, 25 Ala. App. 361, 146 So. 628 (1933).

The defendant has the right to be confronted on the trial by all witnesses against him. Scaggs v. State, 16 Miss. (8 S. & M.) 722 (1847).

109. — — Time right attaches, confrontation of witnesses.

Right of confrontation does not attach until criminal prosecution has begun. Singing River Elec. Power Ass'n v. State ex rel. Miss. Dep't of Envtl. Quality, 693 So. 2d 368 (Miss. 1997).

110. — — Pre-trial confrontation of witnesses.

Although a defendant was entitled to a preliminary hearing, he was not prejudiced by the lack of one where he was afforded ample opportunity through his pretrial hearings to confront the State's witnesses. Rogers v. State, 599 So. 2d 930 (Miss. 1992).

111. — — Joint trial, confrontation of witnesses.

Confrontation clause of Sixth Amendment bars admission, at joint criminal trial, of nontestifying codefendant's pretrial confession which incriminates defendant and is not directly admissible against defendant, even though jury is instructed not to consider confession against defendant, and defendant's own confession, corroborating that of codefendant, is admitted against defendant. Cruz v. New York, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987), on remand, 70 N.Y.2d 733, 519 N.Y.S.2d 959, 514 N.E.2d 379 (1987).

Confrontation clause of Sixth Amendment is not violated by admission, at joint criminal trial, of nontestifying codefendant's confession, even though defendant is linked to confession by other evidence properly admitted against defendant at joint trial, where codefendant's confession is redacted to eliminate not only defendant's name but any reference to defendant's existence, and jury is given proper limiting instruction not to use codefendant's confession against defendant. Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987).

At the joint trial of two defendants charged with armed robbery, the admission of their confessions, found to have been otherwise admissible, in the state's case-in-chief, did not violate each defendant's right to confrontation of witnesses and was not improper, although both confessions incriminated each defendant and neither of them took the stand, where, upon the admission of the confessions; the trial judge instructed the jury that each confession could not be considered as evidence against the other defendant, that the confessions were almost identical in every detail, and that each defendant admitted his own guilt. Seales v. State, 495 So. 2d 475 (Miss. 1986).

At the joint trial of two defendants charged with conspiracy to commit murder, admission, in prosecution's case-in-chief, of co-conspirators' post-arrest statements, wherein each co-defendant pointed a finger at the other, was reversible error, where these statements fell outside the co-conspirator's exemption from the hearsay rule, did not interlock in substantial particulars, and were not attended by other indicia of reliability sufficient to satisfy the conspirators' rights under the confrontation of witnesses clauses of federal and state constitutions. Mitchell v. State, 495 So. 2d 5 (Miss. 1986).

At the joint trial of two defendants charged with armed robbery, the admission of their confessions, found to have been otherwise admissible, in the state's case-in-chief, did not violate each defendant's right to confrontation of witnesses and was not improper, although both confessions incriminated each defendant and neither of them took the stand, where, upon the admission of the confessions; the trial judge instructed the jury that each confession could not be considered as evidence against the other defendant, that the confessions were almost identical in every detail, and that each defendant admitted his own guilt. Seales v. State, 495 So. 2d 475 (Miss. 1986).

Where a co-defendant alleged to have made an out-of-court statement inculpating the other defendant at a joint trial is present at the trial to testify and to submit to cross-examination, the admission of the co-defendant's out-of-court statement does not present a confrontation problem, even though the statement is hearsay as to the other defendant, so that its admission against him, in the absence of a cautionary instruction, would be reversible error under state law. Nelson v. O'Neil, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971).

Where a co-defendant at a joint trial in a state prosecution takes the stand in his own defense, denies making an alleged out-of-court statement implicating the other defendant, and proceeds to give testimony favorable to the other defendant concerning the underlying facts, the defendant implicated by the statement has been denied no rights protected by the Sixth and Fourteenth Amendments to the United States Constitution. Nelson v. O'Neil, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971).

At the joint trial of 2 defendants charged with conspiracy to commit murder, admission, in prosecution's case-in-chief, of co-conspirators' post-arrest statements, wherein each co-defendant pointed a finger at the other, was reversible error, where these statements fell outside the co-conspirator's exemption from the hearsay rule, did not interlock in substantial particulars, and were not attended by other indicia of reliability sufficient to satisfy the conspirators' rights under the confrontation of witnesses clauses of federal and state constitutions. Mitchell v. State, 495 So. 2d 5 (Miss. 1986).

112. — — Misconduct of defendant, confrontation of witnesses.

While courts must indulge every reasonable presumption against the loss of constitutional rights, the privilege of personally confronting witnesses may be lost by consent or at times by misconduct, and a defendant can lose his constitutional right to be present at his own criminal trial, if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Illinois v. Allen, 51 Ohio Op. 2d 163, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), reh'g denied, 398 U.S. 915, 90 S. Ct. 1684, 26 L. Ed. 2d 80 (1970).

113. — — Child witnesses, confrontation of witnesses.

In a sexual battery and touching of a child for lustful purposes case, as the trial court was correct in its determination that the statements made by the child to her mother and to her therapist were nontestimonial in nature, they did not trigger the protections of the confrontation clause, and defendant's right to confrontation was not violated. Bishop v. State, 982 So. 2d 371 (Miss. 2008).

In a case involving sexual abuse of children, defendant's Sixth Amendment claim was rejected because he failed to show that he was prejudiced by the denial of the right to view the demeanor of the children as they testified via closed circuit television, pursuant to Miss. R. Evid. 617. Therefore, defendant's motions for a mistrial and a new trial were properly denied. Rollins v. State, 970 So. 2d 716 (Miss. 2007).

Trial did not violate a defendant's confrontation rights in admitting a child victim's video statement where he was allowed to cross-examine the victim after she testified in court and he was given an opportunity for re-cross-examination after the statement was entered. Penny v. State, 960 So. 2d 533 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 384 (Miss. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 386 (Miss. 2007).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as a part of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause violation argument was without merit. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Social worker was properly allowed to testify as to statements made by the victim in a child-fondling case because Miss. R. Evid. 803(25) applied, and considering the social worker's testimony at the preliminary hearing and the trial court's review of the videotape of the interview, the victim's statements at the interview bore substantial indicia of reliability. Further, defendant's right to confrontation was not violated because the victim testified at trial and defendant cross-examined her. Elkins v. State, 918 So. 2d 828 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), writ of certiorari denied by 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564, 74 U.S.L.W. 3685 (2006).

For statement made by child of tender years describing act of sexual contact performed with or on child by another to be admissible, reliability of statement must be judged independently of any corroborating evidence. Hughes v. State, 665 So. 2d 852 (Miss. 1995).

114. — — Unavailable witnesses, confrontation of witnesses.

Admission of a police detective's videotaped deposition testimony into evidence was not an abuse of discretion because the detective had serious health complications and was considered by the circuit judge to have been unavailable at the trial. Moreover, defense counsel had the opportunity to cross-examine the detective during the deposition, with defendant present. McKenzie v. State, 119 So. 3d 1145 (Miss. Ct. App. 2013).

Defendant's convictions for robbery and capital murder were appropriate because, while the circuit court erred in allowing references to a deceased codefendant's statement to law enforcement to corroborate defendant's statement, the violation of defendant's constitutional right to confront the witness was harmless since the weight of the evidence was overwhelming. Defendant's own statement confessing to robbing the victim and stabbing him in the abdomen with a screwdriver was entered into evidence; other evidence included an officer's and sheriff's recounting of the "treasure hunt" with the codefendant, where they traveled to various areas and retrieved evidence that corroborated defendant's statement to a "T." Singleton v. State, 1 So. 3d 930 (Miss. Ct. App. 2008).

Reversal is required in the interest of justice when the prosecution is permitted to introduce an out-of-court hearsay statement for the truth asserted therein as a result of its main witness's professed loss of memory on direct examination; but, when cross-examined, the witness's responses indicate that his loss of memory is entirely fabricated. Not only was defendant entitle to a new trial after a victim's prior statements were improperly admitted as a result of the victim's memory loss seeming to disappear during cross-examination thereby making the victim available again but admission of the victim's statements also violated defendant's rights under the Confrontation Clause as defendant did not have an opportunity to cross-examine the victim about his accusations. Smith v. State, 25 So. 3d 313 (Miss. Ct. App. 2008), reversed by 25 So. 3d 264, 2009 Miss. LEXIS 546 (Miss. 2009).

Testimony that defendant had a sexual relationship with one of the victims, his stepson's wife, was properly admitted under Miss. R. Evid. 804(b)(5) because the trial court carefully analyzed the five requirements of trustworthiness, materiality, probative value, interests of justice, and notice; furthermore, defendant failed to object on the basis of the Confrontation Clause, as the statements made by the victim, the declarant, were non-testimonial for Crawford purposes, and the declarant was unavailable. Rubenstein v. State, 941 So. 2d 735 (Miss. 2006).

Defendant's capital murder convictions were proper where his confrontation rights under U.S. Const. Amend. VI and Miss. Const. Art. III, § 26 were not compromised because the statements defendant argued violated his right to confrontation did not constitute testimonial hearsay, which would be barred unless the witness was unavailable and the defendant had a prior opportunity for cross-examination; defendant made no objection at trial that the Confrontation Clause had been violated; and the trial court had determined that the victim, who was the declarant, was unavailable and that the evidence in question showed reliability and trustworthiness. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Where the State's expert witness testified by deposition because he was unavailable for trial before he had reviewed defendant's medical records, defendant was not denied his right to cross-examine the State's expert witness because the court found that the expert had testified that he had had the information that he had needed to testify as to defendant's sanity and the jury heard testimony from eye witnesses, defendant's expert, and others. Wilson v. State, 923 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 151 (Miss. 2006).

Trial court did not err in admitting the tape-recorded statement of defendant's mother, who was unavailable at the time of trial based on her mental condition, under Miss. R. Evid. 804(b)(5) because (1) the mother was able to give an accurate statement when it was taken and (2) the statement was reliable because she was an eyewitness to the incident where defendant fatally shot defendant's brother, and there was no reason to believe that the mother harbored prejudice against one son or the other; even if it was error for the trial court to have admitted the statement, the error was harmless and there was no violation of the Confrontation Clause under U.S. Const. amend. VI, Miss. Const. Art. 3, § 26 because the evidence proved convincingly that defendant's conviction of manslaughter was proper. Thornton v. State, 841 So. 2d 170 (Miss. Ct. App. 2003).

Statements of unavailable witnesses may be precluded where they lack indicia of reliability and trustworthiness. Williams v. State, 667 So. 2d 15 (Miss. 1996).

In order for statement of unavailable witness to be admissible under confrontation clause, particularized guarantees of trustworthiness must be shown from totality of circumstances, including only those relevant circumstances that surround making of statement and that render declarant worthy of belief. Williams v. State, 667 So. 2d 15 (Miss. 1996).

Admission of defendant's wife's statement which inculpated defendant and exculpated wife from criminal liability for shooting of victim violated confrontation clause since statement lacked particularized guarantees of trustworthiness where wife was unavailable to testify, wife was involved in placing shooting victim's body in trunk of car, giving her motive to fabricate, and statement was given while she was in custody. Williams v. State, 667 So. 2d 15 (Miss. 1996).

Police officer's testimony that robbery suspect was identified by third party not present in courtroom and not available to be confronted and cross-examined violates right of confrontation. Miller v. State, 473 So. 2d 945 (Miss. 1985).

Generally, where one is deprived of the opportunity to cross-examine a witness, as in the case of the illness or death of the witness after his direct examination, he may have the testimony previously given on direct examination excluded from the jury's consideration. Crapps v. State, 221 So. 2d 722 (Miss. 1969).

115. — — Adverse or hostile witnesses, confrontation of witnesses.

A defendant's constitutional right to confront witnesses was violated by the prosecution's attempted cross-examination of a witness who had been called as an adverse witness by the defendant, where the witness pleaded her privilege against self-incrimination on direct examination, and then, on cross-examination, the prosecuting attorney purportedly read from the witness' pretrial statement, which implied the defendant's guilt, before each of the witness' claim of privilege against self-incrimination. However, the error was harmless beyond a reasonable doubt where the evidence against the defendant was overwhelming. Hansen v. State, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

116. — — Discovery, confrontation of witnesses.

Electric power company's confrontation clause rights were not violated by denial of access to reports containing identities of informants who told Department of Environmental Quality (DEQ) that electric power company was improperly disposing of regulated environmental waste, where company was not subject of criminal, civil, or administrative charges prior to its filing of complaint. Singing River Elec. Power Ass'n v. State ex rel. Miss. Dep't of Envtl. Quality, 693 So. 2d 368 (Miss. 1997).

A denial of a list of witnesses does not always amount to a prejudicial denial of due process, particularly where student witnesses in a school disciplinary proceeding are involved, since a school board has not been given the power of subpoena. However, school boards should be especially sensitive to the right of students to know the complete nature of the charges, especially where charges of misconduct are denied and proof is based solely on testimony of other students. Although confrontation may not be an absolute necessity-or even advisable-in every case, written statements should ordinarily be provided. Findings of fact should be made, especially where there are multiple allegations. School boards should take note that although courts should not become involved in running schools, expulsion and suspension are severe sanctions requiring solemn attention to a pupil's rights. Jones v. Board of Trustees of Pascagoula Mun. Separate Sch. Dist., 524 So. 2d 968 (Miss. 1988).

At trial of sexual battery charge, the exclusion from evidence of letters written by prosecutrix to defendant, predicated on defense's failure to disclose them in pretrial discovery, did not deprive defendant of his constitutional right to confront witnesses, to a fair trial, and to due process of law, even though the excluded letters, which otherwise were competent evidence, on their face reflected a relationship between defendant and his stepdaughter (prosecutrix) substantially at odds with prosecution's theory that defendant had employed threats of violence or death to force his stepdaughter to engage in sexual acts with him, contained materials which impeached testimony of prosecutrix, and contradicted other more peripheral parts of prosecution's case. Coates v. State, 495 So. 2d 464 (Miss. 1986).

Where it appears that an informer was a participant in the crime or is a material witness essential to the defense of the accused, the state must divulge the name of the informer to the defendant; Conviction for possession of marijuana was reversed where the state refused to divulge the name of the informer who knew who had possession of the marijuana within the 24 hours prior to defendant's arrest and who knew that that man was not the defendant. Raper v. State, 317 So. 2d 709 (Miss. 1975).

No constitutional right is violated by refusing defendant's request for production of a written statement of a state's witness to the district attorney, not shown to be at variance with trial testimony. Mattox v. State, 243 Miss. 402, 139 So. 2d 653 (1962).

117. — — Test results and testing equipment, confrontation of witnesses.

Defendant's confrontation rights were not violated because as the technical reviewer assigned to the case, the witness was familiar with each step of the complex DNA testing process conducted by the analyst; the witness personally analyzed the data generated by each test conducted by the analyst and signed the report. Galloway v. State, 122 So. 3d 614 (Miss. 2013), writ of certiorari denied by 189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685, 82 U.S.L.W. 3685 (U.S. 2014).

Admission of a crime lab report was error because the surrogate testimony that was used to enter the report into evidence was presented by a police officer with no apparent relation to the Mississippi Crime Laboratory or to the report, and the analysts were not found to be unavailable, and defendant had no prior opportunity for cross-examination; the admission of the document without live testimony from an individual involved in the analysis constituted a violation of the Confrontation Clause. Burdette v. State, 110 So. 3d 296 (Miss. 2013).

While the State's expert was accepted as an expert in toxicology, there was no testimony that she was in any way involved in the testing of defendant's blood specimen or that she was actively involved in the production of the report and had intimate knowledge of the analyses even though she did not perform the tests first hand, and the trial court erred in admitting the test results without evidence that the expert actually performed the test or participated in its analysis; however, because overwhelming evidence was presented to the jury that defendant was intoxicated, this error was harmless. Debrow v. State, 972 So. 2d 550 (Miss. 2007).

Defendant's conviction for burglary of a dwelling was proper because there was no merit to his argument that his right to confrontation was denied. There was no testimony or evidence from a fingerprint examiner and the report was neither admitted into evidence nor were the findings ever presented to the jury. Denham v. State, 966 So. 2d 894 (Miss. Ct. App. 2007).

In a capital murder and death penalty case, there were no due process violations under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963); no DNA testing was done, most of the film had been disclosed, but to the extent that it was not, there was no reasonable probability that the outcome would have been different, and the other evidence had been disclosed to defendant. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant's confrontation rights were not violated when the trial court did not require an expert to analyze and testify to the chemical analysis of the ingredients in cold medicine as the evidence was properly admitted under Miss. R. Evid. 803(24) as the medicine had a label that was made in normal process of nationwide manufacturing and distribution by an established pharmaceutical company, thus, the label as to the medicine's ingredients had substantial indicia of trustworthiness. Burchfield v. State, 892 So. 2d 248 (Miss. Ct. App. 2004), affirmed by 892 So. 2d 191, 2004 Miss. LEXIS 1346 (Miss. 2004).

Defendant's conviction for depraved heart murder was proper where the trial court did not err when it overruled defendant's objection to the testimony of a witness regarding statistical date of DNA evidence because defendant objected on the ground that the witness was not a statistician and thus not qualified to testify about statistical results but the witness did not make the statistical calculations of which he was testifying; further, there was no error and defendant was not denied his rights to confront and cross-examine witnesses against him. Edwards v. State, 856 So. 2d 587 (Miss. Ct. App. 2003), writ of certiorari dismissed by 860 So. 2d 1223, 2003 Miss. LEXIS 812 (Miss. 2003), writ of certiorari denied by 187 L. Ed. 2d 69, 2013 U.S. LEXIS 6108, 82 U.S.L.W. 3180 (U.S. 2013).

There was no violation of the defendant's right to confront witnesses against him when a witness testified about DNA evidence, notwithstanding that the witness did not perform the actual tests on the various DNA samples collected from the defendant, where she did perform the scientific analysis of the data obtained. Byrd v. State, 741 So. 2d 1028 (Miss. Ct. App. 1999).

The admission of a calibration certificate for an Intoxilyzer without testimony from the calibration officer does not, in general, violate the confrontation clauses in the Mississippi or United States constitutions, so long as the proper foundation is laid. Harkins v. State, 735 So. 2d 317 (Miss. 1999).

In a prosecution for driving while intoxicated, the trial court's refusal to compel production of an intoxilyzer machine into court to conduct a demonstration did not violate the defendant's constitutional right to be confronted by the witnesses against him and to have compulsory process for obtaining witnesses in his favor, where the trial court ordered the city to allow the defendant the opportunity to run a test in the police station where the intoxilyzer machine was situated, the defendant failed to show that he would be unable to do what was needed in order to properly defend the case by examining and testing the machine at the police station, the defendant made no showing that he could substantially replicate the conditions of the night of his arrest, and moving the intoxilyzer machine to the court house would have been substantially disruptive and inconvenient to the city law enforcement authorities. Goforth v. City of Ridgeland, 603 So. 2d 323 (Miss. 1992).

A trial court in a murder prosecution erred in allowing the prosecutor to cross-examine a witness about a certified lab report of results of the defendant's drug screen test, where the test results were never offered into evidence during the trial and the witness had no actual knowledge of the drug screen analysis; without the testimony of a sponsoring witness with personal knowledge of the facts contained therein, the drug screen report was inadmissible hearsay, and without the opportunity to cross-examine the person responsible for the information contained in the report, the defendant's right to confront witnesses secured by the Sixth Amendment and Article 3, § 26 of the Mississippi Constitution were violated. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

In a prosecution, the admission of the testimony of a director of the state hospital, in which the director, who had not himself examined the defendant, stated that the final determined diagnosis was that the defendant was without psychosis was highly prejudicial and constituted reversible error; since by such testimony the state got into evidence the opinion of the doctors who examined the defendant, depriving the defendant of his right to be confronted by these witnesses as well as his right to cross-examine them. Butler v. State, 245 So. 2d 605 (Miss. 1971).

A defendant charged with possession of marijuana was entitled to be furnished a sample of the alleged marijuana which had been seized from his automobile, for the purpose of enabling a chemist employed by him to determine whether marijuana was present, but he was not entitled to a report setting forth the tests and procedures used by the state's chemist and findings from the analysis of the substance, where a portion of the substance would be made available to him, affording him sufficient knowledge for a competent cross-examination of the state's chemist. Jackson v. State, 243 So. 2d 396 (Miss. 1970).

118. — — Informants, confrontation of witnesses.

In a case involving possession of methamphetamine, possession of precursor materials, and false pretenses, plain error was shown because there was a violation of the state and federal Confrontation Clauses based on the admission into evidence of two search warrants and an affidavit that included hearsay statements attributed to a confidential informant. Regardless of the strength of the properly admitted evidence, it could not have been said beyond a reasonable doubt that the documents did not prejudice defendant. Johnson v. State, — So. 3d —, 2014 Miss. LEXIS 150 (Miss. Mar. 13, 2014).

Trial court sustained defendant's hearsay objections when a police officer attempted to testify to an informant's statements, and the trial court sua sponte directed the police officer to refrain from testifying about what the informant said; thus, the informant's statements were never admitted into evidence, and there was therefore no violation of defendant's right to confront the witnesses against him under USCS Const. Amend. 6 and Miss. Const. Art. 3, § 26. Turner v. State, 945 So. 2d 992 (Miss. Ct. App. 2007).

Defendant's confrontation rights are not violated when a police officer testifies about the statement of a confidential informant if the informant is available for cross-examination; moreover, an officer's testimony regarding an informant's statement that defendant sold drugs was not hearsay because it was merely offered to show the reason behind the officer's actions, and it was not offered to prove the truth of the matter asserted. Stubbs v. State, 878 So. 2d 130 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 936 (Miss. 2004).

Statement of an officer to explain why a particular person was approached on a certain date was admissible because it did not constitute hearsay; moreover, the statement did not violate defendant's right to confrontation because the officer was cross-examined at trial, despite the officer's actions being based on the statements of several anonymous tipsters. Hill

v. State, 865 So. 2d 371 (Miss. Ct. App. 2003).

In a prosecution for sale of a controlled substance, the defendant was not deprived of his constitutional right to confront witnesses on the ground that the State failed to provide information as to the whereabouts of an informant where the defendant did not allege any bad faith by the State, and the State provided evidence as to its good faith attempt to locate the informant. Campbell v. Campbell, 618 So. 2d 116 (Miss. 1993).

A trial court erred in determining that a defendant was not entitled to disclosure of the identity of a confidential informant where, without the informant's eyewitness testimony, the State's case would have rested almost exclusively on the uncorroborated and doubtful testimony of 2 codefendants; however, the trial court's error did not require reversal where the defendant discovered the informant's identity at trial and subsequently confronted and cross-examined him, since confrontation and cross-examination are the very rights which require disclosure of material witnesses in the first place and the defendant fully exercised those rights at the trial. Fleming v. State, 604 So. 2d 280 (Miss. 1992).

Informant's tip is admissible evidence to extent required to show why police officer acted as he did and was at particular place at particular time, and thus defendant in prosecution for possession with intent to distribute marijuana was not deprived of constitutional right to confront one's accusers when officer testified to discussion with informant regarding defendant's whereabouts prior to arrest. Swindle v. State, 502 So. 2d 652 (Miss. 1987).

The trial court did not err in failing to require the state to divulge the identity of the person who informed the officers that the defendant had contraband in his apartment where the informant was not an active participant in the commission of the crime, nor was he present when the defendant was apprehended in the commission of the crime charged, nor was the informant a witness against the defendant. Wood v. State, 322 So. 2d 462 (Miss. 1975).

Ordinarily, disclosure of the identity of an informer, who is not a material witness to the guilt or innocence of the accused, is within the sound discretion of the trial court, but where the informer is an actual participant in the alleged crime, the accused is entitled to know who he is. Young v. State, 245 So. 2d 26 (Miss. 1971).

In a prosecution for unlawful sale of marijuana, refusal of the court to require disclosure of the identity of an informer who had apparently advised police officers that they could purchase marijuana from the defendant, but who was not an active participant or an eyewitness to the offense, was not an abuse of discretion. Young v. State, 245 So. 2d 26 (Miss. 1971).

119. — — Accomplices and codefendants, confrontation of witnesses.

In a capital murder case, defendant's confrontation rights were not violated by the admission of a co-defendant's statement where the evidence showed that the co-defendant had committed suicide prior to trial, because they were offered to rebut defendant's evidence of statements that the co-defendant had made to inmates. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Defendants' constitutional rights under U.S. Const. amend. VI, Miss. Const. Art. 3, § 26 were not violated when the trial court admitted their confessions at trial because the statements given by one defendant did not implicate the others, and defendants did not move for severance. Harris v. State, — So. 2d —, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Where defense counsel was aware that the codefendant was unavailable as a witness, but nevertheless placed another witness on the witness stand to introduce statements made by the codefendant which favored the defendant, it was rationally inconsistent and constitutionally wanting for defense counsel to later argue that the subsequent introduction of the codefendant's statements which disfavored the defendant was in violation of the defendant's right to confront the codefendant. Jordan v. State, 728 So. 2d 1088

(Miss. 1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

A trial court erred in admitting accomplices' statements into evidence in a murder prosecution under Rule 106, Miss. R. Ev., which contemplates the introduction of a writing by a party and contemporaneous introduction of other parts of the statement to prevent the misleading of the jury, where the defense counsel was merely cross-examining the police officer who investigated the accomplices and he in no way introduced parts of these statements into evidence. Additionally, there were serious confrontation problems since the jury was unable to observe the demeanor of the accomplices when they made the unsworn statements and the statements were taken under the coercive atmosphere of police interrogation. Welch v. State, 566 So. 2d 680 (Miss. 1990).

120. — — Examination of witnesses generally, confrontation of witnesses.

Defendant's convictions for possession of more than 500 grams but less than 1 kilogram of marijuana with the intent to distribute within 1,500 feet of a church, and possession of more than 10 grams but less than 30 grams of cocaine with intent to distribute within 1,500 feet of a church were proper because his right to confront witnesses against him was not violated when the circuit court prohibited defendant from calling an assistant district attorney who was present during the search of defendant's house as a witness. The district attorney was not a necessary witness, as he had nothing of significance to offer at trial, and defendant was not prejudiced in not being permitted to call the district attorney as a witness. Thompson v. State, 33 So. 3d 542 (Miss. Ct. App. 2010).

Trial judge did not err in not allowing defendant to question arresting police officers regarding their termination from the police department because the testimony was not relevant as defendant's assertions were general in nature, and defense counsel never established with certainty why the two officers were terminated and what effect that had on defendant's case; defendant's right to confrontation was not violated. Betts v. State, 10 So. 3d 519 (Miss. Ct. App. 2009).

In defendant's criminal prosecution for murder and attempted arson, the State did not dilute defendant's rights of confrontation and cross-examination under Miss. Const. Art. III, §§ 14, 26 by cross-examining and redirecting its witnesses. The State was permitted to redirect a witness about her statement where defense counsel placed the statement at issue by introducing it into evidence on cross-examination; the State was permitted to ask its witness leading questions about the statement. Brown v. State, 981 So. 2d 1007 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

Defendant's conviction for the sale of a controlled substance was appropriate, in part because defendant suffered no substantial prejudice in that he was not denied his constitutional right to confront witnesses based on the admission of audiotaped telephone recordings of the pre-drug-buy conversations between the confidential informant and unknown persons. Neither the confidential informant nor the law enforcement officials knew the identity of the voices on the tape, other than the confidential informant, nor did not State or any of its witnesses attempt to state or imply that one of the unidentified voices on the tape recording was defendant's. Brown v. State, 969 So. 2d 855 (Miss. 2007).

It was not an abuse of discretion for the trial court to deny defendant's request for recross-examination of a witness because the prosecutor's questioning on redirect did not go beyond matters raised during cross-examination; the contents of defendant's statement to the witness were fair game for redirect examination because on cross-examination, defense counsel asked the witness if he was "trying to hide something." Bailey v. State, 952 So. 2d 225 (Miss. Ct. App. 2006), writ of certiorari denied by 2007 Miss. LEXIS 166 (Miss. Mar. 1, 2007), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 167 (Miss. 2007).

In a sexual battery of a child case, the victim's grandmother, the babysitter, the psychotherapist, and the doctor were not working in connection with the police; further, their statements were not made for the purpose of aiding in the prosecution because (1) the victim's unsolicited statements were made to his grandmother and his babysitter for the sake of his well-being and not for the purpose of furthering the prosecution; and (2) his statements to the psychotherapist and the doctor were for the purpose of seeking medical and psychological treatment. The victim was taken to the psychotherapist and the doctor at the family's request and not sent there by police to further their investigation; thus, their testimony did not violate the Confrontation Clause. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

In a sexual battery of a child case, the statements testified to by a police officer and a detective were testimonial and should have been excluded under the Confrontation Clause; therefore, the trial court erred in admitting them. However, similar testimony was properly admitted from four other witnesses; therefore, the testimony was duplicative, and the error was harmless. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

Defendant's convictions for murder and aggravated assault were proper where he was not denied his constitutional right to confrontation because he was permitted to cross-examine the living victim as well as all other witnesses who testified for the State. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

Trial court did not violate defendant's confrontation rights in limiting his examination of two eyewitnesses to the shooting as defendant was questioning the witnesses about whether they were told what to testify by the police when he had no basis in fact for doing so, and was repeating questions that had already been answered. Harris v. State, 901 So. 2d 1277 (Miss. Ct. App. 2004), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 279 (Miss. 2005).

Defendant was not denied adequate cross-examination by fact that defense counsel was unaware until after prosecution witness had been excused of taped conversations in which witness told defendant that district attorney's office was threatening to revoke witness' probation if he did not testify; counsel was nonetheless able to elicit from witness the implication that his probation could be revoked if his testimony was not favorable, got witness to confess to selling cocaine, and thus clearly presented issues of witness' involvement, motivation, and bias to jury. (Per Smith, Justice, with three Justices concurring). Harris v. State, 704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

In a prosecution for felonious child abuse arising from the defendant's beating of his 9-year-old son, the defendant's constitutional right to confront his accuser was not violated, in spite of the defendant's argument that his accuser was his wife and that he was not allowed to "confront" her, where the defendant's wife was not a witness at the trial, the defendant was allowed to fully cross-examine all State witnesses against him, and the record did not indicate that the defendant's wife ever accused him of felonious child abuse. Ahmad v. State, 603 So. 2d 843 (Miss. 1992).

Where a defense witness invoked the Fifth Amendment, so that his testimony on direct-examination yielded nothing, the trial court erred in permitting the prosecutor to cross-examine the witness concerning a prior statement made by him; when the prosecutor, through the use of leading questions, parades before the jury the "testimony" of a silent witness, this violates the confrontation clause since the prosecutor cannot take the stand to be cross-examined by the defendant about the silent witness' "testimony". Balfour v. State, 598 So. 2d 731 (Miss. 1992).

Mere calling of witness by State who invoked Fifth Amendment privilege against self-incrimination would not be sufficient grounds for reversal of capital murder conviction; however, where state was allowed to call other witnesses to testify regarding alleged confession given by that witness, wherein he had detailed events of murder and implicated defendant as party to murder, defendant's right to confront and cross-examine witnesses presented against her was violated. Witness invoking Fifth Amendment privilege against self-incrimination and refusing to answer any questions regarding confession effectively prevented defendant from conducting meaningful cross-examination in violation of her constitutionally protected rights; fact that defendant was allowed to cross-examine both witnesses concerning circumstances under which confession was given could not hardly be substitute for meaningful cross-examination of declarant himself; state's contention that this evidence was properly admitted to impeach testimony given by witness was rejected, where state was allegedly attempting to impeach witness concerning statement that was accurate and truthful, which was that jury had previously decided whether he had killed decedent; court stated that it knew of no authority where truthful statements were held to be impeachable; instruction to jury that testimony was to be viewed only for impeachment purposes did nothing to diminish importance of this testimony and certainly did not cure constitutional error. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

Party improperly denied cross-examination is not required to make pro-offer of witness' testimony as would otherwise be required. Suan v. State, 511 So. 2d 144 (Miss. 1987).

Circuit Court erred when it refused to allow cross-examination of principal witness for State because one accused of crime has right to broad and extensive cross-examination of witnesses against him, and evidence that material witness has received favored treatment at hands of law enforcement authorities, particularly where that witness is himself subject to prosecution, is probative of witness' interest or bias and may be developed through cross-examination or otherwise presented to jury. Suan v. State, 511 So. 2d 144 (Miss. 1987).

Defendant was denied fundamental right to be confronted with witnesses against him because restriction on cross examination in trial court prevented defendant from questioning key prosecution witness concerning bias or motive in testifying. Foster v. State, 508 So. 2d 1111 (Miss. 1987).

Cross-examination of victim was not unduly restricted either to develop defendant's state of mind at time of incident or for pure impeachment purpose, where cross-examination involved collateral issue concerning business practices of victim and did not constitute viable defense to indictment for aggravated assault, and was sufficiently extraneous to charge in indictment and sufficiently unprovoked by victim's direct testimony that restriction of the cross-examination was matter within discretion of trial judge. Black v. State, 506 So. 2d 264 (Miss. 1987).

The trial court was within its discretion in denying defendant, who was represented by counsel, the right to personally cross-examine his father during an out-of-court hearing on the admissibility of certain evidence since Art. 3 § 26 did not grant to the defendant the absolute right to conduct a cross-examination where that defendant was also represented by counsel. Wilcher v. State, 455 So. 2d 727 (Miss. 1984), cert. denied, 470 U.S. 1034, 105 S. Ct. 1411, 84 L. Ed. 2d 794 (1985), denial of habeas corpus aff'd in part, rev'd in part, 978 F.2d 872 (5th Cir. 1992), reh'g denied, 981 F.2d 1254 (5th Cir. 1992), cert. denied, 510 U.S. 829, 114 S. Ct. 96, 126 L. Ed. 2d 63 (1993), vacated in part, 635 So. 2d 789 (Miss. 1993).

In a forgery prosecution, dismissal of the state's witness after he had given the only evidence introduced in the case which identified the defendant as the person who cashed the check, and had indicated that the defendant had cashed bad checks on other occasions, without giving the defendant an opportunity to cross-examine the witness, was prejudicial error, since it denied the defendant his right to be confronted by witnesses against him, and deprived him of due process of law. Crapps v. State, 221 So. 2d 722 (Miss. 1969).

Where a witness in prosecution for manslaughter by culpable negligence in the operation of a motor car was permitted to examine his prior written statement to refresh his recollection, admission of testimony to the limited extent that the witness' memory was refreshed by the statement and the questions of the prosecuting attorney predicated thereon did not violate this section on the ground that the written statement was given in the absence of defendant and without the privilege of cross-examination, where it was not introduced in evidence as an ex parte statement or deposition and the jury was not permitted to read, or hear the statement read, on the trial. Cutshall v. State, 203 Miss. 553, 35 So. 2d 318 (1948).

121. — — Impeachment, confrontation of witnesses.

Where a co-indictee testified against defendant at his capital murder trial, the trial court violated Miss. R. Evid. 609(b) by excluding the co-indictee's prior felony convictions that were more than ten years old without conducting the balancing test under Miss. R. Evid. 403; however, the trial judge allowed the co-indictee's most recent conviction for burglary and larceny to be introduced into evidence, which had more probative value than the older convictions. Any violation of defendant's confrontation rights was harmless. Spurlock v. State, 13 So. 3d 301 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 343 (Miss. 2009).

Although a trial court abused its discretion when it denied defendant the opportunity to re-cross-examine a victim about the victim's probation revocation, the error was harmless because defendant was allowed an extensive opportunity to impeach the victim regarding the victim's drug use and criminal history; the jury also heard evidence that the victim was smoking marijuana on the day of the shooting. Moore v. State, 1 So. 3d 871 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 59 (Miss. 2009).

At trial for fondling and sexual battery of a child, there was no merit to defendant's contention that he should have been able to impeach the child's statements by showing that they were not corroborated by the child's cousin, as defendant had had the opportunity to call the cousin as a witness. Hodgin v. State, 964 So. 2d 492 (Miss. 2007).

Defendant's proffer showed that not only did a witness believe that the prosecutor's office had the power to offer him leniency, but in fact his lawyer was working on it; that was permissible evidence of bias and interest, which defendant was entitled to show under Miss. R. Evid. 616, and without testimony about his beliefs of leniency, the jury was unable to consider if the change in the witness's statements to police and his testimony at trial was because he hoped to ingratiate himself to the district attorney's office. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Any error that occurred as a result of the trial court excluding defendant's line of questioning of the victim about the victim's grand jury testimony was harmless error as the testimony that defendant was trying to elicit, that the victim had previously told others he did not know who his assailant was, was before the jury, as the victim had admitted that he had told people that during cross-examination. Thus, defendant's confrontation rights were not violated. Harris v. State, 901 So. 2d 1277 (Miss. Ct. App. 2004), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 279 (Miss. 2005).

Because the two witnesses admitted making the prior inconsistent statements and explained them, extrinsic evidence of their statements could not be admitted into evidence under Miss. R. Evid. 613(b); thus, defendant's claim that he was denied the right to cross-examine the witnesses failed. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Trial court did not abuse its discretion in refusing to allow a defendant on trial for capital murder to attempt to impeach a former police detective who had been arrested for but not convicted of bribery with evidence of the arrest because the arrest was irrelevant to the credibility of the detective and the acts were too far removed to be of probative value; trial court's action did not deprive defendant of his right to confront the witness. Ellis v.

State, 856 So. 2d 561 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 1223, 2003 Miss. LEXIS 892 (Miss. 2003).

In a prosecution for selling crystal methamphetamine, the right of the defendant to confront witnesses against him was violated because he was not permitted to cross-examine a confidential informant with regard to his out-of-state drug violation which occurred after his purchases from the defendant. White v. State, 785 So. 2d 1059 (Miss. 2001).

A trial court's refusal to permit a capital murder defendant to impeach an eyewitness regarding his statement that he had been employed by his cousin for part of the previous year did not deprive the defendant of his constitutional right to confront witnesses against him since the issue of the witness' employment was a collateral matter; the constitutional right to confront witnesses applies only to issues pertinent to the crime charged, and the general rule that a party may not impeach a witness on collateral matters is applicable. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

The right of an accused to confront and cross-examine his accuser is so broad and fundamental as to transcend the right of a juvenile accuser to keep secret his former delinquent activity, and the refusal to permit a full cross-examination of a juvenile whose testimony implicated one defendant with possession of LSD, and who had been adjudged a juvenile delinquent, and was afraid of being returned to the training school, was error. Hamburg v. State, 248 So. 2d 430 (Miss. 1971).

122. — — Hearsay evidence, confrontation of witnesses.

Defendant's fundamental, substantive confrontation rights were not violated, because, since its inception, the right to confront one's accuser carved out an exception for dying declarations, and the court properly admitted the victim's statement as a dying declaration. Grindle v. State, 134 So. 3d 330 (Miss. Ct. App. 2013), writ of certiorari denied by 133 So. 3d 818, 2014 Miss. LEXIS 163 (Miss. 2014).

As a witness to defendant's fatal shooting of a victim testified and all of the traditional constitutional protections were present, defendant's confrontation rights were not violated by testimony from a police officer who recited the witness's statement. Davis v. State, 130 So. 3d 1141 (Miss. Ct. App. 2013), writ of certiorari denied by 131 So. 3d 578, 2014 Miss. LEXIS 73 (Miss. 2014).

Purported statements of unidentified persons at the company that manufactured the bullets involved in a crime constituted hearsay, and because it was unclear who contacted the company, perhaps double hearsay, and its admission resulted in a violation of the Confrontation Clause. Burdette v. State, 110 So. 3d 296 (Miss. 2013).

None of defendant's contentions required reversal based upon ineffective assistance of counsel where trial counsel's decision to not request a jury instruction fell under the category of trial tactics, and the fact that defense counsel never called defendant to testify in support of an intruder defense did not constitute ineffective assistance of counsel. Neal v. State, 15 So. 3d 388 (Miss. 2009).

Any violation of defendant's right to confrontation under U.S. Const. Amend. VI or Miss. Const. Art. 3, § 26 due to the trial court's failure to sustain her hearsay objection was harmless because the police officer testified about whether defendant had called 911 in June 2001 to report that her fugitive son had returned to the house but defendant was convicted based on a later incident in February 2002 in which she failed to report that her son had returned to the house. Therefore, the hearsay testimony about the earlier incident was not especially probative of her intent, or lack thereof, to aid her son evade police in 2002 and there was overwhelming evidence that defendant's conduct in the later incident conformed with the elements of the crime of accessory-after-the-fact. Young v. State, 908 So. 2d 819 (Miss. Ct. App. 2005).

Under Miss. R. Evid. 803(d)(2)(E), statements made between co-conspirators in the course of the furtherance of the conspiracy had the necessary guarantee of trustworthiness the court required to address the right to confrontation. Bush v. State, 895 So. 2d 836 (Miss. 2005).

Testimony admitted under former testimony exception to hearsay rule does not violate Confrontation Clauses of Federal and State Constitutions. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

In determining whether a minor rape victim's hearsay statements qualify under the residual hearsay exception, a proper consideration for the court as to the requirement of "sufficient guarantees of trustworthiness" of the victim's statements would be the behavior of the victim and her own mental and emotional condition as indicative of having undergone some severe emotion trauma such as sexual abuse. In considering the admissibility of testimony of this nature, a court must be extremely careful that on the one hand the rights of a defendant are protected under the witness confrontation clauses of the federal and state constitutions and the Mississippi Rules of Evidence, and, on the other hand, that testimony which on balance should be admitted under the framework of the Rules of Evidence is not excluded. Leatherwood v. State, 548 So. 2d 389 (Miss. 1989).

In a sense, the right to confront witnesses clause of the federal and state constitutions are hearsay rules elevated to constitutional status. Mitchell v. State, 495 So. 2d 5 (Miss. 1986).

What an informant told police officers in the course of their investigation was hearsay and inadmissible to the jury, and where such hearsay was incriminating as to the defendant the case was reversed and remanded. Ratcliff v. State, 308 So. 2d 225 (Miss. 1975).

123. — — Waiver, confrontation of witnesses.

Where there was no evidence in the record to suggest that the defendant dissented to his attorney's decision to stipulate to the testimony of a handwriting expert at the time it was made, the trial court did not abuse its discretion in allowing such stipulation, and the defendant thereby waived his right to confront the handwriting expert. Waldon v. State, 749 So. 2d 262 (Miss. Ct. App. 1999).

Defendant waived his right to confrontation where he failed to object in the trial court on the constitutional ground later relied upon on appeal as the basis for reversible error. Montgomery v. Parrish, 279 So. 2d 156 (Miss. 1973).

124. Right of accused to be heard.

Where defendant presented nothing more than a cursory accusation that his trial counsel refused to put him on the witness stand, in disregard of defendant's desire to testify, and defendant had not adequately populated the record with a transcript of the proceeding before the trial court from which the appellate court could make a determination whether there was any merit to his ineffective assistance accusations, defendant's conviction was affirmed. Young v. State, 33 So. 3d 1151 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 226 (Miss. 2010).

Defendant's conviction for murdering his girlfriend was appropriate because, procedural bar notwithstanding, he was clearly advised of his right to testify, or not, by both his defense counsel and the trial judge. Fannings v. State, 997 So. 2d 953 (Miss. Ct. App. 2008).

Defendant's attorney did not prevent defendant from testifying, but rather the attorney informed the trial court that defendant desired to testify on defendant's own behalf; because defendant desired to testify on defendant's own behalf, there was no need for the trial court to warn or advise defendant of the right to testify independent of counsel's advice not to testify, and the trial court did not have to advise defendant of all the possible ill effects of testifying. Scott v. State, 965 So. 2d 758 (Miss. Ct. App. 2007).

Defendant's conviction for murder was appropriate because he was specifically instructed on his right to testify in his own defense and the trial judge was careful to inform defendant that the decision was for defendant alone to decide; the record did not demonstrate that defendant was refused an opportunity to present a defense, and the record and arguments demonstrated that defendant's counsel was satisfied that defendant received what he asked of the trial judge. McCain v. State, 971 So. 2d 608 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 700 (Miss. 2007), writ of certiorari denied by 553 U.S. 1056, 128 S. Ct. 2478, 171 L. Ed. 2d 772, 2008 U.S. LEXIS 4228, 76 U.S.L.W. 3620 (2008).

Defendant's right to testify was not infringed upon in a capital murder case where defendant changed his mind and refused to do so after the state asked the trial court to rule on the admissibility of defendant's statements made during a competency hearing; the trial judge provided defendant with a detailed explanation of the right and asked if defendant understood that he was waiving such. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

In a prosecution for the sale of cocaine, the court properly advised the defendant of his right to testify, notwithstanding that the court also warned the defendant that, if he testified that he did not sell cocaine, the prosecutor could ask him questions "from now until the sun goes up and down two or three times." Gilley v. State, 748 So. 2d 123 (Miss. 1999).

The defendant was not fully advised of his right to testify on his own behalf and, therefore, his constitutional rights were violated; he was entitled to a new trial where (1) trial counsel testified that he had talked with the defendant regarding what his testimony would be if he testified at trial, but that he could not definitively say that he had advised the defendant that he had a right to testify, and (2) the defendant definitively testified that he was never informed of his right to testify by trial counsel. Dizon v. State, 749 So. 2d 996 (Miss. 1999).

A defendant has a constitutional right to make an opening statement without impingement of his constitutional guaranty against self-incrimination; the law does not require a defendant to make a choice between proceeding pro se and exercising his constitutional right against self-incrimination. Armstead v. State, 716 So. 2d 576 (Miss. 1998).

A criminal defendant can not be prohibited from exercising a clearly established constitutional right merely because the trial judge determines that to do so will prejudice the defendant's case. Armstead v. State, 716 So. 2d 576 (Miss. 1998).

A trial court erred in not permitting a murder defendant himself to make an opening statement even though the judge had not been forewarned that the defendant wished to make the opening statement himself. A defense attorney who is made aware by his or her client that the client wishes to personally conduct his or her own defense first has an obligation to fully advise the client of the constitutional right to represent himself or herself, and also of the responsibility and risk entailed. The defense counsel also has an obligation to inform the judge prior to exercise of the right, of the client's desire to do so, in order to give the judge an opportunity to instruct as well as warn the defendant outside the presence of the jury of his or her rights and responsibilities. Bevill v. State, 556 So. 2d 699 (Miss. 1990).

A defendant who alleged that he was denied effective assistance of counsel in a capital murder prosecution due to his counsel's refusal to allow him to testify was entitled to an evidentiary hearing on his claim that he was denied the right to take the witness stand and testify on his own behalf. Neal v. State, 525 So. 2d 1279 (Miss. 1987).

Claim that counsel was ineffective at trial because defendant did not take stand in his own defense was not supported where there was no suggestion that defendant insisted upon taking stand and was precluded from doing so by counsel or court; defendant was advised by his attorney that he should not take stand because he would not be good or effective witness on his own behalf and cross-examination would bring out information that would be highly damaging. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

Defendant was not denied his right to be heard at his sentencing as an habitual offender, where he had been present and represented by counsel throughout the entirety of his trial, had offered no evidence, and on appeal offered no indication of any evidence he would have placed before the trial court had he been given an opportunity to do so. Seely v. State, 451 So. 2d 213 (Miss. 1984).

The denial of the right of an accused to testify in his own behalf is a violation of his constitutional right under Article 3, § 26, regardless of whether the denial stems from the refusal of the court to let the defendant testify or whether it stems from the failure of the accused's counsel to permit him to testify. Furthermore, in a case where a defendant does not testify, before the case is submitted to the jury, the defendant should be called before the court out of the presence of the jury, and advised of his right to testify. If the defendant states he does not wish to testify, he may not be forced to take the stand; however, if he states that he wants to testify he should be permitted to do so. A record should be made of this so that no question about the defendant's waiver of his right to testify should ever arise. Culberson v. State, 412 So. 2d 1184 (Miss. 1982).

Where defendant requested permission to "make a statement to the jury" during argument at the guilt stage of his murder trial, the trial court's refusal to allow such argument constituted a violation of this section. Gray v. State, 351 So. 2d 1342 (Miss. 1977).

Action of trial court, in submitting to jury the issue of insanity at time of trial, the issue of insanity at the time of commission of the offense, and the issue of guilt or innocence, all at the same time, was not prejudicial error, where jury under proper instructions from the court found defendant to be sane at the time of trial and fully capable of making a rational defense. Williams v. State, 205 Miss. 515, 39 So. 2d 3 (1949).

Constitutional "right of accused to be heard," which means right to be heard at proper time, cannot be postponed to a time when it is in whole or in part ineffective, or when to avail of it entails acceptance of conditions which may not lawfully be imposed upon accused. Warren v. State, 174 Miss. 63, 164 So. 234 (1935).

Refusal to permit defendant to testify that confession was not free and voluntary at close of State's evidence upon preliminary inquiry as to admissibility of confession made to sheriff held error as denying defendant's constitutional right to be heard. Warren v. State, 174 Miss. 63, 164 So. 234 (1935).

125. Right to counsel — In general.

Trial court did not deny a father due process by allowing him to proceed pro se at a hearing to determine the amount of his child support arrearage, because 1) after the father's attorney had moved to withdraw, the father had 10 months to secure new counsel before the hearing, but neither did so nor requested a continuance; and 2) the trial court did not address contempt at the hearing. Reasor v. Jordan, 110 So. 3d 307 (Miss. 2013).

Defendant's conviction for felony child abuse was appropriate because his claim that his attorney was an inactive member of the bar and that defendant was unaware of the attorney's status change, did not deprive defendant of his right to counsel. There was no question that the attorney was engaged in the practice of law during his representation of defendant and the attorney's recent status change with The Mississippi Bar was harmless error because defendant failed to show any prejudice as a result of the attorney's status and because such status had no effect on the jury's determination of guilt. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Appellant's conviction for two counts of sexual battery was upheld because he did not allege that he suffered any untoward consequences because he did not have pre-indictment counsel, aside from the fact that he was indicted; he claimed only that, if counsel had been available, counsel could have objected to the hearsay testimony introduced during the grand jury proceedings, and could have filed a motion to dismiss. Jones v. State, 962 So. 2d 571 (Miss. Ct. App. 2006).

Although the circuit court found that the justice court judge denied petitioner the constitutional right to counsel under Miss. Const. Art. 3, § 26 and the U.S. Const. Amend. VI, petitioner clearly had notice of the pending trial, petitioner and petitioner's attorney were aware that the motion for continuance, which the trial court did not err in denying, had been denied; thus, the justice court judge did not err in proceeding to trial in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 and petitioner was not denied the constitutional right to counsel. In re Chisolm, 837 So. 2d 183 (Miss. 2003).

State constitution's right to counsel embraces all rights guaranteed to criminally accused defendant by the Sixth Amendment. Triplett v. State, 666 So. 2d 1356 (Miss. 1995).

Statements made by a defendant's sister in the defendant's presence that she intended to get an attorney were not sufficient to trigger the defendant's right to counsel during police questioning and to preclude any subsequent waiver on his part where the record was devoid of any evidence that the defendant attempted to adopt, or even understood, the statements made by his sister. Lee v. State, 631 So. 2d 824 (Miss. 1994).

Representation by a legal intern, acting under authority of § 73-3-207, does not constitute the actual assistance of counsel guaranteed by the Constitution. Benbow v. State, 614 So. 2d 398 (Miss. 1993).

It is a matter of fundamental fairness and due process that the defendant is entitled to be apprised of communications between the court and the jury during deliberations. The defendant is also entitled to be represented by counsel during this very important procedure. Edlin v. State, 523 So. 2d 42 (Miss. 1988).

This Article grants an accused the right to be heard by counsel. Watson v. State, 196 So. 2d 893 (Miss. 1967).

The fact that some undue advantage was taken of a defendant in the course of his arraignment or trial at a time when he was not represented by counsel is not ground for his discharge or release, but only entitles him to a new trial. Allred v. State, 187 So. 2d 28 (Miss. 1966).

The accused has a right to be heard by himself or by counsel, nor can courts require counsel, or impose counsel upon accused, except by his request. Schwartz v. State, 103 Miss. 711, 60 So. 732 (1913).

126. — — Administrative proceedings, right to counsel.

A pharmacist, whose license was revoked by the Board of Pharmacy, was not deprived of his right to retain counsel, in spite of his argument that he was denied procedural due process when the Board's agent implied that the charges against him were not serious in nature and thereby coerced him into not retaining counsel, where the agent merely stated that the decision to retain an attorney for the hearing was the pharmacist's choice and told him "You may just want to go down and talk to them, though," the pharmacist received notice that clearly highlighted his right to retain counsel, and the notice clearly stated that the charges could result in suspension or revocation of his pharmacy license. Duckworth v. Mississippi State Bd. of Pharmacy, 583 So. 2d 200 (Miss. 1991).

127. — — Pro se or hybrid representation, right to counsel.

No on-the-record examination was necessary to determine whether defendant knowingly and voluntarily waived the right to counsel because he received substantive assistance from his counsel in the form of hybrid representation; even if no hybrid representation were found, the requirements of the rule that defendant knowingly and voluntarily waive the right to counsel were met as the trial court made it sufficiently clear to defendant the requirements and perils of self-representation. Wash v. State, 129 So. 3d 247 (Miss. Ct. App. 2013).

In determining whether a trial court granted "self-representation" or "hybrid representation" to a defendant, and thus whether a waiver of the right to counsel was necessary, the factors to be considered include: (1) the defendant's accessibility to counsel; (2) whether and how often the defendant consulted with counsel up to the point of the request; (3) the stage of trial at which the defendant requested a participatory role; (4) the magnitude of the role the defendant desired to assume; (5) whether the trial court encouraged immediate and constant accessibility of counsel; and (6) the nature and extent of assistance of counsel which had been provided up to the point of the request, including both substantive and procedural aid. Metcalf v. State, 629 So. 2d 558 (Miss. 1993).

Trial court did not err in ordering defendant to proceed to trial with a court-appointed attorney since no other attorney had ever entered an appearance or filed a motion on defendant's behalf, and appointed counsel indicated that no other attorney had ever contacted the attorney in regard to defendant's representation; the trial court was not required to question defendant as to satisfaction with the appointed counsel in the absence of any indication that the defendant was dissatisfied with defendant's attorney. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

Defendant claimed that his trial counsel was ineffective, but as defendant voluntarily assumed the role of trial counsel, he could not claim that his adviser failed to provide him with adequate representation; simply put, defendant could not benefit on appeal from his own ineptitude at trial. Jackson v. State, 943 So. 2d 720 (Miss. Ct. App. 2006).

A waiver of counsel inquiry was not required before permitting a defendant to represent himself at trial where the defendant requested and was provided with the assistance of counsel throughout the entire trial process in the form of a "hybrid representation." Metcalf v. State, 629 So. 2d 558 (Miss. 1993).

A criminal defense counsel did not render constitutionally ineffective assistance of counsel where the defendant requested during trial that the defense counsel be dismissed but the court denied the request, and thereafter the defendant acted pro se with the attorney present and ready and willing to assist the defendant in the case, and therefore the attorney, as stand-by counsel, was without authority, discretion or control. Estelle v. State, 558 So. 2d 843 (Miss. 1990).

A defendant has the constitutional right to make an opening statement pro se without being put under oath and subject to cross examination, and action of trial court preventing him from doing so is reversible error. Trunell v. State, 487 So. 2d 820 (Miss. 1986).

Forcing an accused, against his will, to accept a state-appointed public defender deprived the accused of his constitutional right to conduct his own defense under circumstances where (1) weeks before trial, the accused clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel, (2) the record affirmatively showed that the accused was literate, competent, and understanding, and that he was voluntarily exercising his informed free will, and (3) the trial judge warned the accused that the judge thought it was a mistake not to accept the assistance of counsel, and that the accused would be required to follow all the ground rules of trial procedure. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Under ordinary circumstances, it is elemental that one appealing from a conviction, if mentally competent, has a right to discharge his attorneys and represent himself in the Supreme Court and to have his appeal dismissed if he so desires. Tarrants v. State, 231 So. 2d 493 (Miss. 1970).

In an appeal from a felony conviction, where the appellant filed a motion requesting that his appeal be dismissed and purporting to discharge his attorneys, and counsel of record responded to the request by raising the question whether the appellant was mentally competent to represent himself, the question of his competency was to be determined before passing on the motion, the Supreme Court would order that the trial court conduct a factual hearing after a mental examination, on the question whether the appellant was competent to represent himself in the case and to know and understand the effect of his motion to dismiss the appeal. Tarrants v. State, 231 So. 2d 493 (Miss. 1970).

Trial courts should observe the constitutional right of defendants to be heard by self or counsel or both with meticulous care, and should submit to the jury, preliminarily, the issue of defendant's sanity in all cases where there is a probability that defendant is incapable of making a rational defense. Williams v. State, 205 Miss. 515, 39 So. 2d 3 (1949).

128. — — Accrual of right to counsel.

Defendant did not have a right to have counsel present at the identification because he was merely a suspect and criminal proceedings had not yet been initiated against him at the time of the show-up identification procedure. Weaver v. State, 996 So. 2d 142 (Miss. Ct. App. 2008).

While one's right to counsel under Mississippi law attaches once proceedings against defendant reach accusatory stage, earlier than does federal right, defendant must show some adverse effect upon his or her ability to conduct defense before denial of right to counsel constitutes reversible error; although defendant's right to counsel had attached under State Constitution at time of arraignment, arraignment without counsel did not severely prejudice defendant's right to fair trial, and therefore no reversible error occurred. Williamson v. State, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, Jasso v. State, 655 So. 2d 30 (Miss. 1995), Walton v. State, 678 So. 2d 645 (Miss. 1996).

Once proceedings against a defendant reaches the accusatory stage, a right of counsel attaches, and, for purposes of the state constitutional right, the advent of the accusatory stage is determined by references to state law, including Mississippi Code § 99-1-7 and Rule 1.04, Unif. Crim. R. Civ. Ct. Proc. Page v. State, 495 So. 2d 436 (Miss. 1986).

129. — — Invocation of right to counsel.

An accused invoked her Fifth Amendment right to counsel at the time of her arrest when she asked for an attorney and stated that she was not going to sign any papers or answer any questions without having a lawyer present; the accused invoked her Sixth Amendment right to counsel and the state counterpart right secured by Article 3, § 26 of the Mississippi Constitution at her initial appearance when she indicated a desire for representation and an interest in contacting her family to ascertain their progress in hiring a lawyer for her. Balfour v. State, 598 So. 2d 731 (Miss. 1992).

Defendant's conviction for felony possession of methamphetamine was appropriate in part because there was no evidence suggesting that defendant attempted to invoke his right to counsel or his right against self-incrimination during what was determined to be a voluntary statement to a police officer; each of those rights was required to be invoked. Mooney v. State, 951 So. 2d 627 (Miss. Ct. App. 2007).

130. — — Time of appointment, right to counsel.

A delay of over 2 months from the time of the defendant's capture to the time counsel was appointed did not deny the defendant his constitutional right to effective assistance of counsel. Corley v. State, 536 So. 2d 1314 (Miss. 1988).

An "eleventh hour" appointment of counsel does not amount to a per se denial of the right to effective assistance of counsel. Bostic v. State, 531 So. 2d 1210 (Miss. 1988).

Delay in affording counsel to defendant was not sufficient to warrant reversal of conviction, absent showing that accused experienced some untoward consequence flowing directly from denial of counsel, where, during time defendant was without counsel, no confession was obtained from him, nor was any lineup held, nor did State in any way take advantage of his lack of counsel; defendant's only argument for reversal was that his only witness disappeared during this interlude, whom he contended promptly provided counsel would have been able to locate and have available for trial. Wright v. State, 512 So. 2d 679 (Miss. 1987).

Where defendant was arrested for unlawful possession of whisky in the county, and immediately arraigned without the presence of his attorney, and trial was set for 8:30 A. M. the next day, and his attorney, who arrived just five minutes before trial time, having been previously engaged in chancery court in another county, requested time to confer with the defendant and prepare his defense, refusal of such request and trial and conviction of defendant was erroneous as denying defendant a fair and impartial trial, notwithstanding that defendant's principal witness was out of the state in view of statement in affidavit in support of such request that he would voluntarily appear and testify if given an opportunity to do so. Cruthirds v. State, 190 Miss. 892, 2 So. 2d 145 (1941).

131. — — Counsel of defendant's choosing, right to counsel.

Trial court did not err in failing to move for a continuance sua sponte or to grant a continuance at the request of the inmate because there was no proof in the record to support the inmate's allegation that he had retained his own counsel, a proposed receipt did not state that it was for representation of the inmate's case, and the inmate's appointed counsel was present and ready for trial. Harris v. State, 999 So. 2d 436 (Miss. Ct. App. 2009).

Defendant's right to counsel was not violated, although trial judge ordered court-appointed counsel to proceed instead of defendant's hired counsel, since judge made decision based on hired counsel's unpreparedness, and court allowed hired counsel to assist and even participate in trial. Atterberry v. State, 667 So. 2d 622 (Miss. 1995).

Defendant's right to be represented by his choice of retained counsel was not violated when a trial court denied his motion for a continuance on the morning of trial so that he could discharge his substitute counsel and hire new counsel where there was adequate time between his original attorney's activation to Iraq and trial for him to retain other counsel. Sturkey v. State, 946 So. 2d 790 (Miss. Ct. App. 2006), writ of certiorari denied, writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 65 (Miss. 2007), writ of certiorari denied by 552 U.S. 918, 128 S. Ct. 276, 169 L. Ed. 2d 201, 2007 U.S. LEXIS 10167, 76 U.S.L.W. 3165 (2007).

132. — — Conflicts of interest, right to counsel.

Defendant wanted counsel's assistance on whether to rest his case, an accused had the a right to be heard by himself, counsel, or both, and the trial court erred in assigning counsel to be advisory while at the same time allowing her to withdraw due to a conflict, and the trial court erred again in requiring counsel to remain as advisory counsel once a conflict arose between her duty to the court and her duty to defendant; defendant's constitutional rights were generally jeopardized. Hill v. State, 134 So. 3d 721 (Miss. 2014).

By dismissing defendant's former attorney, after defendant gave him counterfeit documents concerning a stolen vehicle for which defendant was being charged, the trial court did not violate defendant's constitutional right to counsel because, as the attorney was going to be called as a witness in defendant's subsequent trial, the conflict of interest between defendant and his former attorney required his removal as counsel. There was no evidence that the conflict was manufactured in order to deprive defendant of his former counsel's services or that he suffered undue prejudice by proceeding with his new counsel. Hayden v. State, 972 So. 2d 525 (Miss. 2007).

Defendant knowingly waived his right to conflict-free counsel and, further, failed to show that the fact that a single attorney represented defendant and his two codefendants on charges of assault of a law enforcement officer prejudiced defendant or rendered defendant's guilty plea involuntary. Blansett v. State, 841 So. 2d 165 (Miss. Ct. App. 2002).

Right to effective assistance of counsel includes right to representation by attorney who does not owe conflicting duties to other defendants. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Actual conflict of interest, violating defendant's right to effective assistance of counsel, resulted from public defender's representation of both codefendant during plea negotiations and defendant at trial in prosecution originating from simultaneous double sale of drugs. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Prejudice from attorney's conflict of interest is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected attorney's performance. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Prejudice from actual conflict of interest, which existed when public defender provided dual representation to both defendant and codefendant, existed when public defender prematurely terminated cross-examination of codefendant. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Prosecutor and trial court have responsibility to notify defendant concerning potential conflicts of interest by defense counsel. Smith v. State, 666 So. 2d 810 (Miss. 1995).

Mere fact that counsel for capital murder defendant shared office space with prosecutor who prosecuted defendant's preliminary hearing was not sufficient to demonstrate actual conflict of interest causing prejudice to defendant in violation of defendant's right to counsel. Cole v. State, 666 So. 2d 767 (Miss. 1995).

In a prosecution for conspiracy to distribute cocaine, a defendant's constitutional right to the effective assistance of counsel was violated due to an irreparable conflict of interest where the attorney who represented the defendant had also been counsel for the State's main witness in the trial against the witness for the same offense. Littlejohn v. State, 593 So. 2d 20 (Miss. 1992).

The right to effective assistance of counsel encompasses 2 broad principals-minimum competence and loyal assistance. The right to conflict free counsel is attendant to the Sixth Amendment right to effective assistance of counsel. It is incumbent upon courts which confront and which are alerted to possible conflicts of interest to take the necessary steps to ascertain whether the conflict warrants separate counsel. Thus, where a defense attorney represented 2 codefendants during the sentencing phase of the judicial proceedings and it could easily have been anticipated that the attorney would argue that the actions of one of the codefendants should not be attributed to the other or that the attorney would opt to not say or do anything in litigation for fear that to do so would characterize one codefendant as being more culpable than the other, the failure of the trial court to disclose to the codefendants the potential dangers of joint representation by counsel laboring under a conflict resulted in a violation of the right to effective assistance of counsel, and therefore a new sentencing hearing was warranted. Armstrong v. State, 573 So. 2d 1329 (Miss. 1990).

The trial court erred by not directing a mistrial on its own motion where, during defendant's robbery trial, the state called as a witness a participant in the robbery who had already been convicted, the witness testified that the defendant's attorney (who had also been the witness' attorney) had destroyed evidence that would have incriminated defendant, and the attorney, being subsequently preoccupied with his own exoneration, ceased to be effective as an attorney. Johnson v. State, 332 So. 2d 420 (Miss. 1976).

133. — — Continuances, right to counsel.

Where defendant fired his court-appointed counsel the day before trial, and was told he could represent himself, be represented by former counsel, or have hybrid representation, the trial court's denial of his motion for a continuance to obtain substitute counsel was not an abuse of discretion or a violation of his right to counsel. Fields v. State, 879 So. 2d 481 (Miss. Ct. App. 2004), writ of certiorari denied by 882 So. 2d 234, 2004 Miss. LEXIS 992 (Miss. 2004).

Although the circuit court found that the justice court judge denied petitioner the constitutional right to counsel under Miss. Const. Art. 3, § 26 and the U.S. Const. Amend. VI, petitioner clearly had notice of the pending trial, petitioner and petitioner's attorney were aware that the motion for continuance, which the trial court did not err in denying, had been denied; thus, the justice court judge did not err in proceeding to trial in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 and petitioner was not denied the constitutional right to counsel. In re Chisolm, 837 So. 2d 183 (Miss. 2003).

Where the accused was physically unable to intelligently confer with his counsel and there was testimony of four physicians that he was too ill to stand trial, it was error to deny a motion for continuance, even though the right to grant or deny continuance is in trial court's discretion. Eastland v. State, 223 Miss. 195, 78 So. 2d 127 (1955).

On an appeal from a conviction of rape where the crime occurred on July 10, 1954, and accused was arrested July 11, 1954, and the circuit court was in regular July session and where the defendant was indicted on July 12, 1954, and judgment was rendered on July 16, 1954, the record failed to establish any abuse of discretion by trial judge in overruling a motion for continuance on the ground that there was insufficient time to prepare a defense. Robinson v. State, 223 Miss. 70, 77 So. 2d 265 (1955), cert. denied, 350 U.S. 851, 76 S. Ct. 91, 100 L. Ed. 757 (1955).

That accused in prosecution for felonious assault by cutting with knife was arraigned under indictment before he had employed counsel is not ground for reversal of case when accused did not ask court to delay arraignment until he could employ counsel or claim that he would be unable to employ counsel and ask court to appoint one for him, and defendant was well represented throughout trial by attorneys. Ferrell v. State, 208 Miss. 539, 45 So. 2d 127 (1950).

134. — — Indigent defendants, right to counsel.

County was properly denied declaratory judgment that Miss. Code Ann. §§ 25-32-7, and 99-15-17, requiring counties to provide legal services for indigent criminal defendants violated Miss. Const. Art. III, § 26 because the county did not show specific examples of when public defenders' legal representation fell below the objective standard of professional reasonableness. Quitman County v. State, 910 So. 2d 1032 (Miss. 2005).

Section 99-15-17, which limits the compensation which an attorney may receive for the representation of an indigent, does not amount to an unconstitutional taking of an attorney's property, deprive indigent defendants of the effective assistance of counsel, or violate the equal protection clause. The statute allows for "reimbursement of actual expenses," which can be interpreted to include reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle the case; there is a rebuttable presumption that a court-appointed attorney's actual overhead within the statute is $25 per hour. This construction of § 99-15-17 will allow an attorney to receive $1,000 in profit plus his or her actual expenses. A rebuttal presumption arises that the actual cost contemplated by the statute is the average of $25 per hour; this figure may be subject to change when the 1988 survey conducted by the Mississippi State Bar is updated. The trial court is bound by the $25 per hour figure only when proof to the contrary is not forthcoming. The hours submitted by an attorney are subject to scrutiny under a reasonable and necessary standard. Specific expenses must be approved by the court before the attorney incurs the expenses. Court approved expenses include, but are not limited to, such items as the cost of an investigator, the cost of an expert witness, and a trip to interview witnesses. This interpretation of the statute avoids unconstitutionality on all grounds. Wilson v. State, 574 So. 2d 1338 (Miss. 1990).

An indigent accused under sentence for aggravated assault would be entitled to appointment of counsel to represent him on appeal. Killingsworth v. State, 490 So. 2d 849 (Miss. 1986).

A conscientious and diligently formed opinion of court-appointed counsel that indigent client's appeal is without merit does not constitute good cause within rule allowing attorney, upon proper motion, to withdraw from representation of a client before the Mississippi Supreme Court when good cause exists. Killingsworth v. State, 490 So. 2d 849 (Miss. 1986).

Where court-appointed counsel regards his indigent client's appeal to be without merit and deems it his obligation to so state to the Mississippi Supreme Court, the full protection of accused's rights require that accused receive a copy of counsel's representation to the court and be furnished a reasonable opportunity to file his own comments and raise any additional points he may choose. Killingsworth v. State, 490 So. 2d 849 (Miss. 1986).

Neither the United States Constitution nor the Mississippi Constitution requires that the nation or state furnish an indigent defendant with the assistance of a psychiatrist to examine the defendant and advise with his court appointed counsel in the preparation of his defense. Phillips v. State, 197 So. 2d 241 (Miss. 1967), cert. denied, 389 U.S. 1050, 88 S. Ct. 791, 19 L. Ed. 2d 844 (1968).

135. — — Accessibility of counsel to defendant, right to counsel.

A defendant was not denied effective assistance of counsel because he was not represented by counsel for approximately 2 months following his arraignment where he made no showing that he experienced any adverse effect or "untoward consequence flowing directly from denial of counsel" and there was no indication that the State took advantage of the situation or that any further proceedings were conducted. Johnson v. State, 631 So. 2d 185 (Miss. 1994).

A defendant's right to have counsel present during interrogation was respected and his confession was admissible, where the defendant was given the opportunity to confer with his attorney who advised him to confess, even though the defendant only conferred with his attorney by telephone; there is no reason on principle why telephonic access to counsel is legally less significant than "eyeball-to-eyeball" access. Riddle v. State, 580 So. 2d 1195 (Miss. 1991).

The court's refusal to permit the defendant in a murder trial to confer with her counsel during a two-hour recess, immediately following the conclusion of her direct examination in her own behalf, was an unconstitutional denial of her right to counsel at a crucial stage of the trial, was highly prejudicial, and constituted reversible error. Pendergraft v. State, 191 So. 2d 830 (Miss. 1966), cert. denied and appeal dismissed, 394 U.S. 715, 89 S. Ct. 1453, 22 L. Ed. 2d 671 (1969); Tate v. State, 192 So. 2d 923 (Miss. 1966).

136. — — Informants, right to counsel.

Defendant's right to counsel was not violated by law enforcement officers' use of defendant's wife as confidential informant, absent showing that wife communicated the substance of defendant's conversations and thereby created a realistic possibility of injury to defendant or benefit to the State. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

An arson defendant, whose right to counsel had attached, had not waived his right to assistance of counsel incident to interrogation, where, at the time he made self-incriminating statements, he had no knowledge or way of knowing that he was being interrogated by an informant, wearing a concealed microphone, who was acting for law enforcement officers, and that his statements were being monitored and recorded, and, since, defendant's state constitutional rights were violated, the admission of tapes containing the incriminating statements in evidence, over defendant's objection, constituted reversible error. Page v. State, 495 So. 2d 436 (Miss. 1986).

137. — — Critical stage, right to counsel.

Only an actual confrontation with the defendant at a lineup is the critical stage which requires the right to counsel. Thus, the presence of counsel was not required at a post-lineup encounter between the witness and the police, at which the defendant was not present, since there was no "actual confrontation" between the defendant and the witness. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

138. — — Lineups, right to counsel.

In a murder case, defendant's right to counsel was not violated during the line-up as defendant did not ask for counsel once given the opportunity and did not refuse to participate in the line-up after given the option of whether to participate. Brooks v. State, 905 So. 2d 678 (Miss. Ct. App. 2004), reversed by, remanded by 903 So. 2d 691, 2005 Miss. LEXIS 191 (Miss. 2005).

The explanation of lineup procedures did not constitute improper further interrogation of the defendant after he invoked his right to counsel, where the lineup procedures were not explained for the purpose of eliciting incriminating statements from the defendant, and the explanation of the lineup procedures did not constitute words or actions reasonably likely to elicit an incriminating response. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

The violation of a defendant's right to counsel at his lineup was harmless constitutional error beyond a reasonable doubt where the witness did not identify the defendant at the lineup and the witness' in-court identification testimony was not impermissibly tainted by anything that occurred at the lineup. Magee v. State, 542 So. 2d 228 (Miss. 1989).

A photographic lineup is not a "critical stage" of criminal proceedings and, therefore, an accused enjoys no right to counsel in connection with a photographic lineup. Magee v. State, 542 So. 2d 228 (Miss. 1989).

A defendant's right to counsel had not attached at the time of a pre-indictment line up where the record did not reflect that the defendant was or reasonably ought to have been charged with a crime prior to that time. Nixon v. State, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

Although the denial of the defendant's right to counsel at a line up was a technical violation of his constitutional right to counsel, it was "harmless constitutional error" where the witnesses' identification of the defendant was based on the their view of the defendant at the time of the crime rather than on the line up identification and there was other overwhelming evidence favoring conviction. Jimpson v. State, 532 So. 2d 985 (Miss. 1988).

A voice "lineup" closely resembles the trial-like confrontation of a corporeal lineup and amounts to a critical stage of criminal proceedings for which counsel should be present. Nicholson v. State, 523 So. 2d 68 (Miss. 1988).

Prosecution had commenced and, therefore, the defendant's constitutional right to counsel had attached at the time of a line up where an arrest warrant had issued and the defendant was in custody. Livingston v. State, 519 So. 2d 1218 (Miss. 1988).

Trial judge committed no error in allowing victim's in-court identification of defendant, despite contention of defendant that in-court identification was result of unnecessarily suggestive viewing of defendant by victim while defendant was being treated at hospital, because under totality of circumstances as contemplated by Manson v. Brathwaite (1977) 432 U.S. 98, 53 L. Ed. 2d 140, 97 S. Ct. 2243 there was no substantial likelihood of misidentification; analysis of Manson factors showed that victim had viewed defendant at close range for approximately one hour; victim's undivided attention was focused on defendant; victim's initial description of her attacker to police exhibited high degree of accuracy; victim was positive of her identification of suspect, describing his as "a face I'll never forget;" and, time between crime and subsequent confrontation defendant was approximately one hour. Davis v. State, 510 So. 2d 794 (Miss. 1987).

139. — — Parole and probation revocation proceedings, right to counsel.

Pursuant to Miss. Const. Art. 3, § 26, defendant charged with a violation of post-release supervision was not entitled to counsel at his revocation hearing because, apart from the fact that defendant never requested counsel prior to or during his hearing, he admitted the violations, so his case was not particularly complex. Yance v. State, 30 So. 3d 370 (Miss. Ct. App. 2010).

Post-conviction relief was properly denied in a case involving a probation revocation because appellant inmate did not have the right to counsel since the issues were not complex, and no request for counsel was made. It was noted that the inmate had admitted to violating his probation. Silliman v. State, 8 So. 3d 256 (Miss. Ct. App. 2009).

Denial of the inmate's motion for post-conviction relief was appropriate because his due process rights were not violated by the failure to appoint counsel for him at his probation revocation hearing. The issues relevant to his probation revocation were not complex nor were they difficult to present; thus, the inmate had no right to counsel. Staten v. State, 967 So. 2d 678 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 294 (Miss. 2008).

Where a probation revocation case was not complex since defendant admitted violating the terms of such, and the hearing did not involve any new felonies, it was not error to refuse to appoint counsel. Coleman v. State, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

Post-conviction relief was denied in a case where a portion of a suspended sentence was revoked under Miss. Code Ann. § 47-7-37 because there was no due process violation since the evidence relied upon was listed, there was no double jeopardy violation since the original sentence was reinstated, and counsel was not required since the case was not complex. Pruitt v. State, 953 So. 2d 302 (Miss. Ct. App. 2007).

Where appellant was convicted of two counts of selling a controlled substance, his sentence was suspended during five years of probation, and appellant's probation was later revoked when he was convicted of selling marijuana; appellant was not entitled to appointed counsel for the probation revocation hearing, as he presented no evidence that the probation revocation required counsel or that the court denied his request for counsel. Sanders v. State, 942 So. 2d 298 (Miss. Ct. App. 2006).

Postconviction relief was properly denied, because petitioner was not improperly denied a right to counsel at his probation revocation hearing, as the record did not reflect that petitioner obtained or requested counsel during the revocation hearing, and the trial court was under no duty to appoint counsel for petitioner during the revocation proceeding. Newsom v. State, 904 So. 2d 1095 (Miss. Ct. App. 2004).

Probationers and parolees do not "have, per se, a right to counsel at revocation hearings." Whether probationers have a right to counsel must be answered "on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." Riely v. State, 562 So. 2d 1206 (Miss. 1990).

A probationer was not deprived of the right to counsel at his probation revocation hearings in violation of his constitutional rights where the circuit court did not actually "disallow" the probationer to have legal representation but merely refused to continue the hearing in response to his belated request for more time to obtain counsel, the case was not "complex or otherwise difficult to develop," and counsel was provided upon the probationer's request prior to the fourth hearing before the circuit court and prior to his appeal to the Supreme Court. Riely v. State, 562 So. 2d 1206 (Miss. 1990).

140. — — Post-conviction proceedings, right to counsel.

Defendant's motion to dismiss his appellate counsel was granted, as the trial judge informed him of his constitutional rights and the perils of self-representation, and he stated unequivocally that he desired to act as his own attorney. Grim v. State, 102 So. 3d 1073 (Miss. 2012), writ of certiorari denied by 133 S. Ct. 2856, 186 L. Ed. 2d 914, 2013 U.S. LEXIS 4827, 81 U.S.L.W. 3702 (U.S. 2013).

Inmate's right to counsel under Miss. Const. Art. III, § 26 was not denied, where the inmate argued that the inmate was denied counsel at the evidentiary hearing on the inmate's postconviction relief petition; the inmate had no right to counsel under the Miss. Const. Art. III, § 26, and it was within the trial judge's discretion under Miss. Code Ann. § 99-39-23(1) whether to appoint counsel. Putnam v. State, 877 So. 2d 468 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 861 (Miss. 2004).

Inmate was not denied effective assistance in a postconviction proceeding because he had no state or federal right to counsel in the proceeding. Sheffield v. State, 881 So. 2d 249 (Miss. Ct. App. 2003), writ of certiorari dismissed by 2005 Miss. LEXIS 87 (Miss. Feb. 3, 2005).

A trial court did not err in failing to sua sponte appoint counsel for a post-conviction relief petitioner at the evidentiary hearing, in spite of the petitioner's contention that it was clear that he lacked knowledge and understanding of the proceedings being conducted by the court. A criminal defendant has neither a state nor federal constitutional right to appointed counsel in post-conviction proceedings. Additionally, the appointment of counsel at an evidentiary hearing is discretionary with the trial judge by virtue of § 99-39-23(1). Moore v. State, 587 So. 2d 1193 (Miss. 1991).

141. — — Waiver, right to counsel.

Circuit court did not err in finding that defendant waived his right under U.S. Const. amend VI and Miss. Const. art. 3, § 26 to the assistance of counsel under Miss. Unif. Cir. & Cty. R. 8.05 where the record was clear that even after the circuit court apprised defendant of his rights, he refused to participate in his trial. Defendant purposefully intended to use his absolute right to counsel to avoid going to trial, a course of action that the Alabama Supreme Court specifically proscribed; additionally, defendant's waiver was knowing and voluntary since he was fully aware of the rights that he would be jeopardizing by proceeding without counsel. Lewis v. State, 131 So. 3d 579 (Miss. Ct. App. 2013), writ of certiorari denied by 132 So. 3d 579, 2014 Miss. LEXIS 94 (Miss. 2014).

Defendant was not denied the constitutional right to counsel because, through a series of events, defendant either failed to retain counsel, failed to keep defendant's retained counsel, lost defendant's appointed counsel due to a withdrawal, or rejected defendant's appointed counsel. Moreover, when the circuit court thoroughly questioned defendant regarding defendant's understanding of defendant's right to counsel, defendant affirmatively stated that defendant wished self-representation at trial. Gibbs v. State, — So. 3d —, 2013 Miss. App. LEXIS 856 (Miss. Ct. App. Dec. 10, 2013).

Defendant was not denied his right to counsel because the deputy explained the waiver of rights form to defendant before he signed it and told defendant several times that he had a right to a lawyer. It was defendant who requested to speak with an officer and, ultimately, confessed to the crime and he appeared to understand the waiver of rights form which he signed. Wilson v. State, 923 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 151 (Miss. 2006).

Trial court erred when it denied defendant his right to self-representation because even though a psychiatric examination found defendant to be operating in the range of low to borderline intellectual function, the record showed that he was competent to assert or waive his constitutional rights, and that he made an unequivocal request to represent himself at his trial for armed robbery, kidnapping, and burglary. Coleman v. State, 914 So. 2d 1254 (Miss. Ct. App. 2005).

Defendant waived his right to counsel under Miss. Const. Art. III, § 26 when he reinitiated communication with police a few days after he had said he should speak with an attorney before questioning, as the right of counsel could be waived and defendant was not coerced into making the statements implicating himself in murder that followed the waiver of his right to counsel. Grayson v. State, 806 So. 2d 241 (Miss. 2001), writ of certiorari denied by 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329, 2002 U.S. LEXIS 7800, 71 U.S.L.W. 3281 (2002).

The defendant had no foundation to claim that he did not understand and was not thoroughly explained his rights involving representation and self-representation where the trial judge adequately informed him of his constitutional right to represent himself as well as the dangers and responsibilities of self-representation and, furthermore, he had been granted a continuance in order to find new counsel six months prior to the trial. Davis v. State, 811 So. 2d 346 (Miss. Ct. App. 2001).

If the right to counsel or the privilege against self-incrimination is waived at an initial trial which is later reversed, on appellate review, on retrial defendant can reinvoke rights previously waived. State v. Caldwell, 492 So. 2d 575 (Miss. 1986).

142. Ineffectiveness of counsel — In general.

In a burglary prosecution, defense counsel was not ineffective for failing to request a circumstantial-evidence instruction; because the State produced direct evidence of the gravamen of the offense, defendant had not been entitled to such an instruction. Grayer v. State, — So. 3d —, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), opinion withdrawn by, substituted opinion at, remanded by 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).

Any claim of ineffective assistance of counsel was without merit because there was no supporting affidavit other than one from appellant. Collier v. State, 112 So. 3d 1088 (Miss. Ct. App. 2013).

Alleged deficiencies of counsel were not based on facts fully apparent from the record, and were more appropriate for post-conviction review. Keithley v. State, 111 So. 3d 1202 (Miss. 2013).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Despite contacting a potential witness after trial, there was no evidence to show that the potential witness had anything to contribute to defendant's case. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Inmate failed to prove any instance of deficiency on the part of his counsel because the inmate offered only his own statements alleging deficiency on the part of his counsel and such allegations were directly contradicted in his sworn plea petition and his statements made under oath in which the inmate agreed that counsel advised him of the elements of both crimes and that counsel met his expectations in all aspects of his representation. Willis v. State, 17 So. 3d 1162 (Miss. Ct. App. 2009).

In a case involving the possession of precursors used in the manufacture of a controlled substance, defendant failed to show that he received ineffective assistance of counsel because he did not assert any facts or legal authority in support of his claim that his attorney's failure to obtain a bond was improper. Fillyaw v. State, 10 So. 3d 986 (Miss. Ct. App. 2009).

Court could not say that defendant's trial counsel was deficient in failing to raise the issues that defendant raised in his post-conviction motion because there was no merit to any of the issues raised by defendant in his post-conviction motion which included challenges to his guilty plea and to his indictment. Harris v. State, 5 So. 3d 1127 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 181 (Miss. 2009).

Defendant's allegation of ineffective assistance of counsel was without merit because defendant admitted that he committed second degree arson in violation of Miss. Code Ann. § 97-17-5 (Rev. 2006) and his previous convictions properly subjected him to sentence enhancement under Miss. Code Ann. § 99-19-83 (Rev. 2000). Hughes v. State, 989 So. 2d 434 (Miss. Ct. App. 2008).

Defendant did not demonstrate that trial counsel was ineffective where he did not demonstrate how he was prejudiced by his attorney's failure to object to a witness's testimony, and defendant's crime had not been publicized to a point where a change of venue was needed; trial counsel was not ineffective in not calling a witness to testify on defendant's behalf as there was nothing in the statement that defendant claimed would show another shooter. Lamar v. State, 983 So. 2d 364 (Miss. Ct. App. 2008).

Defendant did not demonstrate ineffective assistance of counsel where his guilty plea admitted all elements of a formal charge and operated as a waiver of all non-jurisdictional defects contained in an indictment; defendant was unable to name any witnesses that should have been interviewed and his attorney advised him of the maximum and minimum sentence. Nichols v. State, 994 So. 2d 236 (Miss. Ct. App. 2008).

Appellant inmate's motion for post-conviction relief was properly denied because the inmate could not demonstrate that, in allowing appellee State to amend an indictment to charge him as a habitual offender, the performance of his counsel was deficient because the inmate received a favorable recommendation from the State in exchange for his plea, the record indicated that the inmate signed a written waiver acknowledging that he was pleading guilty as a habitual offender under the amended indictment, and the circuit judge confirmed that fact with the inmate in their plea colloquy before he allowed the inmate to enter his guilty plea. Jones v. State, 994 So. 2d 829 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 659 (Miss. 2008).

Defendant did not show ineffective assistance of counsel where, even if defense counsel had successfully moved to have the charges severed, given the strength of the State's case against defendant, he could not reasonably have expected a different result on the manufacture-of-marijuana charge; defendant's counsel performed a thorough cross examination of the witnesses called by the State; and defendant showed no prejudice in having the trial judge preside over the case. Williams v. State, 971 So. 2d 581 (Miss. 2007).

Defendant's ineffective assistance of counsel argument was without merit because defendant offered no evidence other than defendant's own allegations that defendant's counsel's performance was deficient, and had no proof that the outcome would have been different had counsel conducted an investigation. Frith v. State, 984 So. 2d 316 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 293 (Miss. June 12, 2008).

Motion for post-conviction relief was properly summarily dismissed because defendant failed to show that his original counsel rendered ineffective assistance of counsel by transferring the case due to either a lack of experience or personal reasons; moreover, advice that was given to the family was not ineffective since defendant was told to plead not guilty. Edge v. State, 962 So. 2d 81 (Miss. Ct. App. 2007).

Claims that defendant argued to be defects in the indictment were insufficient to show deficiency in his counsel's performance or prejudice to his case. Westbrook v. State, 953 So. 2d 286 (Miss. Ct. App. 2007), writ of certiorari dismissed by 962 So. 2d 38, 2007 Miss. LEXIS 436 (Miss. 2007).

Defendant failed to support his allegations of ineffective assistance of counsel and mainly used the issue to reassert his innocence; therefore, the issue was without merit. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

Defendant's counsel was not ineffective: (1) in failing to offer a jury instruction on defining reasonable doubt because the practice in Mississippi was to refuse to give a jury instruction on reasonable doubt; or (2) in failing to object and raise in a motion for new trial the failure of the trial court to allow a witness to testify because, although her testimony might have been useful, it would have been cumulative to other evidence. Chandler v. State, 967 So. 2d 47 (Miss. Ct. App. 2006), writ of certiorari denied by 966 So. 2d 172, 2007 Miss. LEXIS 595 (Miss. 2007).

Indictment charging appellant with selling of cocaine was not required to allege the weight of the controlled substance, because it was not an element of the crime defined in Miss. Code Ann. § 41-29-139(a)(1); there was no merit to appellant's claim that counsel was ineffective because of flaws in the indictment. Hammond v. State, 938 So. 2d 375 (Miss. Ct. App. 2006).

Defendant's trial counsel was not ineffective where the indictment clearly informed defendant of the elements of the crime with which he was charged and there was nothing indicating that trial counsel's decision not to interview defense witnesses was not a valid legal strategy; defendant acknowledged that the trial judge advised him she could impose a minimum sentence of two years at his plea colloquy. Brown v. State, 944 So. 2d 103 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 732 (Miss. 2006).

Appellate court affirmed defendant's conviction for sexual battery as sufficient evidence existed to convict defendant and defendant only generally alleged that his attorney's performance was deficient. Curry v. State, 943 So. 2d 78 (Miss. Ct. App. 2006).

In a possession of cocaine case, defendant was not denied effective assistance of counsel when his attorney failed to object to the jurisdiction of the trial court after the State amended the indictment to include the habitual offender charge. The trial court had jurisdiction under Miss. Unif. Cir. & County. Ct. Prac. R. 7.09, and the evidence showed that defendant was afforded a fair opportunity to present a defense and was not surprised with the habitual offender amendment, as required by Rule 7.09. Troupe v. State, 922 So. 2d 844 (Miss. Ct. App. 2006).

Aggravated assault conviction and sentence were affirmed where counsel was not ineffective because the defendant provided no evidence that proved he suffered harm as a result of his attorney not objecting to the State's leading questions or that had his attorney objected to the State's leading questions the outcome would have been different and trial counsel's failure to object to leading questions by the State could have been a trial strategy. Bullard v. State, 923 So. 2d 1043 (Miss. Ct. App.

2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 160 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate where his counsel was not ineffective because there was no double jeopardy violation and the indictment against him was valid and proper. Ramage v. State, 914 So. 2d 274 (Miss. Ct. App. 2005).

Counsel was not ineffective where the defendant claimed he received ineffective assistance of counsel because his attorney filed a motion for continuance without defendant's knowledge or permission, failed to pursue defendant's right to a speedy trial, failed to respond to the State's motion in limine to exclude character evidence of the victim, failed to submit a limiting instruction to the jury regarding defendant's prior felony conviction, and failed to file a motion to sever his murder charge from his charge of possessing a firearm. The appellate court held that the right to effective counsel did not entitle the defendant to an attorney who made no mistakes at trial. Jenkins v. State, 912 So. 2d 165 (Miss. Ct. App. 2005).

Defendant did not cite any actions by his counsel that supported an argument that the attorney's performance was deficient or to show how his attorney's performance was prejudicial to him. Jones v. State, 904 So. 2d 1107 (Miss. Ct. App. — 2004), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 249 (Miss. 2005).

Trial counsel was not ineffective where defendant argued counsel was ineffective due to counsel's use of prescription morphine—however, the bare allegation that defense counsel was taking morphine by prescription was insufficient, in and of itself, to constitute a claim of ineffective assistance of counsel, and defendant presented no specific instance in which counsel's performance was deficient due to his alleged use of morphine, nor was any instance clear from the record. Stanley v. State, 904 So. 2d 1127 (Miss. Ct. App. 2004).

Defense counsel's actions were found to be trial strategy where defendant argued counsel was ineffective for failure to interview a list of potential defense witnesses which defendant provided and failing to gather a copy of the victim's criminal record in order to impeach his testimony at trial. Harris v. State, 892 So. 2d 830 (Miss. Ct. App. 2004).

Inmate's counsel was not ineffective in allowing the State to proceed against him on an indictment with the incorrect name; once the inmate's counsel informed the court of the inmate's correct name, the district attorney made a motion in open court to amend the inmate's indictment. Neal v. State, 879 So. 2d 1111 (Miss. Ct. App. 2004).

On review of defendant's conviction for two counts of sexual battery and one count of conspiracy to batter, defendant failed to prove that his attorney was ineffective for failing to impeach the State's witness; failing to conduct an independent investigation; failing to subpoena witnesses; or failing to raise defendant's speedy trial claim. Norris v. State, 893 So. 2d 1071 (Miss. Ct. App. 2004), writ of certiorari denied by 893 So. 2d 1061, 2005 Miss. LEXIS 122 (Miss. 2005).

In defendant's postconviction relief action the record indicated that defendant's counsel brought forward evidence that, under the circumstances existing at the time of the trial, was sufficient to demonstrate that defendant was incompetent to stand trial and/or less culpable for the murders. Counsel's performance as to the issue of mental retardation was not to be evaluated in the light of Atkins v. Virginia, where the United States Supreme Court held that imposition of the death penalty on mentally retarded inmates constituted cruel and unusual punishment, where Atkins was decided after defendant's trial and where the Mississippi Supreme Court had found on direct appeal that defendant was competent to stand trial. Snow v. State, 875 So. 2d 188 (Miss. 2004).

Counsel's performance in not moving for a change of venue was not deficient where all of the jurors stated that they could be fair and impartial and where the record revealed overwhelming evidence of a prisoner's guilt. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

Denial of postconviction relief was affirmed because the inmate failed to demonstrate that his counsel's performance was deficient, and considering the totality of the circumstances, the performance of the inmate's counsel was neither deficient nor prejudicial. In his plea petition, the inmate affirmed that he was satisfied with the advice of his counsel, the inmate's plea petition clearly stated that the sentencing range for the sale or transfer of cocaine was zero to 30-years, with 60-years for enhanced punishment for a habitual offender, and the inmate made no specific allegations of action or inaction on the part of his counsel that resulted in prejudice to his defense. Falconer v. State, 873 So. 2d 163 (Miss. Ct. App. 2004).

Defendant offered no evidence to support his contention that his lawyer had given him bad advice in advising him to plead guilty to support his ineffective assistance claim; when asked at his guilty plea hearing whether he was satisfied with the advice and help given by his attorney, defendant responded affirmatively. Wofford v. State, 875 So. 2d 251 (Miss. Ct. App. 2004).

The defendant could not assert ineffective assistance of counsel based on his own incompetence to represent himself where the record reflected that the trial judge forewarned the defendant of the dangers and responsibilities of self-representation and the defendant chose to ignore those warnings and proceed on his own behalf; it was far too late to argue that he lacked the legal knowledge to represent himself. Davis v. State, 811 So. 2d 346 (Miss. Ct. App. 2001).

It is inappropriate for an attorney who represents a criminal defendant at trial to represent that same defendant on appeal where the attorney intends to raise an ineffective assistance of counsel claim in that appeal. Hill v. State, 749 So. 2d 1143 (Miss. Ct. App. 1999).

A Louisiana attorney's failure to comply with court rules concerning appearances by foreign attorneys did not, per se, create ineffective assistance of counsel. Hubbard v. State, 628 So. 2d 1386 (Miss. 1993).

It is not per se professionally unreasonable for an attorney to allow a client to talk to the police and give a statement; where the evidence is otherwise overwhelming, confession may be a significant step toward prompt disposition of the case and mitigation of sentence. Thus, a defendant was not denied effective assistance of counsel on the ground that his attorney advised him to talk to the police, even though the attorney advised the defendant by telephone and did not go to the police station or further assist the defendant, where it appeared that the attorney "brought to bear independent scrutiny and judgment" before advising the defendant, and the evidence against the defendant was overwhelming. Riddle v. State, 580 So. 2d 1195 (Miss. 1991).

Ineffectiveness of counsel should not be excused simply because counsel has been privately retained. Therefore, that portion of Bennett v. State 293 So. 2d 1 (Miss 1974), and any other case, which attempts to draw a relevant distinction between court-appointed and retained counsel where a defendant's right to appeal and effective assistance of counsel is concerned would be expressly overruled. Triplett v. State, 579 So. 2d 555 (Miss. 1991).

A defense attorney's failure to object when a prosecution witness, who was a nurse, was sent into the jury room to attend to a juror who had become ill, did not constitute ineffective assistance of counsel where no allegation or facts were presented as to how the attorney's failure to object resulted in any significant prejudice to the defendant at his trial. Jordan v. State, 577 So. 2d 368 (Miss. 1990).

A defendant was not denied his right to effective assistance of counsel on the ground that his attorney gave the prosecution permission to interview the defense witnesses while allowing the prosecution to disallow the defendant from taking a deposition of the victim, since the defendant had no right to such a pre-trial deposition and the trial court lacked the authority to require the victim to talk with defense counsel where the victim was unwilling to do so; the defendant's counsel could not be faulted as ineffective for failing to secure that which the defendant had no right to obtain. Jordan v. State, 577 So. 2d 368 (Miss. 1990).

A defense counsel's heavy case load and limited resources are, absent specific instances of error, wholly insufficient in themselves to reverse a conviction and sentence on the ground of ineffective assistance of counsel. Cabello v. State, 524 So. 2d 313 (Miss. 1988).

Claim that counsel was ineffective because certain issues were procedurally barred due to ineffective assistance of counsel did not have merit because none of issues claimed had merit and thus failure to assert them could not constitute ineffective assistance of counsel. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that trial counsel did not have requisite legal experience to properly try criminal case was rejected as basis for claim of ineffective assistance of counsel where trial counsel had 2 ½ years experience and had tried 5 criminal cases, none of which were capital cases, at time of first trial of defendant. Level of criminal trial experience is one factor to be considered in determining whether there was effective assistance of counsel. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

The right to counsel in a criminal prosecution is not illusional theory but is a genuine positive command without which due process of law is impossible, and when a case has progressed to the point where it is apparent or should be apparent that the attorney for the defendant is either incompetent or is doing nothing to represent the interest of the defendant, the court must take such appropriate action as may appear necessary to insure the defendant a fair trial, such as appointing additional counsel or granting a new trial. Mid State Homes, Inc. v. Zumbro, 229 So. 2d 53 (Miss. 1969).

143. — — Waiver of issue, ineffectiveness of counsel.

Defendant's petition for postconviction relief was properly denied because defendant's guilty plea waived defendant's constitutional rights against self-incrimination and to have each element of the offense proved beyond a reasonable doubt, and defendant failed to show that trial counsel was ineffective in failing to object to the State's evidence and to suppress defendant's statements. Estes v. State, 120 So. 3d 429 (Miss. Ct. App. 2013), writ of certiorari denied by 119 So. 3d 328, 2013 Miss. LEXIS 454 (Miss. 2013).

Because an inmate's claims in his motion for post-conviction relief that his appellate counsel was ineffective were decided on direct appeal, those issues were procedurally barred from appellate review by the doctrine of res judicata; the inmate's claim that his appellate counsel failed to cite his trial counsel's error in not litigating his claim of an illegal search and seizure of his vehicle was procedurally barred because the inmate failed to raise the claim of illegal search and seizure during the trial and on direct appeal. Lattimore v. State, 37 So. 3d 678 (Miss. Ct. App. 2010).

Issues of an involuntary guilty plea, ineffective assistance of counsel, a defective and improper indictment, and misconduct on the part of the state officials that were presented by an inmate in a motion for post-conviction relief were procedurally barred because the inmate waited more than six years after the inmate was convicted to file the motion; furthermore, the trial court found that none of the exceptions to the three-year statute of limitations of Miss. Code Ann. § 99-39-5(2) were applicable, and thus the inmate was not entitled to post-conviction relief. Davis v. State, 958 So. 2d 252 (Miss. Ct. App. 2007).

Appellate court declined to consider defendant's ineffective assistance of counsel claim because the issue was not presented to the trial court, nor did defendant cite any authority in support of a claim that defense counsel's failure to object to the prosecutor's closing argument amounted to ineffective assistance of counsel. Stubbs v. State, 878 So. 2d 130 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 936 (Miss. 2004).

In a postconviction proceeding, an inmate's argument that he was denied effective assistance of counsel at his trial for burglary of a dwelling was waived because the issue was procedurally barred where the inmate had a meaningful opportunity on direct appeal to raise a claimed error by his trial counsel; further, there was no plain error in the inmate's trial counsel's failure to raise the issue of whether a vacant house owned by a nursing home resident was a "dwelling" because there was an intent for it to function as a dwelling. Sheffield v. State, 881 So. 2d 249 (Miss. Ct. App. 2003), writ of certiorari dismissed by 2005 Miss. LEXIS 87 (Miss. Feb. 3, 2005).

Claim of ineffective assistance of counsel is not procedurally viable where defendant waived issue when he declined to assert that point in his error coram nobis pleading; defendant had not shown sufficient cause to excuse this waiver where record reflected that trial counsel exited state court proceedings at conclusion of direct appeal and did not participate in presentation of error coram nobis pleading. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

144. — — Factors considered, ineffectiveness of counsel.

Defendant's claim of ineffective assistance of counsel was without merit because counsel had the authority to represent defendant in all matters before the court, including the filing of motions for continuance; when the attorney signed the documents that defendant alleged were forged, the attorney clearly noted that the attorney was signing as counsel on defendant's behalf; and sufficient pretrial discovery and investigation were conducted. Avery v. State, 95 So. 3d 765 (Miss. Ct. App. Aug. 14, 2012), writ of certiorari denied by 109 So. 3d 567, 2013 Miss. LEXIS 122 (Miss. 2013).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, defendant's claims that his attorney was physically infirm and lacked the stamina required to represent a criminal defendant was without merit; there was no evidence in the record to show that the attorney's need to sit instead of stand prejudiced the defense in any way. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, defendant's contention that his attorney did not prepare a proper defense because the attorney made certain assertions during opening statements that were not proven by the evidence presented at trial was without merit; it was unclear from the record that the assertions amount to the attorney's lack of preparation and defendant failed to prove that the outcome of the trial was prejudiced by the comments, especially in light of the overwhelming weight of evidence against defendant. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Counsel gave numerous reasons for his decision to not request a transfer of venue and he stated that he discussed that strategy with defendant and his family; thus, defendant failed to show that his counsel was deficient for not requesting a change of venue. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Although defendant argued that his counsel erred in allowing a death certificate to be admitted, there was no indication that a death certificate had actually been admitted; therefore, defendant's contention was without merit. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. There was no merit to defendant's contention that trial counsel was deficient for failing to seek out the victim's medical records; to date, no medical records had been produced and therefore, there is no showing that the records would have provided anything of use to defendant. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Denial of appellant's, an inmate's, motion for postconviction relief was appropriate because he failed to prove that he received the ineffective assistance of counsel at trial and on direct appeal. The record demonstrated that the inmate's counsel investigated the case and was prepared for the trial and none of counsel's alleged errors or deficiencies substantially affected the outcome of the trial. Robert v. State, — So. 2d —, 2009 Miss. App. LEXIS 747 (Miss. Ct. App. Nov. 3, 2009), opinion withdrawn by, substituted opinion at 52 So. 3d 1233, 2011 Miss. App. LEXIS 45 (Miss. Ct. App. 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because his allegation of ineffective assistance of counsel was without merit. During his plea hearing, he stated that he had not been promised anything, coerced, or threatened by anyone into entering his plea and he testified that he was satisfied with counsel's performance; additionally, he acknowledged that he understood that by entering a guilty plea that he was admitting to the facts as read from the indictment and thus, his guilty plea was entered voluntarily and knowingly. Jordan v. State, 21 So. 3d 697 (Miss. Ct. App. 2009).

Denial of appellant's, an inmate's, motion for postconviction relief was proper because she failed to prove that she received the ineffective assistance of counsel. At her plea hearing, the inmate stated that she was fully informed of the charges against her, that she wished to plead guilty, and that she was satisfied with the services that were provided by her attorney. Harding v. State, 17 So. 3d 1129 (Miss. Ct. App. 2009).

Defendant's conviction for armed robbery and the denial of his motion for a new trial were both proper because defendant failed to prove that he received the ineffective assistance of counsel in that he failed to demonstrate how any alleged deficiencies on the part of his counsel prejudiced the defense. Defendant's own statement and that of his half-sister were sufficient to prove the State's case of attempted armed robbery. McClendon v. State, 17 So. 3d 184 (Miss. Ct. App. 2009).

Inmate's contentions did not raise sufficient questions of fact regarding his ineffective assistance counsel claim to warrant an evidentiary hearing; although the inmate claimed his attorney failed to investigate the possibility that the inmate was having mental problems, the attorney was unable to locate the inmate's psychiatrist or his medical records, and the inmate's affidavits did not pertain to his mental health. Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 559 U.S. 1078, 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (2010).

Denial of appellant's, an inmate's, motion for postconviction relief was appropriate because his indictment was not faulty for its failure to contain a provision for his eligibility for parole since it was not an essential element of the crime or had no effect on jurisdiction. His attorney was not ineffective for failing to object to a valid indictment. Bowling v. State, 12 So. 3d 607 (Miss. Ct. App. 2009).

Where indictments charging defendant with the sale of cocaine were not defective, there was no reason for defense counsel to object; hence, counsel was not ineffective. Hunt v. State, 11 So. 3d 764 (Miss. Ct. App. 2009).

Inmate's contentions did not raise sufficient questions of fact regarding his ineffective assistance counsel claim to warrant an evidentiary hearing; although the inmate claimed his attorney failed to investigate the possibility that the inmate was having mental problems, the attorney was unable to locate the inmate's psychiatrist or his medical records, and the inmate's affidavits did not pertain to his mental health. Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 559 U.S. 1078, 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (2010).

Attorney had not rendered ineffective assistance in failing to present mitigation evidence of a defendant, who was convicted for capital murder and sentenced to death, because the defendant did not suffer prejudice; if the evidence of the defendant's mental and educational problems, history of substance abuse, and troubled childhood had been admitted, the details of the defendant's criminal activity and drug use also would have been admitted.

Doss v. State, — So. 2d —, 2008 Miss. LEXIS 608 (Miss. Dec. 11, 2008), opinion withdrawn by, substituted opinion at, remanded in part by 19 So. 3d 690, 2009 Miss. LEXIS 510 (Miss. 2009).

Defendant's conviction for murdering his girlfriend was appropriate because he failed to prove that he received the ineffective assistance of counsel. The fact that the jury deliberated approximately 16 minutes before finding him guilty did not equate with ineffective assistance of counsel; a more probable explanation was that the overwhelming evidence against defendant, paired with proper jury instructions, made the jury's decision clear. Fannings v. State, 997 So. 2d 953 (Miss. Ct. App. 2008).

Performance of appellant's counsel was not deficient and thus not ineffective because (1) counsel did not have to object to the amendment of the indictment since the indictment was properly amended to reflect appellant's status as a habitual offender; (2) the circuit court clearly and adequately informed appellant of the consequences of his guilty plea before accepting it; and (3) appellant's counsel apparently had another pending felony charge against appellant dismissed as a result of his voluntary plea. Spencer v. State, 994 So. 2d 878 (Miss. Ct. App. 2008).

In appellant's capital murder case, counsel was ineffective in regard to a lineup identification because attorneys presented affidavits that they were not present at the lineup, and the witness's identification of appellant was crucial to the State's case. Minimal efforts on the part of trial counsel could have confirmed the presence or non-presence of counsel at the lineup. Howell v. State, 989 So. 2d 372 (Miss. 2008).

Defendant's ineffective assistance of counsel claim on direct appeal was dismissed because (1) the record evinced that defendant was represented by two experienced defense attorneys; (2) the decisions of which defendant complained fell within the presumption of trial strategy and reasonable professional assistance; and (3) the failure to request an accident jury instruction was not prejudicial because it would have been denied had it been requested. Staten v. State, 989 So. 2d 938 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Defendant's claim of ineffective assistance of counsel failed, as there was no evidence that counsel improperly coerced defendant to plead guilty (at most, counsel may have given defendant a blunt assessment of his chances of success at trial, which may have led in part to defendant's decision to plead guilty), and even if defense counsel was deficient in not calling certain alibi witnesses provided by defendant, defendant had failed to show any prejudice resulting from that deficiency. Jones v. State, 970 So. 2d 1316 (Miss. Ct. App. 2007).

Two defendants' convictions for depraved-heart murder were appropriate because they failed to prove that they received the ineffective assistance of counsel since, although the first defendant stated that his counsel followed or adopted very action taken by the second defendant's counsel, the first defendant did not argue or state anything else that proved that his counsel was ineffective; additionally, the second attorney's failure to object to alleged hearsay used in the state's opening statement was deemed to have been trial strategy. McDowell v. State, 984 So. 2d 1003 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

Post-conviction relief was properly denied where trial counsel's failure to seek a change of venue because of pretrial publicity was not error, as most of the venire was largely unaware of the case, and those who were unaware of it assured counsel and the trial court that they could be impartial. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

Dismissal of the inmate's motion for post-conviction relief was proper in part because he failed to prove that his counsel was ineffective; the inmate failed to demonstrate how the outcome of his case would have been different had his attorney performed the acts that the inmate alleged that the attorney was deficient in failing to perform. Truitt v. State, 958 So. 2d 299 (Miss. Ct. App. 2007).

Performance of defendant's counsel was not deficient and he was not prejudice in any way because: (1) the failure to file a motion demanding a speedy trial could not be said to have affected the outcome of the trial because the evidence obtained by the delay was arguably exculpatory since no gun shot residue was found on the steering wheel of the car defendant was driving the night of the shooting; (2) decisions to call witnesses, ask certain questions, or make particular objections fell within the purview of the attorney's trial strategy and could not give rise to an ineffective assistance of counsel claim; and (3) the jury instruction regarding the two-party theory was legally sufficient. Boone v. State, 964 So. 2d 512 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 515 (Miss. 2007).

Appellate court rejected an inmate's claims of ineffective assistance of counsel because the inmate made only conclusory allegations, and all of evidence indicated that the inmate's counsel acted capably. Berry v. State, 924 So. 2d 624 (Miss. Ct. App. 2006).

Although the counsel who represented the inmate had previously prosecuted him on similar charges, the inmate failed to establish that he was deprived of effective assistance of counsel because the inmate did not prove prejudice. Dobbs v. State, 932 So. 2d 878 (Miss. Ct. App. 2006).

Denial of the inmate's motion for post-conviction relief was proper; his counsel was not ineffective because the inmate's argument that his attorney was not convincing enough since the judge ruled against him did not show deficient performance under Strickland. The inmate had credited his counsel with making the correct arguments before the judge. Jones v. State, 922 So. 2d 31 (Miss. Ct. App. 2006).

Time elapsing from the date of defendant's arrest to the beginning day of his trial was more than 31 months, and was presumptively prejudicial under the Barker factor. However, he had not asserted his right to a speedy trial and on appeal, he did not assert that his defense suffered any prejudice because of his lengthy incarceration; he did not contend that witnesses were unavailable because of the delay or that evidence had been lost or destroyed or that his defense against the charges was affected in any way by the delay, and because no actual prejudice was shown, his constitutional right to a speedy trial was not violated. Guice v. State, 952 So. 2d 187 (Miss. Ct. App. 2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Most significant factor was that defendant failed to demonstrate how his incarceration and the 31-month delay between his arrest and trial caused him any actual prejudice. Thus, per the Barker factors, the appellate court found that there was no violation of defendant's constitutional right to a speedy trial; secondly, defendant waived his right to complain about the denial of his statutory right to a speedy trial since he did not assert that right until well after the statutory deadline had passed, and because his assertions as to a denial of his speedy trial rights would not have resulted in a different outcome to the case, counsel was not ineffective in failing to raise said issues. Guice v. State, 952 So. 2d 187 (Miss. Ct. App. 2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Inmate failed to establish that he was deprived of effective assistance of counsel due to his counsel's failure to pursue an insanity defense, to have him evaluated or to obtain his records from the United States Army showing he was discharged for reasons related to his mental health, as he did not offer evidence in support of his claims, other than unsubstantiated allegations, sufficient to overcome the strong presumption that his attorney's conduct fell within the wide range of reasonable professional assistance. Thomas v. State, 930 So. 2d 1264 (Miss. Ct. App. 2005).

Denial of the inmate's petition for postconviction relief without an evidentiary hearing was proper pursuant to Miss. Code Ann. § 99-39-19 because his claim that his counsel was ineffective was without merit. The inmate did not suggest that mitigating evidence was available and did not identify a witness or situation that might have convinced the judge to impose a lighter sentence. McNabb v. State, 915 So. 2d 478 (Miss. Ct. App. 2005).

Defendant's murder conviction was appropriate where her counsel was not ineffective because he participated in an extensive voir dire of the jury and in the cross-examination of the State's witnesses. Further, he called four witnesses on behalf of defendant who supported her theory of the case. Lyle v. State, 908 So. 2d 189 (Miss. Ct. App. 2005).

Defendant's convictions for kidnapping and sexual battery were proper where his argument that counsel was ineffective because the jury was improperly instructed on the issue of whether or not the sexual act was consensual was without merit because a prerequisite to finding defendant guilty of sexual battery was to determine that the sexual act between him and the victim was without the victim's consent. As the jury determined that defendant was indeed guilty of sexual battery, inherently the jury had to determine that the sexual act took place without the victim's consent. Winding v. State, 908 So. 2d 163 (Miss. Ct. App. 2005).

While defendant's trial counsel's performance might have been less than perfect and lacking in some respects, there was nothing in the record that proved that his trial counsel's performance was not in the "wide range of reasonable professional assistance." There was nothing in the record to support defendant's allegations that trial counsel failed to perform any pretrial investigation or failed to interview potential witnesses, and based on documents not contained in the record but included in defendant's record excerpts, a reasonable inference could be drawn that trial counsel either requested some discovery or some discovery was voluntarily tendered to him by the State. Dunigan v. State, 915 So. 2d 1063 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2005 Miss. LEXIS 793 (Miss. 2005).

Inmate's trial attorneys were not ineffective because (1) although some of the State's race-neutral reasons for striking jurors were a close call, the trial court allowed the challenges to stand, and the inmate did not show that a different outcome would have resulted had the Batson objections been sustained; (2) his counsel filed numerous pre-trial motions, cross-examined nine out of eleven prosecution witnesses, ultimately did not call a defense witness because he would have corroborated the State's witnesses, and met with the inmate on numerous occasions and even discussed a plea offer from the State that the inmate rejected; (3) the inmate's accusation that trial counsel had failed to properly investigate was merely an unfounded allegation given that the inmate supplied little or nothing of what an effective attorney performing a proper investigation would or should have found by the way of mitigating testimony; and (4) trial counsel did not err in failing to raise the issue of the inmate's competency because the inmate presented no evidence that he was currently incompetent or incompetent at the time of his trial. Knox v. State, 901 So. 2d 1257 (Miss. 2005), writ of certiorari denied by 546 U.S. 1063, 126 S. Ct. 797, 163 L. Ed. 2d 630, 2005 U.S. LEXIS 9080, 74 U.S.L.W. 3335 (2005).

Even if defendant's trial counsel was deficient in allegedly failing to make numerous potential objections to hearsay and other improper evidence, there was no reasonable probability that the proceeding would have been different given the plethora of evidence against defendant, including his confession that he had "killed the bitch." While trial counsel's performance may have been less than perfect, there was nothing in the record that proved that trial counsel's performance was not within the "wide range of reasonable professional assistance." Gibson v. State, 895 So. 2d 185 (Miss. Ct. App. 2004).

Inmate's counsel was not ineffective simply because he had not had a lot of death penalty cases and was involved in three death penalty cases at the same time as the inmate failed to show any errors that resulted from either issue that prejudiced him. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Where the inmate claimed in a postconviction petition to have been denied effective assistance of counsel under

Miss. Const. Art. III, § 26 and U.S. Const. Amend. VI due to defense counsel's failure to request and file complete discovery and to meet more than once with the inmate, the claim failed, as the inmate failed to argue that these failures had resulted in prejudice. Battaya v. State, 861 So. 2d 364 (Miss. Ct. App. 2003).

Under Strickland, test to be applied in cases involving alleged ineffectiveness of counsel is (1) whether counsel's overall performance was deficient and (2) whether deficient performance, if any, prejudiced defense. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel's failure to obtain services of forensic pathologist was not sufficient to constitute ineffective assistance of counsel where cause of death was important issue at trial because (1) there is no law requiring employment of forensic pathologist as prerequisite to defense counsel being considered constitutionally effective and (2) as practical matter, defense counsel did in fact consult with pathologist and discuss reports of prosecution's pathologist and was advised that pathologist saw nothing which would be of any benefit. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

Counsel's conduct in failing to request change of venue, to move for continuance, and to object to exhumation of body of victim, was within range of competence demanded of attorneys in criminal cases and therefore did not constitute ineffective assistance of counsel. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

145. — — Speedy trial, ineffectiveness of counsel.

Post-conviction relief was denied because appellant inmate did not show that he received ineffective assistance of counsel due to a failure to file a constitutional speedy trial motion because there was no showing that it would have been successful; even though the reason for an 8-month delay weighed in the inmate's favor, the inmate did not show that he was prejudiced, other than due to his pretrial incarceration. Moreover, there was no evidence that the inmate had asserted the speedy trial right. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

146. — — Trial strategy, ineffectiveness of counsel.

Defendant's allegation of ineffective assistance of counsel was without foundation because (1) defendant's grounds concerned trial strategy, which was within counsel's discretion, and counsel's choices were not unreasonable and were sound trial strategy that could only have helped defendant; and (2) defendant failed to demonstrate how any of defendant's grounds for defendant's ineffective assistance of counsel claim had a prejudicial effect. Thus, defendant failed to show that defendant was denied a fair trial. Pittman v. State, 121 So. 3d 253 (Miss. Ct. App. 2013).

On appeal from his conviction for the possession of at least 2, but less than 10, dosage units of hydrocodone, the record before the appellate court was not adequate to determine whether counsel's decision to allow a statement into evidence constituted ineffective assistance of counsel because it could have been argued that counsel might have agreed to the admission of the statement with the hope that the jury would conclude that the charges against defendant were not filed not because he actually possessed the contraband, but because he refused to work as a confidential informant for the authorities. Sistrunk v. State, 48 So. 3d 557 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 629 (Miss. 2010).

On appeal from his conviction for the possession of at least 2, but less than 10, dosage units of hydrocodone, the record before the appellate court was not adequate to determine whether counsel's decision to allow a statement into evidence constituted ineffective assistance of counsel because it could have been argued that counsel might have agreed to the admission of the statement with the hope that the jury would conclude that the charges against defendant were not filed not because he actually possessed the contraband, but because he refused to work as a confidential informant for the authorities. Sistrunk v. State, 48 So. 3d 557 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 629 (Miss. 2010).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, counsel's choice of whether or not to argue a motion was trial strategy and it was possible that defendant had already made the decision that he would not testify; if so, the attorney's argument in the Peterson hearing would have been unnecessary. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, counsel's choice of whether or not to file certain motions, call certain witnesses, ask certain questions, or make certain objections fell within the ambit of trial strategy; the attorney most likely wished to avoid drawing further attention to the photographs referenced by the prosecutor that depicted the severity of the victim's injuries. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Counsel explained his reason for not further developing evidence of defendant's medical history and the issue at trial was whether defendant killed the victim; to date, nothing had been introduced to show what defendant's medical records would have shown in his defense. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Counsel testified that he discussed whether to introduce an online chat transcript with defendant and that the reason it was not introduced was that in the transcript, the victim said that she could not kill herself; defendant had alleged that the victim killed herself in a suicide pact and that he did not murder her. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

In terms of whether or not trial counsel was ineffective for entering polygraph evidence into the record, it fell under the scope of trial strategy; defendant attempted to show that he was tricked into making his statement during his interrogation by the polygraph examiner, and allowing such evidence was not reversible error. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Court rejected defendant's claim of ineffective assistance of counsel; because the defense was that defendant killed the victim in self-defense, counsel's statement conceding that defendant killed the victim was a tactical decision. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Nothing in the record rebutted the presumption that defendant's attorney's decision not to call witnesses was sound trial strategy, and defendant presented no evidence that the victim impact statement was inaccurate; defendant presented no evidence that there was any agreement that the State would not argue for the maximum sentence, and defendant received the agreed recommendation. Martin v. State, 20 So. 3d 734 (Miss. Ct. App. 2009), writ of certiorari dismissed by 24 So. 3d 1038, 2010 Miss. LEXIS 21 (Miss. 2010).

Trial counsel's representation was not ineffective because admission of photographic lineup was for strategic purpose of attempting to establish that defendant could not have been the man who had robbed the store. Conner v. State, 26 So. 3d 383 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 36 (Miss. 2010).

In a case involving the sale of cocaine, defendant did not receive ineffective assistance of counsel because it was not ruled out that a cross-examination regarding an informant's previous trips to defendant's house and a stipulation to the conviction of a third party who also sold drugs to the informant were just sound trial strategy. Liddell v. State, 7 So. 3d 217 (Miss. 2009).

Defendant's claim that counsel was ineffective for not interviewing defendant until the day before the trial was without merit; counsel was able to procure a sentencing deal where defendant would not be sentenced as a habitual offender and arranged for the dismissal of another charge with a potential 60-year sentence. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

Defendant's trial counsel was not ineffective for failing to file a motion to suppress any pretrial identification because, although defense counsel thought that a motion to suppress had been filed, the overwhelming evidence against defendant was indicative that even if the prior identifications were stricken, there would be no alteration of the outcome of the trial. Weaver v. State, 996 So. 2d 142 (Miss. Ct. App. 2008).

Defendant's trial counsel was not ineffective because wearing a prisoner's uniform or clothing during his trial was not necessarily a reversible error where, during pretrial motions, the trial court gave defendant the opportunity to object to wearing prison attire, and he chose not to, and where clothing was found for him after the first day of his trial. Weaver v. State, 996 So. 2d 142 (Miss. Ct. App. 2008).

On appeal of defendant's conviction for sexual battery, he failed to prove that trial counsel was ineffective or that he was prejudiced by counsel's failure to investigate, call witnesses, or dismiss a juror. Defendant failed to show how additional investigation would have significantly aided his case during trial; counsel was permitted wide latitude in his choice of defense strategy; and the juror who knew several of the witnesses stated that she could be fair and unbiased. Smith v. State, 989 So. 2d 973 (Miss. Ct. App. 2008).

Where defendant shot his sister after he suffered a head injury, witnesses testified that he did not appear to be aware of what he was doing. On appeal of defendant's conviction for murder, the record did not affirmatively show that counsel was ineffective for failing to investigate defendant's alleged impaired mental state. Page v. State, 987 So. 2d 1035 (Miss. Ct. App. 2008).

Counsel was not deficient for failing to allege that defendant was incompetent to stand trial for aggravated assault where defendant admitted that before trial he had started to take his medicine again and could now think straight. Furthermore, defendant participated in his defense, made a closing argument, and discussed his case and the insanity defense with his cellmate. Epps v. State, 984 So. 2d 1042 (Miss. Ct. App. 2008).

Even though counsel was deficient in failing to pursue an insanity defense in an aggravated assault case, defendant was not prejudiced thereby because the M'Naghten test was not satisfied; defendant understood the consequences of his actions. Defendant stated that he shot his stepfather for "messing with his mother's mind." Epps v. State, 984 So. 2d 1042 (Miss. Ct. App. 2008).

Where appellant was convicted of sexual battery and fondling, trial counsel was not ineffective for failing to call a medical professional to testify that a bicycle accident caused the victim's injury. It was common in criminal trials for the defense to put on no evidence as a means of emphasizing the weakness of the prosecution's evidence. Sharp v. State, 979 So. 2d 713 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 163 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because his counsel was not ineffective; defendant's prior convictions surfaced as a product of his impeachment regarding his assertions of an ongoing, consensual sexual relationship with the victim, and counsel's decision whether to request a limiting instruction regarding a part of the evidence against defendant might have been part of the trial strategy. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Defendant failed to satisfy the deficiency prong of the Strickland analysis where the shirt and gun were relevant evidence because he wore the shirt and had the gun that night and both were similar to the limited descriptions the victims gave; trial counsel's failure to object in the case was reasonable trial strategy as trial counsel set out to impeach the identifications. Jackson v. State, 969 So. 2d 124 (Miss. Ct. App. 2007).

In an aggravated assault case, defendant did not receive ineffective assistance of counsel based on an allegation that counsel did not let defendant or his stepson testify at trial; the decision not to let the stepson testify was merely strategy, and moreover, defendant was clearly advised of his right to testify, and he was told that the decision was ultimately his to make. Ellis v. State, 956 So. 2d 1008 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2007 Miss. LEXIS 687 (Miss. 2007).

In a case involving the sale of cocaine, retained counsel was not ineffective due to improper questions during voir dire or improper statements during closing argument because these comments were made to aid the defense, not prejudice it; moreover, the failure to propose jury instructions could have amounted to mere trial strategy. Jones v. State, 961 So. 2d 730 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 962 So. 2d 38, 2007 Miss. LEXIS 415 (Miss. 2007).

Defendant's assertion of ineffective assistance of counsel was rejected in a post-conviction relief case because several decisions merely amounted to trial strategy, such as failing to call a witness, failing to bring up defendant's misconduct, and the scope of the investigation conducted; further, there was no basis for an entrapment instruction, and defendant was informed of his right to appeal. Shorter v. State, 946 So. 2d 815 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was properly denied where he failed to provide sufficient evidence demonstrating his attorney's deficiency; defendant admitted in his brief that he could not name the witness that counsel should have interviewed, nor did he disclose the "mitigating information" that counsel allegedly failed to uncover. Jones v. State, 956 So. 2d 310 (Miss. Ct. App. 2006).

Defendant failed to show that he received ineffective assistance of counsel when trial counsel did not move for a change of venue in a capital case because the record did not support the allegation regarding pre-trial publicity, and there was no right to change venue to a jurisdiction with certain racial demographics. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant's request for post-conviction relief was denied on the basis of ineffective assistance of counsel due to an alleged failure to investigate in general because that issue was procedurally barred; however, there was no ineffectiveness based on an alleged failure to investigate during the guilt phase of a capital murder trial since counsel would not have been able to determine that testimony would have been perjury, defendant did not have an alibi defense, and decisions regarding the examination of an expert were trial strategy where there was no showing that the expert was not qualified. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

In a murder case, defendant failed to show that he received ineffective assistance of counsel based on a failure to object to certain statements regarding the copying of keys and the failure to call the victim's former girlfriend; defendant failed to show that the statements were relevant, and the choice not to call a witness was merely trial strategy. Sipp v. State, 936 So. 2d 326 (Miss. 2006).

In an armed robbery case, defendant's counsel was not ineffective by spending as much time as he did attempting to show that defendant left his fingerprints at the scene on an earlier occasion as defendant's fingerprints were the only physical evidence tying defendant to the crime scene; had defense counsel succeeded in establishing that defendant left his fingerprints at some time unconnected with the robbery, then his alibi would have been strengthened. As such, the actions of defendant's counsel concerning the fingerprint evidence fell within the wide range of reasonable professional assistance. Madison v. State, 923 So. 2d 252 (Miss. Ct. App. 2006).

Since it was defendant's contention that he did not know that the receiver was stolen and had not given the witness against him marijuana in exchange for it, it seemed a reasonable decision by trial counsel not to seek an instruction which would have allowed the jury to find defendant guilty of an offense that defendant insisted he did not commit (receiving stolen property valued at less than $ 250), even though it was a lesser offense than the one for which he was being tried. Moreover, since defendant was found in possession of the stereo receiver, which admittedly was taken along with other items during the burglary, trial counsel may have made the strategic decision not to ask for an instruction tailored to guilt respecting the receiver out of fear that focusing on the receiver also risked highlighting the fact that the receiver and the other items were inevitably linked; thus, counsel was not ineffective for failing to request a lesser-included offense instruction. Primas v. State, 915 So. 2d 1095 (Miss. Ct. App. 2005).

Because the witness's plea agreement was not part of the official record, defendant could not claim that his trial counsel's failure to ask the witness about any deals he made with the State constituted ineffective assistance of counsel. Moreover, defendant did not prove that the plea agreement was in existence at the time the witness testified at trial. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

In defendant's escape trial, defendant's counsel stipulated that he was confined on felony charges because the pending charges were for kidnapping, sexual battery, rape and burglary. If counsel had not stipulated to that fact, those charges and the heinous nature of the charges would have been presented to the jury; it was certainly a reasonable decision made by his counsel, and therefore counsel was not ineffective in failing to object to said bad acts. Herrington v. State, 911 So. 2d 545 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 601 (Miss. 2005).

Defense counsel was not ineffective for not filing for a change of venue in defendant's arson trial; although only 13 of the 82 jury panelists had not heard about the case, only five of them expressed a fixed opinion on it, and all five were struck for cause. Moreover, a decision on whether or not to file a change of venue motion fell within the purview of trial strategy. McGee v. State, 907 So. 2d 380 (Miss. Ct. App. 2005), writ of certiorari denied by 910 So. 2d 574, 2005 Miss. LEXIS 450 (Miss. 2005).

Counsel was not ineffective in agreeing to admit a Mississippi Bureau of Narcotics report concerning the drug buy, since it appeared to have been a part of counsel's trial strategy, possibly because of a discrepancy between the report and an agent's testimony on cross-examination. Further, the record clearly showed many instances where trial counsel asked questions concerning whether defendant was properly identified as the seller of the drugs and trial counsel did not act deficiently in attempting to bolster the defense of mistaken identity. Robertson v. State, 921 So. 2d 348 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 165 (Miss. 2006).

In defendant's escape trial, defendant's counsel stipulated that he was confined on felony charges because the pending charges were for kidnapping, sexual battery, rape and burglary. If counsel had not stipulated to that fact, those charges and the heinous nature of the charges would have been presented to the jury; it was certainly a reasonable decision made by his counsel, and therefore counsel was not ineffective in failing to object to said bad acts. Herrington v. State, 911 So. 2d 545 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 601 (Miss. 2005).

Record did not support defendant's allegations that he was given ineffective assistance by his counsel in several alleged deficiencies where defendant's brief did not list or contain any possible defense witnesses that trial counsel should have called to testify or how that prejudiced his case; defendant failed to show that the defense counsel's decision to forgo cross-examination of some witnesses was not sound trial strategy or that it prejudiced his case, and trial counsel's conduct was within a wide range of reasonable conduct. Torrey v. State, 891 So. 2d 188 (Miss. 2004).

In defendant's trial for sexual battery of a child, defense counsel was not ineffective for stating during voir dire that defendant could be released on a technicality even though the proof showed defendant guilty. There was no evidence that counsel's actions were anything other than trial strategy. Renfrow v. State, 882 So. 2d 800 (Miss. Ct. App. 2004).

Trial court did not deny burglary defendant effective assistance of counsel, because defendant's claims fell wholly within the realm of trial strategy. Defendant, on appeal, contended that trial counsel had failed to adequately pursue at trial his defense that he did not have the requisite intent to commit burglary; notwithstanding his on-the-record decision not to testify, he mentions, albeit only in passing, that given the evidence presented at trial, it was "imperative" for him to testify; his actual argument on appeal, however, focused on objections his attorney should have made and questions he should have asked on cross-examination. Clay v. State, 881 So. 2d 323 (Miss. Ct. App. 2004), writ of certiorari denied by 893 So. 2d 1061, 2005 Miss. LEXIS 96 (Miss. 2005).

Defendant did not show ineffective assistance of counsel where trial counsel could not be faulted for failing to present mitigating evidence as to defendant's mental retardation, as it did not exist; defendant's argument as to counsel's failure to challenge the aggravating circumstance was barred by res judicata and his other issues were without merit. Mitchell v. State, 886 So. 2d 704 (Miss. 2004), writ of certiorari denied by 544 U.S. 1022, 125 S. Ct. 1982, 161 L. Ed. 2d 864, 2005 U.S. LEXIS 3824, 73 U.S.L.W. 3649 (2005).

Defendant was not denied the effective assistance of counsel during trial for the sale of cocaine; defendant merely gave blanket reasons as to why counsel was ineffective. Defendant did not show that counsel's trial strategies were outside the range of professionally competent assistance nor did defendant show that any deficiency on the part of trial counsel resulted in any prejudice to the case. Wilson v. State, 893 So. 2d 1064 (Miss. Ct. App. 2004), writ of certiorari denied by 893 So. 2d 1061, 2005 Miss. LEXIS 124 (Miss. 2005).

Defendant was not denied the effective assistance of counsel during trial for three counts of statutory rape because there was nothing in defendant's claims that, even accepted as true, would have had the likely effect of changing the outcome of case; decisions that defendant complained of were strategic. Boggan v. State, 894 So. 2d 581 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 162 (Miss. 2005).

Trial counsel's failure to secure a ballistics expert was not ineffective representation as a ballistics expert would not aid in the determination of which bullet proved fatal or who served as the principal in the crime. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Trial counsel's failure to call two potential alibi witnesses was not ineffective representation as the decision not to call the witnesses was trial strategy due to the lack of benefit the witnesses would provide and issues of credibility. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Defendant did not prove ineffective assistance of counsel where the strategy of defendant's counsel was to avoid incarceration, and defendant's attorney negotiated a plea bargain for defendant and she received a suspended sentence, a monetary fine and probation; there was no evidence that a sentence pursuant to the non-adjudication laws was a condition to which the prosecution would have agreed or the trial judge would have accepted, and the record indicated that defendant chose to avoid the risk of such a sentence and sought regular probation instead. Smith v. State, 869 So. 2d 425 (Miss. Ct. App. 2004).

Defendant failed to prove claim of ineffective assistance of counsel, because the fact that defendant's attorney did not object when defendant thought he should have objected did not establish that the attorney's performance was ineffective, and an exhibit was offered to show that this was a trial strategy. Irons v. State, 886 So. 2d 726 (Miss. Ct. App. 2004), writ of certiorari denied by 887 So. 2d 183, 2004 Miss. LEXIS 1380 (Miss. 2004).

Trial counsel did not provide ineffective assistance of counsel where although defendant asserted that his counsel failed to obtain and present at trial any evidence that was relevant to whether the rape and sexual battery occurred, he failed to mention what this evidence would have been or who the witnesses would have been that would have testified in his support; counsel provided a sound trial strategy and it was harmless error to admit evidence that defendant provided marijuana and alcohol to the victims, given the unequivocal testimony of the victims. Carle v. State, 864 So. 2d 993 (Miss. Ct. App. 2004).

Defense counsel's failure to make a motion to suppress defendant's statement during a murder trial did not amount to ineffective assistance of counsel because it constituted trial strategy. Johnson v. State, 876 So. 2d 387 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

In a criminal appeal, defendant failed to prove ineffective assistance of counsel; his counsel's failure to have defendant evaluated by the local psychiatrist and his failure to argue self-defense were nothing more than trial strategy. Stack v. State, 860 So. 2d 687 (Miss. 2003).

Defense counsel was not ineffective as the failure to request a change of venue and the failure to call certain witnesses were matters of strategy, and defendant failed to show that the hiring of a forensic expert would have changed the result of the trial. Roy v. State, 878 So. 2d 84 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 911 (Miss. 2004).

Strategic decision to pursue less than all plausible lines of defense will rarely, if ever, be deemed ineffective counsel, if counsel first adequately investigated the rejected alternative. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to file certain motions, call certain witnesses, ask certain questions, and make certain objections, where counsel's actions fell within ambit of trial strategy. Cole v. State, 666 So. 2d 767 (Miss. 1995).

In a prosecution for possession of cocaine with intent to distribute, the defendant was denied his constitutional right to effective assistance of counsel where the defense strategy was to admit guilt to the charge of simple possession of cocaine, but to deny any intent to sell or distribute, the defense counsel failed to object to evidence of the defendant's past drug sales, which was the most damaging piece of evidence presented, he failed to preserve any objection relating to the sufficiency of the evidence for trial court or appellate review, and the evidence was insufficient as a matter of law to support the charge. Holland v. State, 656 So. 2d 1192 (Miss. 1995).

A murder defendant was not denied effective assistance of counsel by his attorney's admission of his guilt of the crime where the evidence of guilt was overwhelming, and the attorney admitted that the defendant was guilty of simple murder, not capital murder, and submitted a lesser-included offense instruction in accordance with the argument. Woodward v. State, 635 So. 2d 805 (Miss. 1993).

A murder defendant's trial counsel was not ineffective for arguing that the case was one of self-defense, even though the prosecution witnesses were consistent in testifying that the defendant initiated the confrontation that lead to the victim's death so that, with the benefit of hindsight, it was apparent that a self-defense argument did not have a strong possibility of success, where the defendant failed to show that his trial counsel's arguments and strategy were deficient as judged from the time offered, and there was no significant probability that the result would have been different but for the alleged errors of trial counsel since the evidence against the defendant was substantial. Brown v. State, 626 So. 2d 114 (Miss. 1993).

A defendant was not denied his right to effective assistance of counsel on the ground that his attorney failed to file any motion for discovery where the defendant provided no evidence to show that the omission was anything other than his attorney's trial strategy, there was no allegation of critical evidence that may have come to light as a result of discovery, the record did not reflect any surprise to the defendant's attorney as a result of the State's case, and the defense attorney was sufficiently familiar with the State's case and its witnesses that a discovery motion would not have elicited any change in the defense. Ivy v. State, 589 So. 2d 1263 (Miss. 1991).

A defense counsel's failure to pursue an alibi defense was not unsound trial strategy, and therefore did not constitute ineffective assistance of counsel, where the defendant had admitted to the offenses but challenged the dates in the indictment as being incorrect. Schmitt v. State, 560 So. 2d 148 (Miss. 1990). But see Weatherspoon v. State, 736 So. 2d 419 (Miss. Ct. App. 1999).

The mere fact that an attorney did not file a motion for discovery is not sufficient to raise an ineffective assistance of counsel claim since the filing of pre-trial motions falls squarely within the ambit of trial strategy. Powell v. State, 536 So. 2d 13 (Miss. 1988).

Ineffective assistance of counsel was not shown where defendant complained that counsel made absolutely no investigation of psychological evidence, while defendant submitted psychological evidence showing, inter alia, functional I.Q. of 73, lower academic I.Q., alcoholism, and genuine remorse for crime; as trial strategy, counsel could have judged that psychological report may have been harmful. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Claim of ineffective assistance of counsel based on counsel's failure to object to closing argument of prosecutor at sentencing phase was rejected, such failure to object being presumed to be strategic, and presumption having not been rebutted. Additionally, in light of wide range of permissible argument, it was court's opinion that arguments were within proper parameters. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Counsel was not ineffective for failing to move for change of venue before guilt phase of trial because defense counsel is under no duty to make such motion, and thus this would fall into realm of trial strategy. Neither newspaper articles, nor anything else, indicated that, absent change of venue, defendant would lose right to fair trial. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that counsel was ineffective based on opening statement conceding to jury that his client was guilty of crime charged in indictment was rejected because it may have been trial strategy. Candor at guilt phase may help defendant in sentencing phase because attorney who, while sincerely trying to help his client, at same time is open and honest with jury, is more likely to receive sympathetic and open ear in his other arguments. Counsel also argued crime was not capital murder and jurors must therefore return verdict of not guilty. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Ineffective assistance of counsel was not shown where defendant argued that counsel made decision to pursue defense of lack of intent to kill, but failed to follow up on this strategic choice, where counsel elicited evidence of defendant's having "shot up" to negate argument that defendant intended to kill. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Based on case law as it existed at time of trial, counsel's refusal to take chance on waiving objection to wife's testimony by indulging in cross-examination of her did not render his assistance constitutionally inadequate. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

Failure of the defense attorney to make a motion for continuance was not a denial of due process based upon the assumption that the defendant was not properly represented by counsel where a year had elapsed since the homicide and the case had been once continued, in absence of showing that counsel needed more time for preparation of defense. Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950).

147. — — Guilty plea or plea bargaining, ineffectiveness of counsel.

Circuit court did not err in dismissing an inmate's motion for post-conviction collateral relief because the inmate provided no proof, other than his own affidavit, that his counsel rendered ineffective assistance; the inmate's only claim of prejudice was that he entered a guilty plea as a result of his counsel's conduct, but the inmate's signed plea petition stated that he was fully satisfied with the competent advice and help of his counsel, and the inmate stated under oath that he was satisfied with the services rendered by his counsel and that he had no complaints whatsoever about his representation. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Post-conviction relief was denied where inmate provided no proof, other than his own affidavit, that his counsel rendered ineffective assistance; the inmate's only claim of prejudice was that he entered a guilty plea as a result of his counsel's conduct, but the inmate's signed plea petition stated that he was fully satisfied with the competent advice and help of his counsel, and the inmate stated under oath that he was satisfied with the services rendered by his counsel and that he had no complaints whatsoever about his representation. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

On a motion for postconviction relief based on ineffective assistance of counsel, where inmate offered only his statements alleging the deficiencies of his counsel, which were directly contradictory to his statements made under oath, and where he admitted that the factual bases for the charges were correct, and testified that his counsel reviewed the plea petition with him that he signed and submitted to the trial court, inmate failed to prove any instance of deficiency on the part of his counsel, and, even if there were errors, failed to show with reasonable probability that, but for such errors, the result of his proceeding would have been different. Cherry v. State, 24 So. 3d 1048 (Miss. Ct. App. 2010).

Denial of appellant's, an inmate's, motion for postconviction relief was appropriate because he failed to prove that he received the ineffective assistance of counsel. The inmate's testimony that his counsel was ineffective in misrepresenting the sentence that the inmate would have received if he pled guilty was rejected and the appellate court found no basis for disturbing that finding. Mitchener v. State, 32 So. 3d 1218 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 31 So. 3d 1217, 2010 Miss. LEXIS 206 (Miss. 2010).

Denial of appellant inmate's motion for post-conviction collateral relief was proper because he failed to prove that he received the ineffective assistance of counsel since he offered nothing more than his own assertions to prove any deficiency on the part of his counsel. In fact, his statements made under oath at his plea hearing wholly contradicted the assertions he currently brought on appeal; the inmate testified that he was satisfied with the work of his counsel, and his counsel reviewed his plea petition with the inmate that he signed and submitted to the circuit court. Brown v. State, 12 So. 3d 586 (Miss. Ct. App. 2009).

Defendant failed to show that defendant received ineffective assistance of counsel during a guilty plea proceeding because counsel did not coerce defendant into pleading guilty, but simply informed defendant of the likely outcome of the case, believing it would be in defendant's best interest to enter a guilty plea. Defendant, at 55 years old, was charged with four counts of fondling a child; each count carried a maximum penalty of fifteen years in prison. Mayhan v. State, 26 So. 3d 1072 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 58 (Miss. 2010).

Trial court did not err in denying defendant's motion for post-conviction collateral relief because defense counsel was not deficient for not informing defendant that he could be sentenced as an habitual offender, that his sentence could have been illegal, and that he would not be granted post-release supervision for part of his sentence; defense counsel and the trial court both thoroughly led defendant through the plea process to ensure that he understood his plea did not guarantee him either post-release supervision or a particular sentence. Burrough v. State, 9 So. 3d 368 (Miss. 2009).

Trial court did not err in denying defendant's motion for post-conviction collateral relief because defense counsel was not deficient for failing to object when the trial court enhanced his sentence without giving him the opportunity to withdraw his guilty plea; defense counsel's failure to object if any, was one that originated subsequent to the trial court's acceptance of a valid guilty plea, after it was determined to be voluntarily and intelligently given, based on an acknowledged understanding by the defendant that any "consequences" allowed by law could result. Burrough v. State, 9 So. 3d 368 (Miss. 2009).

Post-conviction relief was denied because appellant inmate failed to show that he received ineffective assistance of counsel based on an alleged conflict of interest because he did not show that defense counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance during a guilty plea. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Post-conviction relief was denied because appellant inmate failed to show that he received ineffective assistance of counsel based on an alleged failure to conduct an investigation because the inmate did not give specific information satisfying the second prong of the test under Strickland v. Washington, 466 U.S. 668 (1984), or show that the failure to investigate affected the decision to enter his guilty pleas. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Post-conviction relief was denied to appellant inmate in a case where he pled guilty to credit card fraud and possession of cocaine because he did not show that he received deficient performance; there was a factual basis for the plea, the inmate indicated that he was satisfied with the performance of his counsel, and no evidence was presented to show any deficiencies. Moreover, the inmate's post-conviction relief motion lacked any supporting affidavits or other proof to support his allegation of ineffectiveness of counsel. Shies v. State, 19 So. 3d 770 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

Where appellant pled guilty to capital murder and aggravated assault, she was not entitled to post-conviction relief based on her ineffective assistance of counsel claim; the trial court found credibility in counsel's testimony that he investigated appellant's case, reviewed the case with her, and concluded that it was her best option to plead guilty. Wilbanks v. State, 14 So. 3d 752 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 382 (Miss. 2009).

Defendant's claim that his attorney rendered ineffective assistance of counsel because he led defendant to believe that he would be placed in the drug court program was without merit as during his guilty plea hearing, defendant swore that his lawyer had not promised him anything to get him to plead guilty and defendant swore that he was satisfied with the services of his attorney. Bliss v. State, 2 So. 3d 777 (Miss. Ct. App. 2009).

When appellant sought post-conviction relief on the basis of ineffective assistance of counsel in connection with his plea of guilty to murder, he did not attach any supporting affidavits to his motion for post-conviction relief to support his claim that counsel failed to investigate the case; nor did appellant name any potential witnesses that counsel could have interviewed. Because appellant failed to rebut the presumption that counsel performed with competence, the trial court did not err by dismissing his claim of ineffective assistance of counsel. Smith v. State, 1 So. 3d 937 (Miss. Ct. App. 2009).

Appellant inmate's motion for post-conviction relief was properly denied because he failed to show that he received ineffective assistance of counsel based on a failure to object to the terms of a sentence; the inmate also failed to show that his plea was involuntary based on alleged misinformation given by trial counsel regarding sentencing. Garner v. State, 21 So. 3d 629 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 571 (Miss. Nov. 19, 2009).

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate's other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. McKinney v. State, 7 So. 3d 291 (Miss. Ct. App. 2008).

Defendant failed to establish ineffective assistance of counsel with regard to his conviction, based on a guilty plea, for sexual assault because defense counsel was not required to inform defendant that he had to register as a sex offender for his guilty plea to be knowing, intelligent and voluntary; defendant testified under oath during his guilty plead haring that he was satisfied with his attorney's representation; and defendant failed to establish that how his attorney's performance was deficient or prejudiced defendant by the failure to investigate and subpoena certain unidentified impeachment witnesses. Magyar v. State, 18 So. 3d 851 (Miss. Ct. App. 2008), affirmed by 18 So. 3d 807, 2009 Miss. LEXIS 388 (Miss. 2009).

None of an inmate's proffered allegations of deficiency evinced ineffective assistance of counsel, given that (1) the trial court had no duty under Miss. Unif. Cir. & Cty. R. 8.04 to advise the inmate of the right to counsel, and thus counsel's lack of an objection to a nonexistent duty was not deficient performance, (2) counsel's failure to advise the inmate that he had the right to an attorney if he chose not to plead guilty could not be said to have evinced deficient performance, (3) his guilty plea petition told him that if he chose not to so plead, he was guaranteed the right to counsel, (4) in any event, the record contradicted the contention that the inmate was not advised of his right to counsel, and (5) as the inmate's plea was voluntarily entered, which included an understanding of the charge and the sentence, the court could not say that counsel was deficient in allowing the inmate to plead guilty. Thompson v. State, 990 So. 2d 265 (Miss. Ct. App. 2008).

Post-conviction relief was denied in a case where appellant inmate had pled guilty to the offense of statutory rape because ineffective assistance of counsel was not established; the inmate stated that he was satisfied with his counsel's service and that his attorney had explained the plea petition. He offered no evidence, other than his own allegations, to show that counsel's performance was deficient; moreover, there was no need to contact witnesses to testify as to the inmate's innocence based on his admissions. Kimble v. State, 2 So. 3d 688 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 999 So. 2d 1280, 2009 Miss. LEXIS 94 (Miss. 2009), writ of certiorari denied by 557 U.S. 909, 129 S. Ct. 2801, 174 L. Ed. 2d 300, 2009 U.S. LEXIS 4498, 77 U.S.L.W. 3678 (2009).

Where appellant entered a plea of guilty to grand larceny, he argued that his attorney's misrepresentation about the State's sentencing recommendation constituted ineffective assistance of counsel; however, the trial court gave appellant the opportunity to withdraw the guilty plea after the State made the ten-year recommendation and he declined. Therefore, appellant did not show a reasonable probability that, but for counsel's erroneous advice, he would not have pleaded guilty, but would have insisted on going to trial. Myles v. State, 988 So. 2d 436 (Miss. Ct. App. 2008).

Where appellant pleaded guilty to felony domestic violence — aggravated assault and aggravated assault by use of a deadly weapon, he failed to prove that he received ineffective assistance of counsel in light of counsel's advice to plead guilty and because his attorney failed to argue a self-defense theory. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he suffered any actual prejudice as a result of a deficiency. McComb v. State, 986 So. 2d 1087 (Miss. Ct. App. 2008), writ of certiorari dismissed by 36 So. 3d 455, 2010 Miss. LEXIS 285 (Miss. 2010).

Defendant did not receive ineffective assistance of counsel where in the petition to enter his guilty plea, defendant clearly acknowledged that his sentence was up to the court and that he could receive zero to ninety years' imprisonment; defendant indicated his satisfaction with his attorney's advice and recognized that if he had been told by his lawyer that he might receive a lighter sentence this was merely a prediction and not binding on the court. Davis v. State, 5 So. 3d 435 (Miss. Ct. App. 2008).

Defendant's trial counsel was not inefficient where defendant neither professed his innocence, nor called attention to the impairment of any defense as a result of not being informed of his ineligibility for parole; trial counsel informed defendant that a conviction for armed robbery carried with it ineligibility for parole. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Trial counsel was not deficient in failing to inform defendant that he could have been charged with carjacking when neither defendant nor his trial counsel had any choice in the matter. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Appellant inmate's ineffective assistance of counsel claim was properly denied because the inmate failed to show that he received deficient advice which prejudiced his defense because, while the inmate argued that his trial counsel failed to explain that he had to surrender himself to authorities on the day he entered his plea, counsel provided competent and reasonable professional assistance during all stages of the guilty plea proceedings, and the mere fact that the inmate was confused about whether he had to surrender himself to authorities as soon as he entered his guilty plea was of no consequence. Busby v. State, 994 So. 2d 225 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 672 (Miss. 2008).

Defendant's counsel was not ineffective during plea proceedings where the trial judge and defense counsel went to great lengths to lead defendant through the plea process and made sure that defendant's guilty plea to the sale of cocaine was intelligent and voluntary; defendant testified under oath, during the guilty plea, that defendant was satisfied with counsel's representation. Coleman v. State, 979 So. 2d 731 (Miss. Ct. App. 2008).

Where appellant entered a guilty plea to conspiracy to commit capital murder, he was not entitled to post-conviction relief based on his ineffective assistance of counsel claim. Appellant admitted his guilt and stated that he was satisfied with the services of his two attorneys; the twenty-year sentence that appellant received was that mandated by the Mississippi Legislature. Payne v. State, 977 So. 2d 1238 (Miss. Ct. App. 2008).

Where an inmate's guilty plea for carrying a concealed weapon was based on the inmate's action of having a pistol under a blanket in a van, counsel was ineffective for allowing the inmate to plead guilty because there was no factual basis for the charge since Miss. Code Ann. § 97-37-1(2) allowed the inmate to possess a concealed firearm or deadly weapon within any motor vehicle; the inmate failed to establish ineffective assistance based on pleading guilty to being a felon in possession of a deadly weapon because, inter alia, the inmate admitted on the record that the inmate had been convicted of a felony. Knight v. State, 983 So. 2d 348 (Miss. Ct. App. 2008), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 267 (Miss. 2008), writ of certiorari denied by 555 U.S. 998, 129 S. Ct. 492, 172 L. Ed. 2d 363, 2008 U.S. LEXIS 8079, 77 U.S.L.W. 3265 (2008).

Where appellant pleaded guilty to two counts of sexual battery, his lawyer was not deficient because he allowed appellant to plead guilty to a faulty indictment which allegedly did not meet the requirements of Miss. Code Ann. § 99-7-9 and Miss. Unif. Cir. & County Ct. Prac. R. 7.06. The indictments charging defendant with committing sexual battery bore a signature of the grand jury foreman and each was stamped filed on October 20, 2005, by the circuit clerk; three unsigned and unfiled indictments in the case were not cause to grant appellant relief on his ineffective assistance of counsel claim. Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008).

Where appellant pleaded guilty to two counts of sexual battery, he failed to prove that trial counsel was ineffective for urging him to plead guilty; counsel told him that if he went to trial and was found guilty, he would be sentenced to two consecutive life sentences plus ten years. The fact that appellant pleaded guilty because he feared a harsher sentence did not render his plea involuntary. Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008).

In a post-conviction proceeding, appellant argued that he received ineffective assistance of counsel because his attorney allegedly conspired with the prosecution to force him to plead guilty to the sale of a controlled substance charge. However, appellant failed to support these allegations and stated that he was satisfied with the advice of his attorney during the plea colloquy; the issue was without merit. Davis v. State, 973 So. 2d 1040 (Miss. Ct. App. 2008).

Even though a public defender failed to prepare for a murder case until after an indictment, appellant inmate's request for post-conviction relief based on ineffectiveness of counsel was denied because there was no prejudice shown since the inmate confessed twice to killing the victim. Moreover, the inmate did not show how retained counsel's failure to conduct independent investigation of the evidence and failure to interview witnesses prejudiced the result in this case; at any rate, he stated that he was satisfied with her services during the plea hearing. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Post-conviction relief was denied in a drug case where appellant inmate offered no evidence, other than his own statements, to prove that counsel was ineffective; moreover, he did not meet the second prong of the test in Strickland v. Washington, 466 U.S. 668 (1984), since he did not show that he would not have entered a guilty plea if counsel had informed him of the felony charges against the State's witnesses. In addition, the inmate had stated during the plea process that he was satisfied with his attorney. Ramsey v. State, 973 So. 2d 294 (Miss. Ct. App. 2008).

Court could not find that appellant's trial counsel performed in an ineffective manner for failing to object to the amendment of an indictment charging appellant as an habitual offender under Miss. Code Ann. § 99-19-83 because it was clear that appellant's counsel was able to negotiate a reduced sentence for appellant, from a possible life sentence under Miss. Code Ann. § 99-19-83 to five years under Miss. Code Ann. § 99-18-81. Sowell v. State, 970 So. 2d 752 (Miss. Ct. App. 2007).

When appellant pleaded guilty to DUI manslaughter and two counts of DUI mayhem, he represented to the court that he was satisfied with counsel's representation; he was not entitled to post-conviction relief based on his claim that counsel was ineffective for failing to assist him in receiving a speedy trial and failing to advise him regarding the maximum and minimum sentences. Appellant failed to present any facts supportive of a speedy trial violation; and he was advised, on the record, of the minimum and maximum sentence. Moreno v. State, 967 So. 2d 701 (Miss. Ct. App. 2007).

In a case where defendant entered a guilty plea to possession of cocaine, post-conviction relief based on ineffective assistance of counsel was denied because there was nothing to support this other than defendant's own bare assertions; moreover, the record did not demonstrate that defendant was coerced into pleading guilty. Ealey v. State, 967 So. 2d 685 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly summarily denied in a case where defendant entered a guilty plea to a drug charge because there was no showing of ineffective assistance of counsel where defense counsel fulfilled his duty by advising defendant to plead guilty after viewing a tape of the drug transaction; moreover, defendant was unable to show that the outcome would have been different if counsel had investigated and found out that defendant had a prior felony conviction. Middlebrook v. State, 964 So. 2d 638 (Miss. Ct. App. 2007).

Post-conviction motion should not have been summarily dismissed under Miss. Code Ann. § 99-39-11 where defendant entered a guilty plea to kidnapping and received 20 years in prison because, although the plea was facially correct, the evidence presented by defendant indicated that his attorney misrepresented the sentence as probation, and this was a proper attack on the voluntariness of the plea and formed the basis for an ineffective assistance of counsel claim; however, ineffective assistance of counsel was not shown regarding the attorney's representation that a victim was unable to testify at the plea hearing on the issue of guilt nnocence or based on an incomplete transcript since no prejudice was shown. Mitchener v. State, 964 So. 2d 1188 (Miss. Ct. App. 2007).

Where defendant claimed that a plea agreement he entered into was coerced and that counsel was ineffective in not objecting to the trial court's sentence, defendant's motion for postconviction relief was properly denied because there was no evidence that defendant fulfilled his obligation, as he was required to do according to the plea agreement. Brown v. State, 963 So. 2d 577 (Miss. Ct. App. 2007).

Where appellant was convicted of selling methamphetamine by entering a plea of guilty, appellant's claim that his counsel failed to interview witnesses did not include which witnesses were not interviewed or any possible exculpatory testimony they would have provided; thus, appellant failed to meet the required burden of showing that counsel was deficient or that defendant was prejudiced by counsel's deficiency. Carroll v. State, 963 So. 2d 44 (Miss. Ct. App. 2007).

Motion for postconviction relief was properly dismissed without an evidentiary hearing in a case where a guilty plea was entered to the charge of burglary of an occupied dwelling because defendant offered no proof of what advice he was given about parole, other than the assertions made in the motion, and he was not eligible for such due to his conviction; also, defendant was told by a trial court that he was required to serve the full term of his sentence when he entered a guilty plea. Edge v. State, 962 So. 2d 81 (Miss. Ct. App. 2007).

Denial of the inmate's motion for postconviction relief was proper in part because he failed to show the ineffective assistance of counsel, as there was no proof that his attorney did not explain the charges to him; to the contrary, the inmate twice swore under oath that his attorney explained the charges to him and that he understood them. Knight v. State, 959 So. 2d 598 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 538 (Miss. 2007).

Defendant did not receive ineffective assistance of counsel by the failure to inform him of an amended sentence under Miss. Code Ann. § 97-21-33 because he was unable to show that he would have chosen to proceed to trial if he had been informed of such; defendant received a very favorable plea agreement under either sentencing scheme, and therefore it was unlikely that the outcome of the case would have been different. Coleman v. State, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

Defendant had not established that he was entitled to post-conviction relief for ineffective assistance of counsel when defendant entered a plea of guilty to the sale of cocaine; counsel was not required to apprise defendant of a defective indictment because the indictment was not defective even though it did not set forth the price and quantity of cocaine sold, and counsel properly advised defendant that he could be facing a statutory sentence of 30 years for the sale of cocaine. Dunlap v. State, 956 So. 2d 1088 (Miss. Ct. App. 2007).

Defendant had not established a claim for ineffective assistance of counsel when he claimed that the attorney assured him he would receive a sentence similar to the one imposed on his co-defendants if he entered a plea of guilty, because the record showed that during the plea proceedings defendant indicated on the record that he had not been promised anything and that he understood that the sentencing was entirely up to the trial court judge. Addison v. State, 957 So. 2d 1039 (Miss. Ct. App. 2007).

In an action in which appellant appealed from a judgment of the Calhoun county circuit court which denied his petition for post-conviction relief, the judgment was affirmed where appellant's counsel did not provide ineffective assistance; through various letters and conferences, appellant's counsel advised him that at trial the state could probably get a conviction, and appellant would potentially face five years' imprisonment, while the judge may be more lenient with a plea. Cougle v. State, 966 So. 2d 827 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where defendant entered a guilty plea to the sale of cocaine because he was unable to show that counsel acted deficiently in the context of a plea when defendant received the exact sentence that he bargained for. Rucker v. State, 955 So. 2d 958 (Miss. Ct. App. 2007).

In a case where defendant pled guilty to statutory rape, and the suspended portion of his split sentence was later revoked, there was no evidence that counsel acted deficient when a guilty plea was entered, and defendant expressed satisfaction with his counsel when he entered a plea and when he was released from incarceration; there was no evidence in the record of involuntariness or ignorance on the part of defendant in signing the plea agreement. Davis v. State, 954 So. 2d 530 (Miss. Ct. App. 2007).

In a case where defendant entered a guilty plea to two drug charges, no ineffective assistance of counsel was shown where he received a 17-year sentence instead of a life sentence required for habitual offenders; the attorney's advice to plead guilty was reasonable, and he raised every credible pre-trial motion and was prepared to go forward with the case. Minchew v. State, 967 So. 2d 1244 (Miss. Ct. App. 2007).

Dismissal of a petition for post-conviction relief was reversed and remanded for an evidentiary hearing because defendant made a prima facie showing that his attorney was deficient in recommending a plea to a weapons charge since there was no probable cause to stop a car where one taillight was working under Miss. Code Ann. § 63-7-13; however, there was no ineffective assistance of counsel shown based on a failure to explain an Alford plea or the failure to investigate. Moore v. State, 986 So. 2d 959 (Miss. Ct. App. 2007), reversed by 986 So. 2d 928, 2008 Miss. LEXIS 326 (Miss. 2008).

Post-conviction relief was denied in a case where a guilty plea was entered to the charge of sexual battery because there was no ineffective assistance of counsel; defendant indicated at his plea hearing that he was satisfied with the attorney's investigation of the case, the attorney was not deficient in advising defendant that he would probably not prevail at trial due to the confession, defendant never told the attorney that there was anything wrong with the confession, and the attorney was not deficient for failing to file an appeal since this right was waived by the guilty plea. Parkman v. State, 953 So. 2d 315 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied in a case where defendant entered a guilty plea to the charge of burglary of a dwelling because there was no ineffective assistance of counsel shown; defendant stated that he was not forced to give the plea, he indicated that he was satisfied with counsel's performance, and there was nothing to show that defendant was surprised by the plea proceedings, despite having a short amount of time to make a decision regarding the plea offer. Young v. State, 952 So. 2d 1031 (Miss. Ct. App. 2007).

In a case where defendant pled guilty to the sale of cocaine, post-conviction relief was denied because he did not show that he received ineffective assistance of counsel, and defense counsel properly informed defendant that he could have received the death penalty if he did not take the plea offer; moreover, even if defendant showed that the first prong of the ineffective assistance of counsel test was met, he did not allege that any imagined deficiency caused him prejudice. Belton v. State, 968 So. 2d 501 (Miss. Ct. App. 2007), writ of certiorari denied by 968 So. 2d 948, 2007 Miss. LEXIS 643 (Miss. 2007).

Defendant did not receive ineffective assistance of counsel in a statutory rape case where a guilty plea was entered; defendant was fully informed of the facts and circumstances surrounding his case, and he admitted that he was satisfied with his attorney's actions during the plea hearing. Plummer v. State, 966 So. 2d 186 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 553 (Miss. 2007).

Request for post-conviction relief was properly denied without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) where the record contradicted a claim that counsel mistakenly informed defendant about the charge he was pleading guilty to, a claim of coercion, and a claim of ineffective assistance of counsel; the case number was in the heading of the document, defendant acknowledged an intent to nolle prosse a remaining charge, and the parties took notice of this agreement at the plea hearing. Hoyt v. State, 952 So. 2d 1016 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where defendant entered a guilty plea to sexual offenses because he did not receive ineffective assistance of counsel; the decision to submit him to a mental evaluation prior to the entry of a plea rested with the judge, there was no failure to investigate or interview witnesses where the information was provided to the defense, the information provided did not rise to the level of exculpatory evidence, and defense counsel did not misrepresent the sentence to defendant's parents. McNeal v. State, 951 So. 2d 615 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was properly denied because he did not receive ineffective assistance of counsel during a guilty plea; there was no duty to investigate for defects in a proper indictment where no error was found in the fact that the instrument bore a grand jury date preceding the indictment's filing date, defendant did not give an adequate argument regarding which rights the attorney failed to advise him of, and it was merely trial strategy to fail to object to a statement from the victim's family at sentencing. Adams v. State, 950 So. 2d 259 (Miss. Ct. App. 2007).

Post-conviction relief was denied because defendant was unable to show that she received ineffective assistance of counsel in entering a guilty plea; an allegation that the attorney did not explain the charges or possible sentences adequately contradicted the sworn statements defendant gave during a guilty plea. Jones v. State, 948 So. 2d 499 (Miss. Ct. App. 2007).

Post-conviction relief was denied because two defendants were unable to show that they received ineffective assistance of counsel based on advice given about leniency promises allegedly made by police prior to their confessions; because there was no evidence that the statements allegedly made had anything to do with their confessions, the promises were not the proximate cause of such, and moreover defendants did not indicate that they were disappointed with counsel during the plea hearing. Holland v. State, 956 So. 2d 322 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief, filed after he pled guilty to two counts of murder, was properly dismissed without a hearing where counsel's advice that a trial could result in a guilty verdict and the death penalty did not support an argument of ineffectiveness; counsel had a duty to inform defendant of the possible outcomes of conviction. Booker v. State, 954 So. 2d 448 (Miss. Ct. App. 2006).

Trial court did not err under Miss. Code Ann. § 99-39-11(2) in denying petitioner an evidentiary hearing on his post-conviction petition because there was no evidence in the record other than his bald assertions that counsel performed inadequately; defendant's testimony at his sentencing hearing did not indicate any confusion as to the result of his guilty plea, and it also did not indicate any dissatisfaction with counsel. Knight v.

State, — So. 2d —, 2006 Miss. App. LEXIS 808 (Miss. Ct. App. Oct. 31, 2006), opinion withdrawn by, substituted opinion at, modified by 983 So. 2d 348, 2008 Miss. App. LEXIS 145 (Miss. Ct. App. 2008).

Post-conviction relief was denied in a case where defendant pled guilty to two counts of armed robbery, in violation of Miss. Code Ann. § 97-3-79, because his attorney did not give erroneous advice since a life sentence was a possible sentence if a jury had convicted him of both counts; the record showed that defendant actively participated in the robbery, and he knew that people were going to be robbed. Wortham v. State, 952 So. 2d 968 (Miss. Ct. App. 2006).

Defendant raised a claim of ineffective assistance of counsel which required a full evidentiary hearing where there was evidence that the victim's girlfriend poured boiling water on him, along with defendant's testimony that someone else committed this act, which was enough to raise a reasonable doubt that defendant committed the offense; this evidence may have changed the outcome had the parties gone forward. Hannah v. State, 943 So. 2d 20 (Miss. 2006).

Appellate court held the inmate was not deprived of effective assistance of counsel as the attorney helped reduce the outstanding charges against defendant. Jewell v. State, 946 So. 2d 810 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 56 (Miss. 2007).

Counsel was not ineffective for failing to investigate the police informant because, had defendant not pleaded guilty and gone to trial, the informant's background would have been relevant only for impeachment purposes, and in his petition to enter a guilty plea, defendant swore that his attorney had counseled him and advised him about the nature of the charge and all possible defenses. Deloach v. State, 937 So. 2d 1010 (Miss. Ct. App. 2006).

In a case involving a plea to the charge of gratification of lust, ineffective assistance of counsel was not shown where defendant only brought forth the unsworn allegations in his brief and the report of a doctor who examined a victim; he did not show that the attorney failed to investigate this evidence, explain how he obtained the information, or show that the attorney would have varied his course at trial. Knight v. State, 956 So. 2d 264 (Miss. Ct. App. 2006), substituted opinion at 959 So. 2d 598, 2007 Miss. App. LEXIS 444 (Miss. Ct. App. 2007).

Appellate court denied an inmate's motion for post-conviction relief because the inmate acknowledged at his plea hearing that his attorney was fully informed as to all of the facts and circumstances surrounding his case. Hill v. State, 935 So. 2d 416 (Miss. Ct. App. 2006), writ of certiorari dismissed by 942 So. 2d 164, 2006 Miss. LEXIS 766 (Miss. 2006).

Since an inmate was unable to show that he was prejudiced by an attorney's failure to subpoena a witness in a plea negotiation, a claim of ineffective assistance of counsel failed in a petition seeking post-conviction relief. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Inmate's petition for post-conviction relief was denied under Miss. Code Ann. § 99-39-11 because a transcript of a plea hearing failed to establish that counsel induced him into pleading guilty; there was a strong presumption of the validity of the statements made by the inmate during the actual plea hearing, and as such, a claim of ineffective assistance of counsel failed. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Defendant was not denied effective assistance of counsel as the record showed that defendant informed the court that he had discussed with his counsel all facts and circumstances relating to the crimes with which he was charged, and all elements of the crime and all facts that might aid in his defense. Brown v. State, 935 So. 2d 1122 (Miss. Ct. App. 2006).

Where appellant pled guilty to armed robbery, he was adequately advised by counsel as to his guilty plea and the record indicated that he said his attorney had discussed all the elements of the crime with him; in post-conviction proceedings, the court rejected his claim that he was not afforded the effective assistance of counsel. Ellis v. State, 952 So. 2d 251 (Miss. Ct. App. 2006).

Petition for post-conviction relief was denied without an evidentiary hearing where a plea was entered to armed robbery because, despite counsel's failure to investigate the type of weapon actually used, no prejudice resulted since an inmate failed to show that he would have proceeded to trial. Hinton v. State, 947 So. 2d 979 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 94 (Miss. 2007).

Appellate court found no merit to appellant's claims that his attorney deceived him into believing that he would receive a lighter sentence if he pled guilty, and that his attorney instructed him to lie to the trial court by stating that he had not been promised anything in return for his guilty plea where appellant had told the trial court that his plea was voluntary and that he was satisified with the assistance of his attorney. Jones v. State, 962 So. 2d 571 (Miss. Ct. App. 2006).

Colloquy between defendant and the court showed the lack of merit in his claim that counsel was ineffective. During his plea colloquy, defendant stated that he was satisfied with the advice of his counsel and stated that his counsel had fully and completely explained the charges that he was facing and any defenses that he would have; nothing in the record indicated that defendant's counsel was deficient in any way, and defendant stated specifically that no one, including his attorney, had induced or coerced him into making his plea. Strohm v. State, 923 So. 2d 1055 (Miss. Ct. App. 2006).

Trial court properly denied defendant's motion for postconviction relief after he pled guilty to armed robbery because he stated in his plea colloquy that he had not been coerced into pleading guilty and that he was satisfied with the advice of his attorney. Counsel's advice that defendant plead guilty was clearly within the range of competence demanded of attorneys in criminal cases. Williams v. State, 922 So. 2d 853 (Miss. Ct. App. 2006).

Post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine because there was nothing in the record to overcome the presumption that defendant received effective assistance of counsel, as defendant acknowledged under oath in his petition to enter a plea of guilty that his lawyer did all that anyone could do to counsel and assist him, and that he was satisfied with the advice and help that he received. Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006).

Any advice by counsel that defendant would be eligible for parole was incorrect and constituted deficient performance, and having shown deficient performance, defendant had to prove that he would not have pled guilty but for the incorrect advice; if his attorney improperly advised him of his eligibility for parole, defendant was entitled to a hearing to investigate his claim that he would not have pled guilty but for the incorrect advice. Garner v. State, 928 So. 2d 911 (Miss. Ct. App. 2006), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 252 (Miss. 2006), writ of certiorari denied by 549 U.S. 1060, 127 S. Ct. 677, 166 L. Ed. 2d 528, 2006 U.S. LEXIS 9138, 75 U.S.L.W. 3283 (2006), remanded by 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006).

Where defendant was charged with aggravated assault and possession of a firearm by a felon, his attorney told him that he would receive life without parole if he went to trial; defendant then entered a plea of guilty to aggravated assault. Because his attorney's advice was correct, defendant was afforded effective assistance of counsel. Brewer v. State, 920 So. 2d 546 (Miss. Ct. App. 2006).

Defendant did not receive ineffective assistance of counsel where, when questioned by the trial judge as to whether he understood that he was entering into an Alford appeal, and if he understood its consequences, defendant answered affirmatively; defendant also answered affirmatively when asked if defendant understood the minimum and maximum sentences for the crimes to which he was pleading; it was clear that defendant was not entitled to relief and the trial court was correct in refusing to grant an evidentiary hearing. Cole v. State, 918 So. 2d 890 (Miss. Ct. App. 2006), writ of certiorari dismissed by 927 So. 2d 750, 2006 Miss. LEXIS 213 (Miss. 2006).

Defendant did not carry his burden of proving that ineffective assistance of counsel led him to plead guilty to armed robbery when he otherwise would have asserted his innocence where defendant, in open court, had responded during his plea allocution that he was satisfied with the legal advice and services of his attorney. At no point in his plea of guilty and sentencing did defendant assert his innocence. Vandergriff v. State, 920 So. 2d 486 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of the inmate's petition; the inmate was unable to show that but for the ineffective assistance of counsel he would not have pled guilty because the inmate stated that he was pleased with his counsel's representation at the plea hearing. Further, the inmate's counsel had the armed robbery charge reduced to simple robbery. Ivy v. State, 918 So. 2d 84 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate did not establish that he was deprived of effective assistance of counsel during his plea hearing, because his mother and his sister testified that the inmate's attorney had told him that he would be pleading guilty to simple assault and would be sentenced to time served, and that testimony directly contradicted the inmate's testimony at the actual plea hearing where he acknowledged that he was pleading guilty to aggravated assault. Riggs v. State, 912 So. 2d 162 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief on the basis that the inmate claimed that he was denied effective assistance of counsel while securing a guilty plea, as the inmate did not present any facts supporting that claim. Ford v. State, 911 So. 2d 1007 (Miss. Ct. App. 2005).

Denial of an inmate's motion for post-conviction relief was affirmed as the inmate's claim that his guilty plea was not knowing and voluntary due to his counsel's alleged deficient performance was contradicted by the inmate's statements at the plea hearing that he understood the consequences of his plea and was satisfied with his counsel's performance. Gonzales v. State, 915 So. 2d 1108 (Miss. Ct. App. 2005).

Inmate failed to establish his claims that he was deprived of effective assistance of counsel because he was persuaded to plead guilty, and that his guilty plea was involuntary and was entered after being ill advised by his counsel, as his counsel was obligated to advise him that the potential consequences of trial and conviction of both counts could be a maximum of 120 years imprisonment, and the inmate acknowledged that he had been informed that a guilty plea would waive his right to a public and speedy trial by jury, his right to confront adverse witnesses, and his right to protection against self incrimination. Epps v. State, 926 So. 2d 242 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate provided nothing more than his own affidavit to establish that he was deprived of effective assistance of counsel and did not allege that had it not been for his counsel's alleged ineffectiveness that he would not have pled guilty. Covington v. State, 909 So. 2d 160 (Miss. Ct. App. 2005).

By entering a guilty plea to manslaughter, defendant did confess to the circuit court that he killed the victim under circumstances in which he was not defending himself. As such, when his counsel informed him that he could plead manslaughter, counsel did exactly what defendant said his counsel failed to do (inform him that he could plead "not in necessary self-defense"); in any event, if defendant had proceeded to trial, it was possible that he could have been convicted of murder and sentenced to life imprisonment, and counsel was not ineffective in advising defendant as to a plea to manslaughter. Barnes v. State, 920 So. 2d 1019 (Miss. Ct. App. 2005), writ of certiorari dismissed by 920 So. 2d 1008, 2005 Miss. LEXIS 602 (Miss. 2005), writ of certiorari dismissed by 921 So. 2d 344, 2005 Miss. LEXIS 761 (Miss. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 79 (Miss. 2006).

During the plea hearing, defendant acknowledged that he was a participant in the armed robbery, and described the events of the robbery. He told the judge that he had discussed the facts of the case with his attorney and his course of action; defendant's ineffective assistance of counsel claim lacked merit. Baldwin v. State, 923 So. 2d 218 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 141 (Miss. 2006).

Defendant failed to prove that his counsel had provided ineffective assistance in violation of the Sixth Amendment because, if defendant had remained dissatisfied after going to confer with his counsel before entering his guilty plea, he would have told the court, since he had done so before and the court had provided him with ample opportunities to say something. However, when he came back to the court and entered his guilty plea he testified that he was satisfied with his counsel. Jones v. State, 915 So. 2d 511 (Miss. Ct. App. 2005).

Where defendant stated that he was satisfied with his counsel's representation and his counsel had not pressured him into pleading guilty, the trial court found that his ineffective assistance of counsel claims were waived by his guilty plea, and where defendant was facing a life sentence and received a seven-year incarcerative term, he failed to prove his claim of ineffective assistance of counsel. Smith v. State, 928 So. 2d 190 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 237 (Miss. 2006), writ of certiorari denied by 549 U.S. 894, 127 S. Ct. 202, 166 L. Ed. 2d 164, 2006 U.S. LEXIS 5463, 75 U.S.L.W. 3170 (2006).

Appellant did not receive ineffective assistance of counsel that rendered her plea involuntary when her counsel allegedly told her that she would receive a more lenient sentence by pleading guilty as the trial judge informed her during a colloquy at the plea hearing of the appropriate sentencing range associated with her plea and appellant stated that she understood. Smith v. State, 919 So. 2d 989 (Miss. Ct. App. 2005).

Denial of the inmate's petition for postconviction relief after he had pled guilty to manslaughter was proper because counsel was not ineffective since the inmate had failed to demonstrate that his attorney's advice was not well within the range of competence required to attorneys in criminal cases. Hardiman v. State, 904 So. 2d 1225 (Miss. Ct. App. 2005).

Defendant was not prejudiced after defense counsel was excused from the courtroom during a plea proceeding where the only issue raised after counsel's departure was the trial judge's decision to retain jurisdiction over the case. In any event, defendant was represented by another attorney at that time with whom he was familiar. McBride v. State, — So. 2d —, 2005 Miss. App. LEXIS 314 (Miss. Ct. App. May 10, 2005), opinion withdrawn by, substituted opinion at 914 So. 2d 260, 2005 Miss. App. LEXIS 524 (Miss. Ct. App. 2005).

In his postconviction action, the record showed that at the plea hearing, defendant specifically announced that he was satisfied with the performance of his counsel. Therefore, it could not be stated that his attorney's performance was deficient, or that he was deprived of a fair trial; further, is was clear from that record that defendant knew the trial court was rejecting his original plea agreement, that he then entered his plea knowingly and voluntarily, and as such, he was not entitled to an evidentiary hearing. Reed v. State, 918 So. 2d 776 (Miss. Ct. App. 2005).

Defendant failed to satisfy his burden of overcoming the strong presumption that an attorney's conduct fell within the wide range of professional assistance where, based on the detailed colloquy between defendant and the trial judge, it was clear that defendant personally understood the nature and consequences of his guilty plea. Beene v. State, 910 So. 2d 1152 (Miss. Ct. App. 2005).

Defendant, who entered a guilty plea pursuant to a plea agreement, contended in his postconviction action that he received ineffective assistance of counsel since his counsel failed to file a motion for discovery. However, defendant provided no assertion of critical evidence that would have been discovered had it not been for counsel's alleged deficiency; moreover, the record was clear that on two separate occasions, defendant answered the trial court that he was satisfied with trial counsel's performance, and therefore, defendant did not meet his burden of proof that counsel was ineffective. Moore v. State, 906 So. 2d 793 (Miss. Ct. App. 2004).

Defendant emphasized his attorney's failure to file motions to dismiss on the grounds of due process and speedy trial violations in arguing his counsel's ineffectiveness. However, he signed the guilty plea petition as evidenced by the exhibit he provided attached to his appellate brief and the latter issue was without merit; in addition, he did not assert any critical evidence that would have been discovered had it not been for counsel's alleged deficiencies, and he failed to object to counsel's representation when given the opportunity. Dearman v. State, 910 So. 2d 708 (Miss. Ct. App. 2005).

Defendant asserted that under Miss. Code Ann. § 47-7-33 (Rev. 2004), a priorly convicted felon could not be given a suspended sentence. However, that information did not appear in the indictment or the record, and in fact, he received a very favorable sentence considering the sentencing options available for his offense of the sale of cocaine; thus, where he stood mute at sentencing, he could not later claim prejudice or that counsel was ineffective and his petition for post-conviction relief was properly denied. Ruff v. State, 910 So. 2d 1160 (Miss. Ct. App. 2005).

Where defendant admitted that he had committed the offense of statutory rape and entered a plea of guilty to the charge, the appellate court rejected his claim of ineffective assistance of counsel. There was no suggestion that defendant had received inaccurate information on his parole eligibility in deciding to enter a plea of guilty; defendant also failed to prove that he was prejudiced by counsel's failure to investigate the facts of the case or present any evidence in mitigation. Carpenter v. State, 899 So. 2d 916 (Miss. Ct. App. 2005), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 274 (Miss. 2005).

Where appellant was charged with sexual battery, his defense attorney was not ineffective for allowing him to plead guilty for aggravated assault. Aggravated assault is a lesser crime than sexual battery and carries a lower maximum sentence. Pearson v. State, 906 So. 2d 788 (Miss. Ct. App. 2004).

With regard to defendant's claim that his attorney had breached a plea agreement made with the prosecution for a five-year sentence for the crime of conspiracy to manufacture methamphetamine, the court found that the negotiated agreement was not withdrawn because of the attorney's actions or inactions but because of defendant's felony history and his use of family members in his criminal activities. Sweat v. State, 910 So. 2d 12 (Miss. Ct. App. 2004), affirmed in part and reversed in part by 912 So. 2d 458, 2005 Miss. LEXIS 661 (Miss. 2005).

Petitioner had testified himself that the elements of the charge against him were fully explained and the guilty plea petition had also required him to indicate whether or not he was dissatisfied with his counsel's representation. He made no such objection at his plea hearing when given the opportunity, and he had previously pled guilty to felony and misdemeanor offenses; therefore, there was more than reasonable evidence to prove that he fully understood the plea procedure and his claim that counsel was ineffective, by failing to explain the elements of the offense before he entered his guilty plea, was without merit. Jennings v. State, 896 So. 2d 374 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 185 (Miss. 2005).

Post-conviction relief was properly denied in a D.U.I. case because the driver's counsel was not ineffective, as his attorney properly informed him that if he did not accept the offered plea bargain, the State would charge him as a habitual offender, and the driver's claim that he could not have been charged as a habitual offender, based on his contention that at least one of his prior offenses occurred before the habitual offender statute went into effect, was clearly wrong. Lawson v. State, 882 So. 2d 783 (Miss. Ct. App. 2004).

Defendant never told the trial judge in his postconviction relief motion what additional discovery materials would have disclosed nor how such material would have affected his decision to plead guilty, so that he did not demonstrate ineffective assistance of counsel that would have led to a different result; even taking defendant's claims of ineffective assistance of counsel as true, he did not show that the performance of his trial counsel caused him to plead guilty or was in any other manner deficient. Chandler v. State, 883 So. 2d 614 (Miss. Ct. App. 2004).

Inmate was not deprived of effective assistance of counsel prior to pleading guilty; the appellate court noted that at the inmate's hearing he admitted to committing the crimes, admitted that he was voluntarily entering his plea, and that his attorneys had properly advised him concerning his constitutional rights and the consequences of pleading guilty. Farris v. State, 881 So. 2d 392 (Miss. Ct. App. 2004).

Defendant's guilty plea petitions for grand larceny and possession of cocaine indicated that defendant was informed of the possible sentence that defendant could receive and that defendant was satisfied with counsel's representation; hence, there was no merit to defendant's claim of ineffective assistance of counsel and the court properly denied defendant's petition for postconviction relief. Dockens v. State, 879 So. 2d 1072 (Miss. Ct. App. 2004).

Defendant's petition to enter a guilty plea and the transcript reflected that he was aware that he would be pleading guilty to the amended charge of attempted possession of precursor chemicals, and that his attorney had gone over both the petition to enter a guilty plea and the amended charge with him. Thus, his assertion that his plea was unintelligent and involuntary was rejected, as was his argument that counsel was ineffective in failing to explain that an "attempted possession" conviction did not carry a lesser sentence. Even if that had been true, defendant received a favorable plea agreement (all but five years suspended), he had admitted guilt and that he understood the nature of the offense, and he failed to show the outcome of a jury trial would have been different. Green v. State, 880 So. 2d 377 (Miss. Ct. App. 2004).

Court properly denied defendant's motion for postconviction relief after defendant pled guilty to sexual battery; trial counsel did not provide erroneous advice in advising defendant that the 14-year-old victim's consent was not an issue for the jury to address. Under the plain language of Miss. Code Ann. § 97-3-95(1)(c), the State would not have had to address the issue of consent; State would have only had to show that the victim was between the ages of 14 and 16, that defendant was more than 36 months older than the victim, and that defendant had engaged in sexual penetration with the victim. Bates v. State, 879 So. 2d 519 (Miss. Ct. App. 2004).

Because neither the plea transcript nor any other evidence showed that defendant had ever received correct information about his parole eligibility, he successfully alleged that he had received ineffective assistance of counsel due to his attorney's incorrect advice about his parole eligibility and he was entitled to an evidentiary hearing to explore the merits of his claim. Thomas v. State, 881 So. 2d 912 (Miss. Ct. App. 2004).

There was no indication in the record other than the allegations of defendant in his brief that counsel's performance was ineffective. The trial judge asked defendant specifically if he had been coerced or threatened into pleading guilty, and defendant answered in the negative; defendant had admitted to committing armed robbery, though he later asserted that only a simulated weapon was used; thus, defendant failed to meet the statutory burden of proof imposed to establish a prima facie showing of ineffective assistance. Ray v. State, 876 So. 2d 1032 (Miss. Ct. App. 2004).

Appellant was properly denied postconviction relief, because, regardless of a procedural bar, it was clear from the record of the plea colloquy that appellant was informed of the consequences of a guilty plea; thus, appellant's claim that counsel was ineffective for failing to inform appellant of the consequences of a guilty plea was without merit. Williams v. State, 872 So. 2d 711 (Miss. Ct. App. 2004).

Appellant was properly denied postconviction relief, because appellant's guilty plea, statements he made during the plea hearing, and his attorney's signed certificate demonstrated that there had been effective assistance of counsel. Jackson v. State, 872 So. 2d 708 (Miss. Ct. App. 2004).

Circuit court properly dismissed defendant's motion for post-conviction relief alleging that her plea of guilty was involuntarily and unknowingly made, because she received ineffective assistance of counsel in that her attorney did not adequately communicate with her or advise her of the consequences of her plea. At the plea proceeding, defendant was asked whether her attorney properly advised her before pleading guilty to the charges, and she answered, "yes." Graves v. State, 872 So. 2d 760 (Miss. Ct. App. 2004).

In postconviction action, where petitioner alleged that the guilty plea was not intelligently entered, and that counsel had misadvised petitioner, petitioner did not demonstrate that the outcome would have been different but for counsel's actions. Even assuming that counsel made statements causing petitioner to believe that petitioner was pleading to manslaughter and failed to inform petitioner of the maximum penalties, the circuit judge's questioning during the plea hearing cleared up any misconception, as the circuit judge clearly explained the maximum penalties for murder, and that there was no minimum sentence or fine for murder. Brown v. State, 876 So. 2d 422 (Miss. Ct. App. 2004).

With respect to the claim that counsel failed to investigate, defendant provided no evidence or even assertions of what exactly counsel should have investigated or how such investigation would have impacted his case favorably; in the absence of any coercive behavior, counsel did not act incorrectly in offering an opinion, which, in light of the State's agreement to forgo life imprisonment, was based on more than reasonable probability. Garner v. State, 864 So. 2d 1005 (Miss. Ct. App. 2004).

Defendant did not prove ineffective assistance of counsel where he signed a petition to enter a plea of guilty in which he stated that his lawyer was competent and defendant was fully satisfied with the advice and help he received; although defendant complained about the lack of pretrial investigation, he failed to tell the trial judge or the appellate court which facts in mitigation a further investigation would have revealed, so that defendant did not demonstrate prejudice, having not alleged anything that would have led to a different result. Hebert v. State, 864 So. 2d 1041 (Miss. Ct. App. 2004).

Inmate's postconviction relief petition was properly denied because the inmate did not produce affidavits to show that defense counsel had failed to investigate two drug charges and to interview witnesses in the case before advising the inmate to plead guilty; moreover, the inmate had given a sworn statement contradicting these complaints at the plea hearing. Steen v. State, 868 So. 2d 1038 (Miss. Ct. App. 2004).

Defense counsel was not ineffective under Miss. Const. Art. III, § 26 where the inmate was allegedly not informed, prior to the inmate's guilty plea, that the inmate's failure to take and carry away property prevented the inmate from satisfying the elements for armed robbery under Miss. Code Ann. § 97-3-79; the inmate did not have to take and carry away the personal property of another to satisfy the elements of armed robbery. Putnam v. State, 877 So. 2d 468 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 861 (Miss. 2004).

Appellate court found no indication that defendant's attorney had performed in a deficient manner where defendant told the judge he was guilty of manslaughter, affirmed that his attorney had explained everything in his petition to plead guilty and that he understood everything in the petition; there was no evidence that defendant's attorney performed in a deficient manner or that any supposed deficiency in any way prejudiced defendant. Thomas v. State, 861 So. 2d 371 (Miss. Ct. App. 2003).

Because defendant's guilty plea petition failed to mention any deficient performance by his counsel and defendant represented that he was satisfied with counsel's representation, he did not receive ineffective assistance. Swindoll v. State, 859 So. 2d 1063 (Miss. Ct. App. 2003).

Inmate entered his guilty plea in a manner that was knowing, voluntary, and intelligent, and he testified that no one made any promises, coerced, or induced him into pleading guilty; the record of the hearing belied the inmate's claims that counsel was ineffective for allegedly misleading him and coercing him into pleading guilty. Glass v. State, 856 So. 2d 762 (Miss. Ct. App. 2003).

Petitioner's attorney did not render ineffective assistance of counsel where the petitioner was aware of his rights and in his petition to enter a plea of guilty and in open court, the petitioner stated that he was satisfied with the assistance and counsel his attorney provided; whether or not the petitioner received a second hearing on the issue of a bond did not rise to the level of prejudice to the defense of his case. Payton v. State, 845 So. 2d 713 (Miss. Ct. App. 2003), writ of certiorari denied by 859 So. 2d 392, 2003 Miss. LEXIS 436 (Miss. 2003), writ of certiorari denied by 540 U.S. 1078, 124 S. Ct. 931, 157 L. Ed. 2d 751, 2003 U.S. LEXIS 9076, 72 U.S.L.W. 3392 (2003).

Petition for post-conviction relief was properly denied because an inmate did not receive ineffective assistance of counsel when counsel failed to pursue an insanity defense after a psychiatric report did not reveal any evidence of insanity; moreover, even if counsel improperly told the inmate not to mention medications during the plea process, there was no evidence that the outcome of the case was effected, and any misconception about the inmate's sentence was corrected by the trial court. Daughtery v. State, 847 So. 2d 284 (Miss. Ct. App. 2003).

Defendant did not receive ineffective assistance of counsel where, although defendant received erroneous advice from his lawyer concerning the length of the sentence pursuant to his guilty plea, the attorney advised the judge of the misinformation during the hearing; when defendant was asked if he understood the correct sentence, he responded that he did. Johnson v. State, 848 So. 2d 906 (Miss. Ct. App. 2003).

Defendant's trial counsel was not ineffective after defendant signed his guilty plea, trial counsel gave defendant an honest assessment of defendant's chances of prevailing in a retrial and the consequences that would flow from a guilty verdict; the real reason that defendant took the plea deal was that he feared he would be convicted and sentenced to life in prison, and that this would come to fruition had little to do with the attorney's performance. Jones v. State, 844 So. 2d 499 (Miss. Ct. App. 2003).

Defendant did not receive ineffective assistance of counsel in entering guilty plea to 2 counts of armed robbery, where counsel gave defendant accurate information about consequences of being found guilty after trial, defendant swore under oath that plea was voluntary, trial court questioned defendant as to voluntariness of plea prior to plea hearing, and defendant had prior experience in dealing with felony charges and was familiar with court proceedings. Roland v. State, 666 So. 2d 747 (Miss. 1995).

Standard generally applicable to determine claims of ineffective assistance of counsel is also applicable to judge counsel's performance in entry of guilty plea. Roland v. State, 666 So. 2d 747 (Miss. 1995).

A defendant who was convicted of armed robbery was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether he was afforded ineffective assistance of counsel during the plea process, where the defendant alleged that his attorney erroneously informed him that if he accepted the prosecution's plea bargain offer of 15 years imprisonment he would be eligible for parole after serving 3 years and 9 months of his sentence, and that he would not have accepted the prosecution's plea bargain offer had he known that he would be ineligible for parole for 10 years pursuant to § 47-7-3(1)(d), which provides that a person convicted of robbery and sentenced to more than 10 years imprisonment shall not be eligible for parole until after serving at least 10 years of the sentence. Alexander v. State, 605 So. 2d 1170 (Miss. 1992).

A capital murder defendant was not denied effective assistance of counsel on direct appeal by his attorney's alleged failure to bring to the Supreme Court's attention a plea bargain with an accomplice who testified as a witness, where the Supreme Court was well aware that the accomplice had been permitted to plead guilty to manslaughter and that he had been sentenced to 15 years' imprisonment but had served only 2 ½ years. Culberson v. State, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991).

A defendant who, in reliance upon his counsel's advice that he could receive the death penalty at a second trial, following upon a first trial conviction and life sentence for murder, entered a guilty plea prior to such second trial and was sentenced to life imprisonment, could not withdraw his guilty plea on the grounds that it was entered as a result of ineffective assistance of counsel, where, at the time given, counsel's advice was correct, and became incorrect only several years later when the United States Supreme Court and the Mississippi Supreme Court ruled that the double jeopardy clause of the state and federal constitutions precluded imposition of the death penalty when defendant had previously been sentenced to life imprisonment for the same crime. Odom v. State, 498 So. 2d 331 (Miss. 1986).

148. — — Jury selection, ineffectiveness of counsel.

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, it could not be assumed that certain jurors failed to respond to a direct question during voir dire; furthermore, there was no evidence that the attorney orchestrated the situation of defendant entering the courtroom carrying a small child since it was entirely possible that defendant himself, independent of any direction from his attorney, decided to bring the baby into the courtroom. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, defendant's claims that his attorney incorrectly informed him that the maximum penalty for felony child abuse was 20 years instead of the correct maximum sentence, which was life in prison, was without merit; the statement made to the jury during voir dire did not say that 20 years was the maximum penalty for felony child abuse but instead merely suggested to the jury the possibility that defendant could go to prison for 20 years, which was a valid possibility under Miss. Code Ann. § 97-5-39(2)(a). Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Trial court properly denied defendant's motion for post-conviction relief where defendant was not entitled to a jury of any particular racial composition; therefore, defendant could not show that counsel was deficient in failing to object to an all-white jury. It was impossible to prove that counsel's objection to the jury composition would have created a different result if no original verdict was reached. Shumpert v. State, 983 So. 2d 1074 (Miss. Ct. App. 2008).

Defendant alleged that defendant was prejudiced because a juror was thought to be a blood relative of the victim's mother, but the juror in question and the victim's mother testified that they were not related and defendant failed to show that the juror and the victim's mother were close; thus, defendant's counsel was not ineffective because: (1) defendant failed to put forth any proof that counsel's failure to object to the juror was not a strategic move; and (2) the defendant showed no prejudice. Scott v. State, 965 So. 2d 758 (Miss. Ct. App. 2007).

No evidence was presented to indicate that any jurors with law enforcement connections were anything other than fair and impartial; in the face of the jurors' statements that they would be fair and impartial, defendant's attorney did not err in not challenging the jurors for cause or in not using peremptory strikes against them. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

In a case where defendant was convicted of several crimes relating to the arson and burglary of a residence, he failed to show that he received ineffective assistance of counsel at trial; he failed to show that defense counsel had a duty to strike a juror that was a distant relative of the victims, and there was no showing of bias. McCollins v. State, 952 So. 2d 305 (Miss. Ct. App. 2007).

In a possession and sale of a controlled substance case, as the juror in question was defendant's aunt, it was reasonable trial strategy to allow her to serve as a juror. Thus, counsel was not ineffective for failing to challenge the juror for cause. McDonald v. State, 921 So. 2d 353 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 159 (Miss. 2006).

Questions posed in voir dire by the State regarding whether the jurors would have difficulty returning a guilty verdict due to religious, moral, or personal bias, were not attempts by the State to persuade the jurors to vote one way or another. It was clear from the transcript that the prosecutor was merely determining whether the jurors could be fair in their deliberation if certain facts were established; thus, counsel was not ineffective in failing to object to said questions. Herrington v. State, 911 So. 2d 545 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 601 (Miss. 2005).

In a capital murder case, defendant did not receive ineffective assistance of counsel through failure to use all of the peremptory challenges available since each juror concluded that they could have been fair and impartial if selected to sit on the jury; defendant failed to show that any prejudice resulted from the failure to strike jurors. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Questions posed in voir dire by the State regarding whether the jurors would have difficulty returning a guilty verdict due to religious, moral, or personal bias, were not attempts by the State to persuade the jurors to vote one way or another. It was clear from the transcript that the prosecutor was merely determining whether the jurors could be fair in their deliberation if certain facts were established; thus, counsel was not ineffective in failing to object to said questions. Herrington v. State, 911 So. 2d 545 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 601 (Miss. 2005).

Defendant's claims of ineffective assistance of counsel in his trial for tax evasion lacked merit; defendant failed to cite any authority supporting the claim that his counsel's failure to request a change of venue demands reversal. Defendant also failed to cite any authority to support his argument that defense counsel rendered ineffective assistance by failing to make a challenge during jury selection. King v. State, 897 So. 2d 981 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 224 (Miss. 2005).

Court found no ineffective assistance of counsel in the failure of attorneys for an inmate to object to the State's use of peremptory strikes in connection with the inmate's capital murder trial because (1) the inmate failed to show any prejudice, and (2) the attorneys could well have thought that the State had adequate race neutral reasons for the State's strikes, and there was no requirement that the attorneys had to make motions that they did not believe would succeed. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Issue raised at trial and on direct appeal from an inmate's capital murder conviction concerning the exclusion of a juror for failing to meet the qualifications of Miss. Code Ann. § 13-5-1 was found to be without merit, and the issue was therefore barred pursuant to Miss. Code Ann. § 99-39-21(2); because the trial court committed no error in excusing this juror and another juror for not meeting the qualifications under Miss. Code Ann. § 13-5-1, then the attorneys were not ineffective for failing to object to the jurors' dismissal, and in any event, the attorneys' decisions regarding the final composition of the jury were generally determined to be matters of trial strategy. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Trial counsel's failure to raise Batson challenges to the prosecution's exercise of peremptory challenges was not ineffective representation of counsel as it was a tactical decision based on the counsel's understanding of the law and the inmate's concurrence that he did not wish to have his selection of the jury challenged. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Trial counsel failed to argue that the trial court erred in denying his request to to allow individually sequestered voir dire; however as the inmate failed to show that the request would have been allowed if the attorney had argued, or that a different jury panel would have resulted, the trial counsel's failures did not constitute ineffective representation. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of effective representation simply because the trial counsel did not ask questions that the inmate believed was necessary to cure the judge's voir dire as the questions the inmate wanted his counsel to ask would have been redundant, and the inmate failed to show how he was prejudiced by his counsel's voir dire. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of effective representation because his trial counsel did not try to rehabilitate jurors who were excused because they stated they could not impose the death penalty due to religious reasons as the inmate failed to prove that the jurors could have been rehabilitated. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of his right to effective representation because his trial counsel failed to excuse eight jury members who had relationships with the victim or his family or the law enforcement community, as mere acquaintance or even family relationships with parties or those related to parties is not sufficient to require that a juror be excused for cause. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Trial counsel's failure to request jury questionnaires was not ineffective representation as the inmate failed to cite any legal authority that not requesting jury questionnaires was ineffective representation. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

There was no merit to defendant's claim of ineffective assistance of counsel based on counsel's failure to object to exclusion of blacks from jury where guilt phase of trial was final before decision in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

149. — — Conduct of trial, ineffectiveness of counsel.

In defendant's felony child abuse case under Miss. Code Ann. § 97-5-39(2)(a), counsel was attempting to prevent the jury from hearing any more testimony about the lingering effects of the child's injuries by stipulating as to the child's condition; the court could not find this action deficient. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

In a carjacking case, even though an indictment and a jury instruction lacked the specific language "from another person's immediate actual possession," as set forth in Miss. Code Ann. § 97-3-117(1), they were sufficient because the use of the name of the victim was the equivalent of such. Therefore, there was no due process violation, and defense counsel was not ineffective for submitting the instruction to the jury. Perryman v. State, 16 So. 3d 41 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

In a possible hybrid representation case, defendant's ineffective assistance of counsel claim failed because there was no support in the record for defendant's allegations that counsel was unprepared for trial or that he made disparaging remarks to defendant during the trial. Jackson v. State, 1 So. 3d 921 (Miss. Ct. App. 2008).

In appellant's capital murder case, counsel was not ineffective for failing to adequately investigate and present the motion to transfer venue because counsel filed a motion to change venue and supported that motion with numerous affidavits and all known relevant press documentation. The trial court held a hearing and determined that a fair trial could be held in Union County. Howell v. State, 989 So. 2d 372 (Miss. 2008).

Defendant's retained counsel was not ineffective in informing the jury that defendant was a habitual offender where that information was included in the indictment. Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Where defendant was convicted of armed robbery, kidnapping, and rape, the record was not sufficiently developed to support his claim that counsel rendered ineffective assistance by failing to: properly investigate the case, call additional witnesses, request a continuance for additional time to prepare, file a motion asserting defendant's right to a speedy trial, file a motion to suppress the 911 tape, or call a DNA expert to rebut the State's DNA evidence. Defendant did not mention which witnesses his attorney failed to contact; since defendant alleged that his attorney should have requested more time to prepare for trial, it was unclear how he was prejudiced by his attorney's failure to request a speedy trial. Burton v. State, 970 So. 2d 229 (Miss. Ct. App. 2007).

In a drug case, defendant did not receive ineffective assistance of counsel because (1) he offered no evidence to rebut the presumption that the jury had been properly sworn, so no objection by counsel was required; (2) defense counsel was not required to request an instruction regarding an accomplice because the State's evidence did not rest upon the testimony of two others involved; (3) defense counsel's failure to request an additional instruction when mention was made of defendant's prior incarceration was not deficient where an objection was made immediately and a curative instruction was given; and (4) the failure to object to defendant's criminal record was not deficient since the testimony of a correctional department custodian was permissible to authenticate such under Miss. R. Evid. 901. Vardaman v. State, 966 So. 2d 885 (Miss. Ct. App. 2007).

Record did not affirmatively show ineffective assistance of counsel of constitutional dimensions where a very thorough motion for pre-trial discovery was in fact made, and defendant failed to identify any witnesses who should have been interviewed or whose testimony would have strengthened his defense; defendant identified no aspect of his attorney's performance that suggested a failure to investigate the circumstances and law surrounding his case, and the sentence defendant received was in accord with the applicable statutes. Wynn v. State, 964 So. 2d 1196 (Miss. Ct. App. 2007).

Defendant's counsel filed numerous pretrial motions, including his successful motion to offer evidence of the first victim's past sexual behavior, presented numerous witnesses for the defense, and succeeded in having count two of the indictment dismissed; thus, defendant's ineffective assistance of counsel claim failed. Poynor v. State, 962 So. 2d 68 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Counsel was not ineffective for failing to object to: (1) the confidential informant's narration of a videotape of a controlled drug buy was proper as he testified to matters he perceived first-hand; (2) a prosecutor's statement during voir dire because he did not elaborate on how the statement was improper or prejudiced the outcome of his trial; and (3) the prosecutor's improper remarks during closing argument because, even though counsel should have objected to the remarks, defendant was not prejudiced by counsel's failure to object since the jury would have still found him guilty. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

Defendant failed to allege any prejudice stemming from an admission by trial counsel that defendant was a habitual offender as the statement was made outside the presence of the jury, with only opposing counsel, the judge, and court staff present; also, since defendant was sentenced to a mandatory term of life as a habitual offender, the remarks made to the court had no impact on the result of defendant's trial, and thus defendant's counsel was not ineffective. McCoy v.

State, 954 So. 2d 479 (Miss. Ct. App. 2007).

In a case involving capital murder and aggravated assault, defendant did not receive ineffective assistance of counsel based on a failure to interview a potential alibi witness, a failure to have gun powder residue tests performed, or the failure to object to the prosecutor's use of a nickname for defendant; defendant did not identify the alibi witness or the substance of the potential testimony, a negative gun powder residue test would not have conclusively proven defendant's innocence, and an objection to the prosecutor's remark was overruled. Sanders v. State, 939 So. 2d 842 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate because his counsel were not ineffective; after appointment, counsel began their defense with a vigorous volley of motions and his attorneys were able to secure a plea bargain that relieved him of a possible death sentence. Harris v. State, 944 So. 2d 900 (Miss. Ct. App. 2006).

Defendant failed to show that his trial counsel was ineffective because (1) a circumstantial evidence instruction would not have been proper under the facts of the case, and the failure of trial counsel to request such an instruction was not error; (2) the failure of counsel to object to the prior statement of an alleged accomplice as hearsay was not error because the trial court properly allowed the former statement of the accomplice to be used for impeachment, and any objection to hearsay by trial counsel would not have resulted in any change in the outcome; and (3) trial counsel did not err in not requesting a lesser-included offense instruction of receiving stolen property because his theory and defense were that the State did not prove its case, and an all or nothing — guilty or acquittal — trial strategy was proper. Long v. State, 934 So. 2d 313 (Miss. Ct. App. 2006), writ of certiorari dismissed by 939 So. 2d 805, 2006 Miss. LEXIS 610 (Miss. 2006).

In a capital murder case, an inmate's ineffective assistance of counsel claims were either procedurally barred, or, even if not procedurally barred, were without merit, under the following circumstances: (1) the inmate's counsel did not fail to adequately develop evidence to impeach a witness because counsel conducted a thorough cross-examination of the witness, and pursued a line of questioning attempting to call into doubt whether the witness could really have overheard a conversation in which the inmate stated that he sold the guns on the street; (2) counsel's representation of another witness in a prior action that was completely unrelated to the inmate's case was not a conflict of interest, and counsel conducted a full cross-examination of the witness; (3) counsel produced several witnesses placing the inmate at a nightclub on the night of the murders; (4) counsel did present a case in mitigation for the jury to consider; (5) counsel's closing argument was coherent and not a poor strategic choice; and (6) the prosecutor's arguments using scriptural, religious, or biblical references were proper because the prosecutor was responding to scriptural or religious arguments made by defense counsel. Manning v. State, 929 So. 2d 885 (Miss. 2006).

In an ineffective assistance of counsel claim, defendant pointed to his trial counsel's failure to object to leading questions, failure to object to jury instructions containing assumptions of fact, failure to effectively cross-examine, failure to adequately investigate his case, failure to call witnesses, and numerous other grounds; however, defendant's trial counsel was not ineffective based on the record. Any errors defendant's trial counsel might have committed in the case were not prejudicial to the defense so as to create a reasonable probability of a different outcome in the absence of such errors; thus, defendant's ineffective assistance of counsel claim failed. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

Defendant alleged that he was denied his constitutional right to effective assistance of counsel, but the aid given by defendant's trial counsel was effective and presented no basis for reversal on appeal because (1) the testimony at trial clearly indicated that the victim's body had been moved and that any knife which might have been at the crime scene was not found until later; (2) during cross-examination, defendant's counsel strongly questioned law enforcement as to how thorough their search and investigation of the scene was; (3) defendant failed utterly to demonstrate that character witnesses would have changed the outcome in his case, and he presented no evidence indicating that the failure to call character witnesses prejudiced his defense; (4) counsel's decision, not to ask that the jury be allowed to view the crime scene, fell within the ambit of reasonable trial strategy; (5) the decision of trial counsel to not discuss any violent incidents of the victim could very well have been predicated upon the fact that any violent propensities of defendant could then be brought out by the State; and (6) it was unclear from defendant's argument what other evidence he would have had his counsel present regarding his self-defense claim. Sullinger v. State, 935 So. 2d 1067 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 423 (Miss. 2006).

In a murder case, defendant's trial counsel was not ineffective because (1) counsel's failure to file a motion to suppress a witness from testifying did not require reversal as the State withdrew her as a witness and the trial court instructed the jury to disregard the testimony that she had made up to that point and to disregard the State's remarks in its opening statement regarding the witness; (2) defense counsel's opposition to a lesser-included manslaughter jury instruction was appropriate; (3) counsel's failure to object to the State's closing argument statement that the police did a good job did not merit reversal; (4) trial counsel was not deficient in failing to investigate whose shoes were at the victim's apartment because neither defendant nor any other witness testified that they saw anyone else at the apartment when the victim was shot; and (5) defendant did not show that the failure to reduce her many statements to writing amounted to ineffective assistance of counsel. Reynolds v. State, 913 So. 2d 290 (Miss. 2005).

Defendant's claim that his counsel's failure to make certain objections at trial constituted ineffective assistance was without merit where his claim was insufficient to rebut the presumption that his counsel was competent and conducted trial in a reasonable manner; proper evaluation of defendant's other two contentions required an examination of evidence beyond the record before the appellate court, and for that reason, defendant's entire ineffective assistance claim was better considered in postconviction relief. Porter v. State, 885 So. 2d 92 (Miss. Ct. App. 2004).

Double murder defendant was not denied effective assistance of trial counsel where counsel was alleged to have a conflict of interest and the trial court denied defense counsel's ex parte motion to withdraw as counsel because the alleged conflict came about as the result of the plea negotiations and counsel being aware and advised that her client was probably guilty. Originally, defense counsel had proposed to put defendant on the witness stand to deny that he was the shooter, but after the plea bargain process, this was clearly not a viable option; this may have resulted in a change in trial strategy but did not foreclose defendant's right to effective counsel; counsel's performance did not show that she was impaired by the revelation; there was no conflict, no deficient performance, and no prejudice, presumed or actual. Evans v. State, 899 So. 2d 890 (Miss. Ct. App. 2004), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 272 (Miss. 2005).

Court found no ineffective assistance of counsel in the failure to object to an inmate being shackled at trial where no juror had stated that the shackling affected the conviction or sentence in any respect. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for not objecting to the presence of a county sheriff during trial proceedings because (1) the inmate cited no authority to support the claim that the sheriff was able to tailor the sheriff's testimony after hearing other witnesses and (2) there was no abuse of discretion in the trial court's decision to permit the sheriff to remain in the courtroom. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for allowing the inmate to be tried jointly with co-defendant at both the guilt and penalty phases because (1) this issue was substantially addressed on direct appeal, and thus was barred in post-conviction proceedings under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the issue was without merit because the inmate and co-defendant insisted on being tried together. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for not objecting to the trial judge's decision to excuse potential jurors after unrecorded bench conferences because even though the bench conferences should have been recorded, and even if the attorneys were negligent in failing to see that the conferences were recorded, there was no showing of prejudice to the inmate and the reasons for the excusal of the jurors were clearly in the record. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for failing to object to certain prosecutorial statements made during closing argument at the guilt phase because (1) the issue was raised on direct appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the comments made were within the wide latitude granted in an attorney's closing argument. Smith v. State, 877 So. 2d 369 (Miss. 2004).

In a burglary case, defendant failed to establish ineffective assistance of counsel where there was nothing to show that defense counsel was unprepared for the trial, defendant was allowed to participate in jury selection, and defense counsel effectively pointed out discrepancies in trial testimony; moreover, the failure to call defendant as a witness and the decision to strike jurors were not grounds for an ineffective assistance of counsel claim. Phinisee v. State, 864 So. 2d 988 (Miss. Ct. App. 2004).

Defendant failed to establish ineffective assistance of counsel based on counsel's decision to request a severance without defendant's permission since the decision benefited defendant as a co-defendant's statement only further implicated defendant in the charged crimes; moreover, assistance of counsel was not shown to be insufficient as to failure to object where the record showed that defense counsel attempted to suppress the admission of defendant's statement to police. Perkins v. State, 863 So. 2d 47 (Miss. 2003).

Court rejected defendant's claim of ineffective assistance of counsel because a review of the record revealed no deficiency in defense counsel's performance; counsel who zealously cross-examined witnesses and properly conducted a defense. Lott v. State, 844 So. 2d 502 (Miss. Ct. App. 2003).

A trial judge's failure to recess and adjourn at reasonable times did not deny the defendant the effective assistance of counsel where the record failed to reveal any evidence of old age, illness, fatigue or exhaustion that affected the defense counsel's performance. Lanier v. State, 533 So. 2d 473 (Miss. 1988).

In a criminal trial which began at 11:00 a.m., court did not deprive defendant of effective assistance of counsel by allowing jury to deliberate until 11:03 p.m. of same day, where defense counsel, in seeking recess, declared himself fit and able, and only expressed concern for the jury. Fairley v. State, 483 So. 2d 345 (Miss. 1986).

Defendant, who was convicted of manslaughter after a one day trial that lasted until almost 11:00 P.M., despite defense counsel's repeated motions for a recess, was denied the effective assistance of counsel, particularly in light of the fact that the aged defense attorney, who had prepared and was selected prior to the trial to making the closing argument, read the state's requested instruction on murder to the jury four successive times and was immediately thereafter taken to a hospital appearing to be in shock. Thornton v. State, 369 So. 2d 505 (Miss. 1979).

150. — — Examination of witnesses, ineffectiveness of counsel.

Statement made by a detective concerning what doctors told him was hearsay under Miss. R. Evid. 801(c), but defendant failed to show how counsel's failure to object prejudiced his defense. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Court was not persuaded that a detective was offering any medical conclusion that only an expert could give; thus, the court could not find that defendant's trial counsel was ineffective for failing to object to the first statement. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Court rejected defendant's claim of ineffective assistance of counsel; the court failed to see how a question posed to the State's expert to discuss the type of wound inflicted showed deficient performance, much less any prejudice. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Trial court properly denied defendant's motion for postconviction relief after defendant was convicted of child molestation because it was not evident that, but for counsel's decision to abstain from using defendant's sister or her husband as witnesses, the outcome of the trial would have been different or that counsel's decisions stemmed from anything other than strategy. Didon v. State, 7 So. 3d 978 (Miss. Ct. App. 2009).

In a case involving the sale of cocaine, trial counsel was not ineffective for allowing an agent to testify that defendant's voice was on an audio recording because the agent's testimony was not subject to the authentication requirements under Miss. R. Evid. 901, and the failure of the State to lay a predicate for the testimony was harmless error since the agent testified on cross-examination that he had personal knowledge of defendant's voice. Moreover, even assuming that trial counsel's elicitation of the agent's previous dealings with defendant was so deficient as to meet the first prong of the test for ineffective assistance of counsel, plenty of other evidence existed to support the jury's verdict. Liddell v. State, 7 So. 3d 217 (Miss. 2009).

In appellant's capital murder case, counsel was not ineffective for failing to obtain the State's witness's criminal history because the witness's felony conviction occurred in 1983, almost seventeen years before the crime at issue, and whether impeachment of the witness concerning his seventeen-year-old conviction for burglary would have been admissible was doubtful. Additionally, the witness was examined thoroughly and extensively about his identification of appellant and about the lighting and other visibility factors. Howell v. State, 989 So. 2d 372 (Miss. 2008).

There was no merit to defendant's ineffective assistance of counsel claim, which seemed to suggest that his attorney was ineffective for failing to ask certain questions, because defendant failed to assert any authority to support his claim that his attorney's actions or inactions rose to the level of ineffective assistance, and defendant did not enunciate the questions that he claimed his attorney was ineffective for failing to ask. Weeks v. State, 971 So. 2d 645 (Miss. Ct. App. 2007).

During defendant's murder trial, it was reasonable for defense counsel not to hire an expert witness to discover whether there was evidence of another shooter who might have killed the victim where defendant confessed to shooting the victim three times, which was consistent with evidence presented in the autopsy report and witnesses' testimony. Davis v. State, 980 So. 2d 951 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 205 (Miss. 2008).

Defendant's conviction for burglary of a business was appropriate in part because the record was insufficient to resolve defendant's claim that his attorney was ineffective for not reviewing a surveillance video prior to cross-examining any of the prosecution's first three witnesses; the record's state rendered it impossible for the appellate court to examine defendant's allegations. Turner v. State, 962 So. 2d 691 (Miss. Ct. App. 2007), writ of certiorari dismissed by 997 So. 2d 924, 2008 Miss. LEXIS 506 (Miss. 2008).

In a drug case, even though defendant alleged that counsel was ineffective by failing to attack certain testimony, by not eliciting certain testimony from the driver of a car where drugs were found, and by failing to impeach this witness for his role in selling drugs, there was no showing of prejudice; therefore, there was constitutionally adequate representation. Walker v. State, 962 So. 2d 39 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 419 (Miss. 2007).

Defendant did not receive ineffective assistance of counsel during his trial for breaking and entering; counsel was not deficient in failing to subpoena two of the State's witnesses who did not even testify at trial against defendant. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Leading questions rarely create so distorted an evidentiary presentation as to deny a defendant a fair trial; thus, defendant's claim that his attorney was ineffective by allowing the district attorney to ask a series of leading questions to the witness failed. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

As to his conviction for murder, defendant did not demonstrate that the outcome of his trial would have been different if his counsel had objected to the district attorney's leading questions to deputies and the district attorney's eliciting of prior bad acts testimony from the victim's family members and a neighbor. He merely asserted that had counsel been as diligent with objections on said matters, he would have received a fair trial, and that statement did not satisfy the prejudice prong of Strickland; defendant's account of the events that led to the victim's death was not corroborated by any of the eyewitnesses, the physical evidence refuted his account that the victim was shot accidentally during a close struggle, and because he was hopelessly guilty, he was not entitled to a new trial on grounds counsel was ineffective. Jones v. State, 911 So. 2d 556 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 599 (Miss. 2005).

Under a Strickland analysis, there was a sufficient basis to conclude that defendant's attorney's performance was deficient and that with the alibi witnesses' testimony there was a reasonable probability that the outcome of the trial would have been different if some minimal pretrial investigation had been performed; defendant's attorney's conduct so undermined the proper functioning of the adversarial process that the trial court could not be relied on as having produced a just result. Ransom v. State, 918 So. 2d 710 (Miss. Ct. App. 2004), reversed by 919 So. 2d 887, 2005 Miss. LEXIS 595 (Miss. 2005).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for failing to impeach a material witness with an alleged prior inconsistent statement concerning the inmate's height because (1) there was little room for impeachment in the relative heights of the inmate, co-defendant, and the witness, and (2) it was a matter of trial strategy not to ask the witness additional questions on cross-examination. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Appellate court properly held that defendant failed to show what specific evidence a witness would have presented or how it would have been relevant to the defense; therefore, it would assume the decision not to call the witness was strictly a matter of trial strategy and not ineffective assistance of counsel. Sharkey v. State, 856 So. 2d 545 (Miss. Ct. App. 2003), writ of certiorari denied by 859 So. 2d 1017, 2003 Miss. LEXIS 594 (Miss. 2003).

Counsel for capital murder defendant was not ineffective for conducting cross-examination of witness that produced responses which allegedly strongly suggested to jury that defendant could not be rehabilitated, where most of the cross-examination was in abstract and was not related directly to defendant, and defendant had previous convictions for rape, manslaughter, robbery and grand larceny based upon which jury could have easily reached conclusion that there was little hope for defendant's rehabilitation. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A burglary defendant was not deprived of his constitutional right to effective assistance of counsel on the ground that his trial counsel failed to object to leading questions about the homes that were burglarized where the questions asked by the prosecutor could have been rephrased to elicit the same testimony, and therefore the defendant did not suffer any disadvantage because of the failure to object. Jackson v. State, 614 So. 2d 965 (Miss. 1993).

Charge that counsel failed to interview prosecution witnesses did not constitute ineffective assistance of counsel where counsel attempted to talk with one witness who refused, adequately familiarized himself with report of doctor, and did not talk with another witness who lived out of state but who offered no testimony which surprised defense. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

Claim that failure to voir dire pathologists relating to their credentials constituted ineffective assistance of counsel failed where one pathologist's credentials were beyond question and defendant failed to produce any evidence that other pathologist was not qualified; defendant's allegation of ineffective assistance of counsel based on failure to cross-examine on merits on cause-of-death issue also failed because this was trial counsel's decision that there was "nothing to gain" by such cross-examination because it would do nothing but allow reception of facts and bolster damaging testimony in minds of jurors. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

The failure of defense attorney to call as witnesses defendant's two sisters on his behalf was not a denial of due process based upon the assumption that the defendant was not properly represented by counsel, where there was no showing in the record as to what the testimony of his witnesses would have been and also where defendant was permitted as a witness to detail conversation between these two sisters, which conversation defendant said he overheard and which presumably constituted the testimony the sisters would have given as witnesses. Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950).

151. — — Objection to admission or suppression of evidence, ineffectiveness of counsel.

Defendant's convictions for aggravated assault and murder were appropriate because he failed to prove that he received the ineffective assistance of counsel since the failure to object to part of an officer's testimony did not meet the requirements of Strickland. Defendant's result would not have changed if his attorney had objected to the testimony; three eyewitnesses identified defendant in court as the only shooter and the evidence was more than sufficient to convict him of the charged crimes. Jackson v. State, 28 So. 3d 638 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 85 (Miss. 2010).

Defendant's convictions for capital murder, aggravated assault, and conspiracy to commit aggravated assault were appropriate because counsel was not ineffective in failing to object to testimony in which the weapon used during the incident was connected to defendant since the probative value of that evidence, connecting defendant and the murder weapons, was not substantially outweighed by any prejudicial effect given the totality of the evidence. As such, trial counsel's failure to object did not constitute deficient performance. Williams v. State, 3 So. 3d 105 (Miss. 2009).

Defendant's counsel was not ineffective for failing to object to the constructive amendment of the indictment and for failing to meet the notice requirements of Miss. R. Evid. 412(c) necessary to introduce evidence of the victim's prior sexual relationship with defendant because those assignments of error were without merit regardless of the procedural bar imposed. Goldman v. State, 9 So. 3d 394 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 222 (Miss. 2009).

Defense counsel was not ineffective for failing to object to defendant's statements that he made to law enforcement being entered into evidence where defendant's statements consisted of his version of an alleged sexual battery incident as well as two prior interactions with the victim; the statements supported defendant's theory of the case, namely that he was looking for a dog on the bed and touched the seven-year-old victim accidentally. McClure v. State, 941 So. 2d 896 (Miss. Ct. App. 2006).

In a case involving possession of cocaine with intent to distribute, defendants did not receive ineffective assistance of counsel based on a failure to object to testimony regarding the value and packaging of cocaine and the failure to request a balancing under Miss. R. Evid. 403 regarding evidence of an undercover drug sale; a different result would not have likely resulted based upon the evidence against defendants. Dixon v. State, 953 So. 2d 1117 (Miss. Ct. App. 2006), affirmed by 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

Defendant's sentence was proper where his counsel was not ineffective for a failure to object because the certified copy of defendant's conviction and the testimony provided proved that convicted of a crime in Louisiana and that he served a term of more than one year. Holloway v. State, 914 So. 2d 817 (Miss. Ct. App. 2005).

Defendant's claim of ineffective assistance of counsel was dismissed without prejudice because defendant had not alleged that the result at trial would have been different if her counsel had made objections to the prosecutor's inflammatory remarks, the introduction of criminal files on defendant and her son, and the introduction of other guns found in her home. Her counsel's failure to object could have been viewed as trial strategy and the record did not affirmatively show that her counsel was constitutionally ineffective. Young v. State, 908 So. 2d 819 (Miss. Ct. App. 2005).

Defendant's counsel was not ineffective during defendant's trial for murdering his ex-wife and daughter because despite defendant's contentions, the record showed that counsel did object to the testimony of defendant's six-year-old son and to the introduction of autopsy photographs of the victims. Richardson v. State, 918 So. 2d 760 (Miss. Ct. App. 2005).

Although defendant claimed that his counsel was deficient because his attorney failed to object to the admission of the cocaine found on defendant, since the officer stated that the cocaine and its packaging all appeared the same as it did on the day he seized it, defendant's counsel did not object; defendant's counsel's decision not to object to the admission of the cocaine into evidence was not ineffective assistance of counsel. Williams v. State, 907 So. 2d 1016 (Miss. Ct. App. 2005).

Defendant was not denied effective assistance of counsel during his trial for the sale of marijuana; although there were instances of leading questions asked by the State without objection from defendant's counsel, the court found no prejudice to defendant. Anderson v. State, 904 So. 2d 973 (Miss. 2004).

Where defendant argued that defense counsel engaged in ineffective assistance of counsel under Miss. Const. Art. III, § 26 and U.S. Const. amend. VI by failing to object to testimony regarding a hearsay statement that powder cocaine had been recovered from defendant when arrested, defendant was not prejudiced, as there was substantial other testimony on this point. Walker v. State, 880 So. 2d 1074 (Miss. Ct. App. 2004).

Although a few of the questions asked could be considered leading questions, Miss. R. Evid. 611(c), because of the age of the witnesses and the limited manner in which the questions were used, it was doubtful that the trial judge would have disallowed the questions; therefore, defendant would have benefitted little by an objection from counsel. Thus, defendant's ineffective assistance of counsel claim was denied. Barrett v. State, 886 So. 2d 22 (Miss. Ct. App. 2004), writ of certiorari denied by 887 So. 2d 183, 2004 Miss. LEXIS 1371 (Miss. 2004).

There is a clear line of cases authorizing a trial court in the prosecution of a sexual offense to permit evidence of past sexual crimes of the accused; thus, it was not error to admit evidence of defendant's past sexual offenses. Therefore, there could be no claim of ineffective assistance of counsel premised on the failure of trial counsel to object. Barrett v. State, 886 So. 2d 22 (Miss. Ct. App. 2004), writ of certiorari denied by 887 So. 2d 183, 2004 Miss. LEXIS 1371 (Miss. 2004).

Defense counsel's failure to object to the admission of a pipe as a murder weapon did not amount to ineffective assistance of counsel because a proper predicate was laid for the introduction of the pipe; the evidence showed that defense counsel attempted to discredit the evidence by exploiting the absence of physical and forensic evidence linking the pipe to the murder. Johnson v. State, 876 So. 2d 387

(Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

Defense counsel's failure to object to the admission of autopsy photographs did not constitute ineffective assistance of counsel; the evidence showed that the pictures were not particularly gruesome, and their probative value outweighed any prejudicial effect that they might have had. Johnson v. State, 876 So. 2d 387 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

Defendant's counsel's failure to make a Miranda objection to the police officer's testimony did not amount to a deficiency in counsel's representation; the officer did not interrogate defendant and defendant volunteered the statement that he shot into the air so there was no basis for a Miranda challenge. Maxwell v. State, 856 So. 2d 513 (Miss. Ct. App. 2003), writ of certiorari denied by 892 So. 2d 824, 2005 Miss. LEXIS 11 (Miss. 2005).

Counsel for capital murder defendant was not ineffective for failing to object to introduction of defendant's prior convictions of grand larceny and simple robbery, where both were relevant to aggravating circumstances set forth under capital sentencing statute, and thus objection would have been futile. Cole v. State, 666 So. 2d 767 (Miss. 1995).

The search of a defendant's person incident to his arrest for carrying a concealed weapon was reasonable within the confines of the Fourth Amendment, even though the search took place after the defendant was taken to the county jail rather than at the time and place of the arrest; thus, the defendant's attorney was not deficient in failing to move to suppress the evidence obtained as a result of this search on the ground that the search was illegal. Rankin v. State, 636 So. 2d 652 (Miss. 1994).

The search of a defendant's jacket incident to his arrest for carrying a concealed weapon was reasonable within the meaning of the Fourth Amendment where the arresting officers saw the defendant take the jacket off and place it on a guard rail beside him, since the jacket was in the area within the defendant's immediate control at the time of his arrest; thus, the defendant's attorney was not deficient in failing to move to suppress the evidence obtained as a result of this search on the ground that the search was illegal. Rankin v. State, 636 So. 2d 652 (Miss. 1994).

In a prosecution for possession of cocaine with intent to distribute, the defendant's trial counsel was not constitutionally ineffective for failing to object to allegedly inadmissible testimony portraying the defendant as a drug dealer where the attorney's failure to object to the testimony in question might reasonably have been trial strategy related to a "personal vendetta" defense since the attorney argued from the time of opening statements that a deputy sheriff had a vendetta against the defendant and there was support for the "vendetta" defense throughout the trial record, the attorney could have concluded that any objections to the testimony in question would have magnified the comments to the detriment of the defendant, and the defendant failed to demonstrate any prejudice as there was eyewitness testimony which was "sufficient to have absolutely sealed his fate with the jury." Edwards v. State, 615 So. 2d 590 (Miss. 1993).

In a prosecution for possession of cocaine with intent to distribute, the defendant's trial counsel was not constitutionally ineffective for failing to object to an admission made by the defendant at the scene of his arrest concerning his involvement in trafficking drugs where the admission was unsolicited, voluntary, and spontaneous, and the defendant's attorney could have reasonably expected any objection to be futile. Edwards v. State, 615 So. 2d 590 (Miss. 1993).

A defendant was denied his right to effective assistance of counsel by his attorney's failure to object to testimony submitted by the State that his accomplice had been tried and found guilty on the same offense for which the defendant was being tried, since the testimony was highly prejudicial and its admission was reversible error. Johns v. State, 592 So. 2d 86 (Miss. 1991).

Failure of defense attorney to object to introduction of evidence of shotgun, used in committing homicide for which defendant was on trial, and a photograph showing the scene of crime and surroundings, was not a denial of due process based upon the assumption that the defendant was not properly represented by counsel. Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950).

152. — — Objection to jury instructions, ineffectiveness of counsel.

Defendant's trial attorney was not ineffective for failing to object to the court's jury instruction; the instruction fairly announced the law applicable to the facts presented and therefore there was no basis for the attorney to object. Perkins v. State, 37 So. 3d 656 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 321 (Miss. 2010).

Appellant failed to show that his trial attorney was ineffective for failing to request a jury instruction presenting the appellant's theory of the case, namely that he had sold sheet rock and not cocaine to the informant; failure to request such an instruction have been a conscious trial strategy, since the attorney may not have wanted the jury to have the option of convicting him of the lesser non-included offense of selling sheet rock under the guise of cocaine. Because the court could not conclude from the record that appellant's attorney had been constitutionally ineffective, the court refrained from ruling upon the claim without prejudice against appellant raising it at a later proceeding. Perkins v. State, 37 So. 3d 656 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 321 (Miss. 2010).

Because there was no reason to assume the trial court delivered an instruction which influenced the jury's guilty verdict, it would not be objectively unreasonable for appellate counsel to fail to raise the issue on appeal. Thus, the inmate's ineffective-assistance claim or appeal would fail under the first prong of Strickland. Tyler v. State, 19 So. 3d 663 (Miss. 2009).

In defendant's trial under Miss. Code Ann. § 97-5-39(2)(a), defendant did admit to shaking the child and his admission to an important element of the crime negated the need for a circumstantial-evidence instruction, such that counsel was not ineffective for failing to proffer such an instruction. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Defense counsel was not ineffective for not objecting to a jury instruction, which contained language that differed from the language of the indictment, because the instruction did not accuse defendant of any other separate or distinct crime other than that of the indictment, nor did it refer to facts of which defendant had no notice; the variance was not material. Nix v. State, 8 So. 3d 141 (Miss. 2009).

Defendant failed to present a prima facie demonstration of ineffective assistance of counsel where there was no indication that the jury would return a verdict of "not guilty" had the jury instruction contained the cumulative language defendant suggested; the jury understood that it was to remain suspicious of the witness's testimony and to weigh it with care. Dear v. State, 960 So. 2d 542 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 396 (Miss. 2007).

Defense counsel was not ineffective where defendant argued that the lesser-included offense instruction of resisting arrest should have been included in the instructions to the jury and defense counsel was ineffective for failing to ask for the instruction; however, the evidence demonstrated that the lesser-included offense instruction of resisting arrest was not warranted as there was no evidentiary basis to support that instruction, so defense counsel was not ineffective for failing to ask for the instruction. Enlow v. State, 878 So. 2d 1111 (Miss. Ct. App. 2004), writ of certiorari denied by 888 So. 2d 1177, 2004 Miss. LEXIS 1479 (Miss. 2004).

Because defendant denied at trial that he assaulted the deputy in any way, a jury instruction on self-defense was not supported by the record; thus, his trial counsel's performance was not deficient in failing to request a self-defense jury instruction. Burnside v. State, 882 So. 2d 212 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for failing to make an objection to an instruction that death could be imposed if aggravating and mitigating circumstances were of equal weight because as the direct claim was found to be without merit, there could be no claim that the attorneys were ineffective in failing to object to what was an acceptable instruction. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for not requesting an amendment to sentencing instructions because (1) the issue was raised on direct appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, there was no showing of deficient performance. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Defendant's counsel was not ineffective in the assistance provided in defendant's defense; counsel's failure to request a jury instruction for manslaughter did not constitute ineffective assistance where defendant himself made the determination that a manslaughter instruction should not be requested, and that decision was purely strategic. Maxwell v. State, 856 So. 2d 513 (Miss. Ct. App. 2003), writ of certiorari denied by 892 So. 2d 824, 2005 Miss. LEXIS 11 (Miss. 2005).

Counsel for capital murder defendant was not ineffective for failing to object to transitional jury instruction stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, where defendant was granted lesser included offense instruction defining crime of murder less than capital, and defendant showed no prejudice flowing from transitional instruction. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to jury instruction that the murder was "especially heinous, atrocious and cruel," where, at time of trial, there was no viable basis under state law for objecting to this instruction. Cole v. State, 666 So. 2d 767 (Miss. 1995).

153. — — Continuances, ineffectiveness of counsel.

Court rejected defendant's claim of ineffective assistance of counsel, given that the court failed to see how asking for a continuance constituted deficient performance in this instance, plus defendant failed to show prejudice. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant did not assert on appeal that the other person present during the controlled drug buy would have been able to provide any more information, nor did he suggest how a continuance would have benefitted his defense; therefore, any deficiency on the part of trial counsel for failing to request a continuance did not rise to the level of ineffective assistance, as defendant did not show any prejudice. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

In sexual battery case, the inmate's trial counsel was not ineffective for asking for several continuances. When even the inmate claimed that he was incompetent to proceed at trial, it was frivolous for him to claim that he was prejudiced by postponing his trial so that he could undergo psychiatric evaluations. Calhoun v. State, 849 So. 2d 892 (Miss. 2003).

Counsel for capital murder defendant was not ineffective for failing to request continuance after prosecution called so-called "surprise" witness who subsequently identified defendant, where counsel interviewed witness for 25 minutes during recess called specifically for that purpose, and defendant showed nothing that continuance would have further gained. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after State introduced into evidence during sentencing phase 2 prior convictions for manslaughter and attempted rape, where there was no prejudice to defendant, in that the prior convictions were valid and not subject to collateral attack. Cole v. State, 666 So. 2d 767 (Miss. 1995).

154. — — Sentencing proceedings, ineffectiveness of counsel.

Where the trial court granted appellant's motion to reconsider his sentence and suspended ten years of his twenty-year sentence for manslaughter, appellant failed to show how counsel was ineffective. The post-conviction court determined that his ineffective assistance of counsel claim lacked merit. Steele v. State, 991 So. 2d 176 (Miss. Ct. App. 2008).

Where defendant was convicted of three counts of sexual battery, the trial court did not err by not declaring a mistrial based upon a deterioration of the attorney/client relationship during sentencing. Several witnesses were called by the defense attorney during sentencing to testify as to defendant's character including his wife, grandmother, mother, and his stepfather. Smith v. State, 989 So. 2d 973 (Miss. Ct. App. 2008).

In a business burglary case, denial of post-conviction relief was proper because, although Miss. Code Ann. § 47-7-33 limited the power of the trial court to suspend a sentence and order probation for previously convicted felons, any error in sentencing the petitioner was harmless as he was given a lenient sentence; he was indicted as a habitual offender with two prior felonies, but he was ultimately sentenced as a non-habitual offender. The petitioner's counsel could not have been ineffective when his sentence was less than if he had been sentenced as a habitual offender. Sago v. State, 978 So. 2d 1285 (Miss. Ct. App. 2008).

Motion for post-conviction relief was properly dismissed based on an allegation of ineffective assistance of counsel because defendant was correctly informed of the 10-year maximum penalty for uttering forgery; however, the case was remanded for resentencing because plain error was committed when a trial court improperly imposed a 15-year sentence. Jefferson v. State, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied on the basis that counsel was deficient because this issue was not preserved for review; notwithstanding the bar, defendant expressed satisfaction with counsel during a plea colloquy based on counsel's work to secure a recommendation for a suspended sentence, and defendant's own misconduct resulted in incarceration when the suspended sentence was later revoked. Ausbon v. State, 959 So. 2d 592 (Miss. Ct. App. 2007).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Counsel was not ineffective for failing to present evidence in mitigation of the death penalty because an expert testified about the petitioner's mental retardation, the petitioner's mother was also questioned regarding the petitioner's mental retardation, and therefore counsel placed the issue of the petitioner's mental retardation before the jury for purposes of mitigation. Scott v. State, 938 So. 2d 1233 (Miss. 2006).

Post-conviction relief in a capital murder case based on the argument that the use of the "avoiding or preventing a lawful arrest or effecting an escape from custody" aggravator was inappropriate was denied because it was procedurally barred; however, even if it was not, the argument was meritless since sufficient evidence supported this due to the fact that the victim's telephone line was cut, two fires were set in her home, and defendant had just been released from prison. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Post-conviction relief was denied because defendant's assertion that he received ineffective assistance of counsel during the sentencing phase of a capital murder trial was procedurally barred; however, even if it was not, ineffectiveness was not shown because, despite mitigation evidence that defendant was a great person and had not been violent, the state could have presented evidence of his prior convictions. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant did not receive ineffective assistance of counsel by the failure to challenged an aggravating circumstance not named in an indictment in a capital murder case because he was not entitled to formal notice of such since an indictment for capital murder put defendant on sufficient notice that the statutory aggravating factor would have been used against him. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Denial of the inmate's motion for post-conviction relief was appropriate because his counsel was not ineffective; his counsel had filed for the inmate to undergo a mental examination and counsel further took the inmate's mental condition into consideration when asking for a lenient sentence. Hayes v. State, 935 So. 2d 1133 (Miss. Ct. App. 2006).

Inmate was not deprived of effective assistance of counsel at his plea and sentencing hearing simply because his counsel failed to object to the presence of the victim's family, because they had a right to be present and speak at the hearings. Johnson v. State, 908 So. 2d 900 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief was proper where his counsel was not ineffective, in part because it was determined that the inmate failed to demonstrate prejudice regarding the State's scriptural references or parole argument closing argument of the sentencing phase of his trial. Thus, his counsel was not deficient for failing to object. Manning v. State, — So. 2d —, 2005 Miss. LEXIS 464 (Miss. Aug. 4, 2005), opinion withdrawn by, substituted opinion at 929 So. 2d 885, 2006 Miss. LEXIS 109 (Miss. 2006).

Defense counsel provided adequate representation at the resentencing where counsel was actively involved in the sentencing hearing; she pointed out to the court defendant's age and his need for hip replacement and asked that the condition be taken into consideration when imposing sentence; additionally, counsel requested that the court consider post-release supervision. Greer v. State, 920 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari dismissed by 933 So. 2d 303, 2006 Miss. LEXIS 307 (Miss. 2006).

Defendant failed to present the appellate court with specific, concrete facts to support his conclusory allegation that his attorney's performance was deficient and that but for his attorney's errors, his sentence would have been different; defendant failed to satisfy his burden of overcoming the strong presumption that his attorney's conduct fell within the wide range of professional assistance. Bates v. State, 914 So. 2d 297 (Miss. Ct. App. 2005).

Defendant's counsel was not ineffective for allowing him to receive an illegal sentence for possession of cocaine because the sentence was corrected six months later and defendant suffered no prejudice. Defendant presented no evidence to show that counsel's objection to the imposed sentence would have changed the outcome. Black v. State, 919 So. 2d 1017 (Miss. Ct. App. 2005).

Appellant's claim that his counsel was ineffective because he assured him that his sentence would not exceed 10 years was disproved by the record; because the plea petition that appellant signed stated the minimum and maximum penalties regarding each crime, appellant knew that his sentence could exceed 10 years. Thornhill v. State, 919 So. 2d 238 (Miss. Ct. App. 2005).

Court did not err in denying defendant's motion to supplement his petition for postconviction relief because his claim that his attorney was ineffective by failing to assure that the sentencing judge was informed of the district attorney's recommended sentence was without merit. Defendant's prior motion for reconsideration of his sentence, which was granted, and the reduction of his sentence by nine years, stated that the recommendation of the district attorney's office was disclosed to the sentencing judge despite the open plea. Sanchez v. State, 913 So. 2d 1024 (Miss. Ct. App. 2005), writ of certiorari dismissed by 920 So. 2d 1008, 2005 Miss. LEXIS 605 (Miss. 2005).

In a capital murder case, defendant did not receive ineffective assistance of counsel by a failure to present witnesses during sentencing because defendant chose not to testify, and defendant failed to present any evidence regarding other witnesses that could have been called; moreover, it was a tactical decision because calling defendant's mother would have opened the door to damaging testimony about drugs and gangs. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Record demonstrated that trial counsel's performance was not deficient where trial counsel acted according to defendant's instructions and his efforts to investigate potential mitigation evidence were thwarted by uncooperative witnesses; defendant also failed to prove there was a reasonable probability that the outcome would have been different. Burns v. State, 879 So. 2d 1000 (Miss. 2004).

Court found no merit in an inmate's claim that counsel was ineffective for failing to adequately investigate, develop, and present mitigation evidence at the sentencing phase for capital murder; some of the proposed evidence would have been irrelevant or inadmissible, and most of the proposed testimony was testified to by the inmate's mother, and there was a minimal showing of deficient performance and no assertion of prejudice. Smith v. State, 877 So. 2d 369 (Miss. 2004).

Denial in part of the inmate's application for leave to file petition for postconviction relief was proper where his claims that trial counsel failed to adequately present mitigating evidence of his mental retardation was without merit; his counsel put forth significant mitigating evidence during the sentencing phase and the Supreme Court could not say that trial counsel's decisions were unreasonable in that regard. Carr v. State, 873 So. 2d 991 (Miss. 2004).

Inmate was not deprived of his right to effective representation because his trial counsel failed to request a continuance between the guilt phase and the sentencing phase as the case was not complex, and, pursuant to Miss. Code Ann. § 99-19-101, the sentencing phase was to be conducted by the trial judge before the trial jury as soon as practicable. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of his right to effective representation because his trial counsel failed to give an opening statement during the penalty phase as the prosecutor did not give an opening statement either and the failure to do so could be deemed trial strategy. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of his right to effective representation because his trial counsel failed to present mitigating evidence regarding his age, mental retardation, emotional disturbances and mental illness, disadvantaged and abusive childhood, adaptation to prison conditions, and cultural impacts on his life as his mother testified about his difficulties growing up and evidence was presented regarding his low I.Q., but the inmate did not present any evidence that evidence that he suffered from either emotional or mental problems. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Inmate was not deprived of his right to effective representation because his trial counsel failed to request an instruction that a Tennessee sentence would have on him if a life sentence was imposed instead of the death penalty as the State argued the violent nature of the subject crime as an aggravating factor rather than the inmate's future propensity for violent crime. Bell v. State, 879 So. 2d 423 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1594, 73 U.S.L.W. 3495 (2005).

Counsel was not ineffective where defendant did not explicitly state why the counsel he received was ineffective but before accepting defendant's guilty plea, the circuit judge asked defendant if he was satisfied with his counsel and defendant responded that he was satisfied. Moreover, defendant pled guilty to murder, which usually carried a sentence of life in prison; his sentence was less, he was only sentenced to 40 years, accordingly, his claim of ineffective assistance of counsel was without merit. Sibley v. State, 877 So. 2d 541 (Miss. Ct. App. 2004).

Inmate's request for leave to file an application seeking postconviction relief was denied because the inmate was unable to show that the imposition of the death penalty was the result of ineffective assistance of counsel since defense counsel objected to the testimony of a pathologist, the admission of certain photographs, and a confession; moreover, the inmate failed to show how the introduction of medical records would have persuaded the jury to exercise leniency, and the inmate failed to show how a government-funded expert would have disputed the finding of the State's expert. Holland v. State, 878 So. 2d 1 (Miss. 2004), writ of certiorari denied by 544 U.S. 906, 125 S. Ct. 1590, 161 L. Ed. 2d 280, 2005 U.S. LEXIS 2273, 73 U.S.L.W. 3529 (2005).

Defendant, as a convicted felon, could not quietly enjoy the benefits of an illegally lenient sentence and later attack the sentence when suddenly it was in his interest to do so; because defendant actually benefited from the illegal sentence, he was not denied his fundamental right from an illegal sentence, and there was no ineffective assistance of counsel or other error. Thomas v. State, 861 So. 2d 371 (Miss. Ct. App. 2003).

In a capital murder case, counsel was not ineffective during the penalty phase regarding the evidence, venue, voir dire, jury verdict, competency, security measures, prosecutorial misconduct, mitigating circumstances, manner of execution, investigating, witnesses, experts, opening statement, or closing argument. Russell v. State, 849 So. 2d 95 (Miss. 2003).

Counsel for capital murder defendant was not ineffective for failing to make offer of proof concerning excluded mitigation-of-sentence testimony about defendant's religious convictions and effect on him of death of his stepchild, where the evidence was adequately established via testimony of other witnesses. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A capital murder defendant was denied effective assistance of counsel at the penalty phase where his attorneys presented almost no facts in mitigation upon which the jury could have acted to spare the defendant's life, they failed to make the most of the available evidence in mitigation, and in closing argument one of the defendant's attorneys stated that the only way the jury could spare the defendant's life was on "redeeming love," which was not one of the factors which the jury could have considered under the court's instructions. Woodward v. State, 635 So. 2d 805 (Miss. 1993).

A defendant's counsel was not ineffective at the guilt phase of a capital murder trial where the defense counsel adequately investigated, filing discovery motions and obtaining the State's entire file, and there was no reasonable probability that the outcome of the trial would have been different had evidence been presented that the defendant's accomplice, rather than the defendant, delivered the fatal injuries, because it was clearly established that the defendant was present at the planning and execution of the murder and was therefore a principal. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

A defense counsel's performance at the sentencing phase of a capital murder prosecution constituted ineffective assistance of counsel where the defendant faced a potential death penalty, and the defense counsel failed to conduct any investigation at all in a search for mitigation evidence; the defense counsel conducted little or no investigation into the defendant's background, he spent negligible time interviewing the defendant and preparing a defense, he made no effort to contact or interview any potential character witnesses other than the defendant's mother who was contacted only after the trial had commenced, and the lack of preparation left the defense counsel unable to blunt the prosecution's forceful case. At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case; it is critical that mitigating evidence be presented at capital sentencing proceedings. Psychiatric and psychological evidence is crucial to the defense of a capital murder case, and there is a critical interrelation between expert psychiatric assistance and minimally effective representation. Thus, the defendant's counsel was unreasonable in not pursuing psychological evidence in support of the defense that the defendant was under the domination of his accomplice where evidence was presented in the post-conviction proceeding that the defendant was immature, dependent and easily lead. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

Although § 99-15-17 allows for the appointment of 2 attorneys in capital cases, a defense counsel's withdrawal of his motion for the appointment of additional counsel did not constitute ineffective assistance of counsel where the defense counsel withdrew the motion because he had successfully developed the case and the case was not so complex that one attorney could not provide a legally sufficient defense. Marks v. State, 532 So. 2d 976 (Miss. 1988).

Ineffective assistance of counsel was not shown concerning investigation of and failure to present mitigating circumstances where there was some mitigation by cross-examination and, strategically, it may be safer to obtain mitigating evidence from state's witnesses than to risk aggravating evidence from witnesses called by defense. Additionally, trial counsel has no absolute duty to present mitigating evidence; strategic choices made after less than complete investigation are reasonable to extent that reasonable professional judgment supports limitations on investigation; court must apply heavy measure of deference to counsel's judgments. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that counsel was ineffective for failing to explain to jury inapplicability and/or insignificance of aggravating circumstances and how to weigh aggravating and mitigating circumstances was rejected where counsel made excellent arguments as to aggravating circumstances, and closing argument contained variety of mitigating evidence. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Argument that counsel should have requested presentence report in light of his failure to investigate mitigating evidence, was rejected as basis for ineffective assistance of counsel claim where question was counsel's competence in not investigating and presenting mitigating evidence; if this was reasonable strategic choice, there was no need for investigation by other means. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

153. — — Appeal of cause, ineffectiveness of counsel.

Defendant's second motion for post-conviction relief was barred as a successive writ. Defendant's failure to perfect an appeal after the first petition was denied was due to his lack of funds and not his attorney's performance; therefore, he failed to prove the ineffective assistance of counsel. Joshua v. State, 913 So. 2d 1062 (Miss. Ct. App. 2005).

Court found no merit to defendant's contention that counsel was ineffective for leading him to believe that by waiving his right to appeal, the trial judge would show leniency; record showed that prior to waiving his right to appeal, defendant was fully informed by the trial judge that his sentence could not be reduced because of his status as a convicted felon. Coker v. State, 909 So. 2d 1239 (Miss. Ct. App. 2005).

A defendant was not deprived of his constitutional right to effective assistance of counsel on the ground that his attorney failed to perfect a timely appeal where his attorney filed for a new trial and J.N.O.V., thereby protecting the defendant's right of appeal to the Supreme Court. Jackson v. State, 614 So. 2d 965 (Miss. 1993).

156. — — Pleading, ineffectiveness of counsel.

Inmate's claims that he lacked ineffective assistance of counsel based on counsel's failure to call two witnesses as a suppression hearing had no merit because the inmate presented no affidavits with his petition and his reliance on the assertions in his brief did not meet the requirements of Vielle and Strickland. Garcia v. State, 14 So. 3d 749 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 383 (Miss. 2009).

Defendant's ineffective assistance of counsel argument was rebutted by a lack of evidence, as well his own statements, and a prisoner's ineffective assistance of counsel claim was without merit when the only proof offered of the claim was the prisoner's own affidavit. Starks v. State, 992 So. 2d 1245 (Miss. Ct. App. 2008).

Because an inmate offered only his own statement as proof of the claim of ineffective assistance, the inmate failed to meet his burden of showing that counsel was deficient or that the inmate was prejudiced. Sneed v. State, 990 So. 2d 226 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 468 (Miss. 2008).

Ineffective assistance of counsel claim was not addressed on direct appeal because appendixes, a transcribed telephone conversation, and references thereto were stricken from brief because they were not admitted into evidence at trial; therefore, defendant was unable to offer support from the record to substantiate his claim. Dimaio v. State, 951 So. 2d 581 (Miss. Ct. App. 2006).

Defendant was unable to raise the issue of ineffective assistance of counsel on appeal because the record did not affirmatively show ineffectiveness of constitutional dimensions and the parties did not stipulate that the record was adequate; defendant failed to show prejudice and did not meet the burden of proof since mere allegations of prejudice was not sufficient. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

Defendant convicted of murder claimed his trial counsel was constitutionally ineffective because counsel failed to file critical motions, failed to subject the State's case to a meaningful adversarial setting, and failed to investigate all of the information relating to his innocence. The appellate court was unable to consider the extra-record documents which defendant attached to his brief; the record did not affirmatively prove defendant's claim. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

In the absence of a valid claim as to the trial court's lack of jurisdiction to revoke defendant's probation, the appellate court could not possibly hold that the performance of defendant's attorney was deficient, and without such deficiency, defendant's defense clearly suffered no prejudice and no ineffective assistance of counsel was shown. Grace v. State, 919 So. 2d 987 (Miss. Ct. App. 2005).

Defendant's claim of ineffective assistance of counsel at trial failed where he failed to tell the nature of the prejudice that resulted from any of the errors he alleged by his defense counsel during his trial for possession of cocaine. Defendant was not guaranteed a "perfect" trial. Magee v. State, 912 So. 2d 1044 (Miss. Ct. App. 2005).

On appeal of defendant's embezzlement conviction, he failed to prove that his trial counsel was ineffective. Defendant's assertion that counsel was ineffective was contained in one line of his brief; defendant failed to allege with specificity any actions or inactions by his counsel that were deficient. Bright v. State, 894 So. 2d 590 (Miss. Ct. App. 2004), writ of certiorari denied by 893 So. 2d 1061, 2005 Miss. LEXIS 136 (Miss. 2005).

Defendant, to prevail on a claim of ineffective assistance, had to show deficiency of counsel's performance and that the deficiency prejudiced his defense; there was a lack of evidence within the record that there was a reasonable probability of a different outcome, but for counsel's alleged errors. Preuett v. State, 879 So. 2d 1116 (Miss. Ct. App. 2004), writ of certiorari dismissed by 883 So. 2d 1180, 2004 Miss. LEXIS 1337 (Miss. 2004).

Defendant had to show a deficiency of counsel's performance that was sufficient to constitute prejudice to his defense; however, the record was void of evidence to establish a claim of ineffective assistance. Sanders v. State, 847 So. 2d 903 (Miss. Ct. App. 2003).

To be entitled to evidentiary hearing on merits of ineffectiveness of counsel claim, defendant must establish prima facie claim on both prongs of Strickland test by alleging with specificity and detail that his counsel's performance was deficient and that the deficient performance prejudiced defense so as to deprive him of fundamentally fair trial. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Defendant who alleges that trial counsel's failure to investigate constituted ineffectiveness must also state with particularity what investigation would have revealed and specify how it would have altered outcome of trial or how such additional investigation would have significantly aided his cause at trial. Cole v. State, 666 So. 2d 767 (Miss. 1995).

A defendant did not present sufficient evidence to show that he received ineffective assistance of counsel where the defendant simply cited actions of his attorney without explaining or justifying his contention that they should be characterized as deficient and prejudicial, and the defendant made no showing that his attorney's alleged errors affected the outcome of the case. Ahmad v. State, 603 So. 2d 843 (Miss. 1992).

A defendant's complaints of ineffective assistance of counsel in his post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel were insufficient as a matter of law where the defendant failed to allege that the asserted errors of his attorney proximately resulted in his guilty plea and that, but for these errors, he would not have entered the plea. Garlotte v. State, 597 So. 2d 641 (Miss. 1992).

A defendant was not denied his right to effective assistance of counsel merely because his attorney failed to procure a preliminary hearing where no allegation or facts were presented as to the way in which this matter operated to the defendant's prejudice. Jordan v. State, 577 So. 2d 368 (Miss. 1990).

A defendant's post-conviction claim of ineffective assistance of counsel, which was based on allegations that the defendant's counsel failed to object to allegedly defective indictments and erroneously advised the defendant to plead guilty, was properly dismissed without the benefit of an evidentiary hearing because it was manifestly without merit where the defendant failed to allege with the "specificity and detail" required that his counsel's performance was deficient and that the deficient performance prejudiced the defense, the facts alleged and the brief submitted were not supported by any affidavits other than his own, the indictments were not defective and therefore the defendant's counsel could not be faulted for failing to challenge their validity, and the defendant failed to identify the "deficient and erroneous advice" of his counsel that allegedly resulted in his pleas of guilty. Brooks v. State, 573 So. 2d 1350 (Miss. 1990).

157. — — Sufficiency of evidence, ineffectiveness of counsel.

Defendant's manslaughter conviction was appropriate because he failed to prove that he received the ineffective assistance of counsel. Defendant's claims regarding the weight and sufficiency of the evidence were without merit and those were the only issues that he argued supported his claim of ineffective assistance of counsel; as there was no merit to his claim of insufficiency of the evidence or his claim that the weight of the evidence did not support the conviction, defendant was unable to show that his attorney's performance prejudiced his defense. Martin v. State, 43 So. 3d 504 (Miss. Ct. App. 2010).

Where appellant, a forty-four-year-old male, was caught having sexual intercourse with a fourteen-year-old female, he entered a plea of guilty to statutory rape under Miss. Code Ann. § 97-3-65(1)(b). He was not entitled to post-conviction relief based on his claim of ineffective assistance of counsel; because there was ample evidence to convict him of statutory rape, there was no reasonable probability that the outcome of the case would have been different but for counsel's alleged errors. Maggitt v. State, 26 So. 3d 363 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 38 (Miss. 2010).

Denial of appellant inmate's request for post-conviction relief after he was convicted of capital murder (murder during the commission of sexual battery) was appropriate because he failed to prove that he received the ineffective assistance of counsel. Even if counsel had procured a DNA expert who testified that the inmate's DNA was not present, that did not exonerate him of the sexual battery charge because sexual penetration could be by insertion of any object into the genital or anal opening of another person's body. Havard v. State, 988 So. 2d 322 (Miss. 2008).

Defendant failed to show ineffective assistance, because defendant stated during the plea colloquy that he was satisfied with his attorney's performance, no indication appeared in the record that defendant's attorney inaccurately advised him concerning his sentence, defendant waived his right to trial when he pled guilty, and defendant did not indicate what motions might had been filed or the likelihood of the success of such motions. Trice v. State, 992 So. 2d 638 (Miss. Ct. App. 2007), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 538 (Miss. 2008).

Defendant's assertion that he received ineffective assistance of counsel was both barred by statute and without merit, because defendant pled guilty on August 13, 2002, and the motion for post-conviction relief was filed on December 14, 2006, and defendant failed to show with specificity and detail how his counsel was ineffective due to counsel's involvement in a prior investigation of defendant as police officer. Hull v. State, 983 So. 2d 331 (Miss. Ct. App. 2007).

Defendant's counsel did not render ineffective assistance because defendant's argument paralleled his contention regarding the lack of evidence that the victim had been placed in fear during the course of the robbery; however, if the taking of property was effectuated by violence or force upon the victim, this action was sufficient to constitute a robbery, and therefore because defendant was an admitted participant in the robbery of the store, there was sufficient evidence presented supporting a conviction of capital murder. Anderson v. State, 5 So. 3d 1088 (Miss. Ct. App. 2007), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Defendant's conviction for armed robbery was proper because he failed to prove that his counsel was ineffective; in part, counsel's failure to object to the introduction of evidence, which was clothing, was not ineffective because the evidence against defendant was overwhelming. Hancock v. State, 964 So. 2d 1167 (Miss. Ct. App. 2007), writ of certiorari denied by 964 So. 2d 508, 2007 Miss. LEXIS 526 (Miss. 2007).

Since the indictment was not defective, counsel's decision not to challenge it could not amount to ineffective assistance of counsel, as challenging it would not have changed the result of the proceeding; defendant failed to present any evidence that would prove ineffective assistance of counsel. Mosley v. State, 941 So. 2d 877 (Miss. Ct. App. 2006).

Defendant raised an ineffective assistance of counsel claim where there was evidence of conflicting statements by the victim as to who poured boiling water on him and was enough to raise a reasonable doubt that defendant committed the offense; if defense counsel had investigated and presented evidence of defendant's prior abuse by the victim, and of the abuse that defendant testified had taken place immediately prior to the incident, the inconsistencies in testimony of the victim's mother and sister concerning those events, and the intervening circumstances of the victim's death from respiratory failure, it was reasonable to conclude that the outcome of a jury trial may have been different. Hannah v. State, — So. 2d —, 2006 Miss. LEXIS 365 (Miss. July 20, 2006), opinion withdrawn by, substituted opinion at, remanded by 943 So. 2d 20, 2006 Miss. LEXIS 578 (Miss. 2006).

Petitioner failed to show that he received ineffective assistance of counsel because it clearly was because of defense counsel's successful negotiations that the petitioner was able to initially receive a lenient sentence and eventually able to escape a possible life sentence, and when asked by the trial court if he had any complaints about the services provided by his defense counsel, the petitioner indicated that he had no complaints whatsoever. White v. State, 921 So. 2d 402 (Miss. Ct. App. 2006).

Appellate court affirmed defendant's conviction for the sale of a controlled substance and marijuana because even if defendant's counsel's performance was deficient, defendant was not prejudiced by it given that the drug transaction was videotaped and shown to the jury and the confidential informant testified against defendant. Westbrook v. State, 928 So. 2d 186 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 243 (Miss. 2006).

Defendant's petition for post-conviction relief from his conviction of sexual battery was properly denied because defendant failed to establish by any convincing evidence that his attorney's performance was deficient where prior to entering his guilty plea, defendant stated that his trial counsel had discussed the charge against him and all possible defenses and that he was satisfied with his attorney's advice. Furthermore, defendant stated that he understood that his sentence could range between zero and thirty years and that he had entered a guilty plea because he had committed the crime charged against him. Myers v. State, 897 So. 2d 198 (Miss. Ct. App. 2004).

In a criminal prosecution for sexual battery, where the record showed the performance of defense counsel to be less than perfect, there was nothing in the record to indicate that the performance of defense counsel was not within the wide range of reasonable professional assistance. The trial court did not err in refusing to recognize ineffective assistance of counsel. Perry v. State, 904 So. 2d 1122 (Miss. Ct. App. 2004).

Evidence was insufficient to establish ineffective assistance of counsel. Edwards v. State, 749 So. 2d 291 (Miss. Ct. App. 1999); Holmes v. State, 754 So. 2d 529 (Miss. Ct. Ap. 1999).

Evidence was insufficient to establish ineffective assistance of counsel. Hill v. State, 749 So. 2d 1143 (Miss. Ct. App. 1999).

Viewed as a whole, it was ineffective assistance for defense counsel to fail to subpoena possible witnesses, to fail to seek a continuance until he could interview every possible eyewitness, to fail to seek special venire, to fail to raise Batson, which prohibits peremptory challenges based solely on race, and to fail to seek jury instruction specifically embracing facts that defendant and witness testified occurred, which would have made killing excusable accident. Triplett v. State, 666 So. 2d 1356 (Miss. 1995).

Defense counsel's failure to subpoena possible witnesses, to seek a continuance until he could interview every possible eyewitness, to seek special venire, to raise Batson, which prohibits peremptory challenges based solely on race, and to seek jury instruction specifically embracing facts that defendant and witness testified occurred, which would have made killing excusable accident, was prejudicial to defendant. Triplett v. State, 666 So. 2d 1356 (Miss. 1995).

Defendant charged with sexual battery and attempted sexual battery was not denied effective assistance of counsel; record was replete with objections lodged by defense counsel, and defendant showed no prejudice from counsel's decision to refrain from making opening statement, from counsel's failure to offer instruction on theory of defense, and from counsel's alleged inadequacy in jury selection. Hughes v. State, 665 So. 2d 852 (Miss. 1995).

Defendants were denied effective assistance of counsel where their trial counsel failed to question the jury panel during voir dire, failed to make an opening statement, failed to object to questionable identification testimony, placed into evidence a photograph of the defendants taken at the police station while they were wearing handcuffs, failed to call available alibi defense witnesses, failed to assure that the defendants were aware of their right to testify, admitted during closing argument that he had failed to bring his trial notes to court, and failed to present available mitigation evidence at sentencing. Moody v. State, 644 So. 2d 451 (Miss. 1994).

In a prosecution for possession of marijuana with intent to distribute, in which the State connected the defendant to the marijuana by virtue of his residence in the house where the marijuana was found, the defendant was denied effective assistance of counsel in violation of his constitutional rights where his attorney failed to provide the State with a list of witnesses, 3 witnesses who allegedly would have testified that the defendant did not live in the house where the marijuana was found were consequently excluded, the defendant was forced to take the stand as the only means to present this evidence to the jury, and the defendant's prior conviction for possession of marijuana with intent to distribute was admitted into evidence as a result of his taking the stand to testify. Stringer v. State, 627 So. 2d 326 (Miss. 1993), cert. denied, 512 U.S. 1209, 114 S. Ct. 2684, 129 L. Ed. 2d 817 (1994).

A defendant was denied effective assistance of counsel where his attorney failed to conduct discovery, failed to object to the admissibility of statements made by the defendant after he was questioned by a police officer without being advised of his Miranda rights, failed to inquire into the constitutionality of a warrantless, nonconsensual search of the defendant's automobile, and failed to raise at the trial level the issue of a speedy trial, though the prosecution missed the statutory deadline for a speedy trial by 148 days. Barnes v. State, 577 So. 2d 840 (Miss. 1991).

A criminal defendant was denied effective assistance of counsel where his attorney subpoenaed no witnesses until the day of trial, called only one witness, a police officer whom he questioned only briefly, submitted into evidence a police report that only reinforced the testimony of the State's witness, failed to request a pre-trial suppression hearing concerning the "show-up" identification of the defendant, failed to file jury instructions, made absurd demands upon the State to produce at trial evidence that should have been available through discovery, made numerous argumentative outbursts with the bench and refused to follow rules and instructions of the court. Yarbrough v. State, 529 So. 2d 659 (Miss. 1988).

Argument that counsel was ineffective was without merit where counsel presented proof concerning defendant's absence of criminal record, co-operation in investigation, his being model prisoner, and testimony of victim's wife that defendant was non-violent. Wiley v. State, 517 So. 2d 1373 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 610 (1988), reh'g denied, 487 U.S. 1246, 109 S. Ct. 6, 101 L. Ed. 2d 957 (1988).

Failure of attorney to investigate background of former wife of defendant, who was important prosecution witness at defendant's murder trial, did not constitute ineffective assistance of counsel where attorney had known defendant's former wife's family for many years and had interviewed her when he represented defendant in divorce action brought by her. Merritt v. State, 517 So. 2d 517 (Miss. 1987).

Representations of a defendant charged with forcible rape was so inadequate as to amount to a denial of due process where counsel for the defense challenged no jurors for cause, made no objections to leading questions propounded by the district attorney, waived cross-examination of all prosecution witnesses, produced no defense witnesses, requested no instructions, and did little, if anything, for the defendant until after the case had been tried and a verdict returned. Mid State Homes, Inc. v. Zumbro, 229 So. 2d 53 (Miss. 1969).

158. — — Totality of circumstances, ineffectiveness of counsel.

Defendant's trial counsel was not ineffective because, inter alia: (1) it was not unreasonable for trial counsel not to ask for a mistrial since the jury was not exposed to any extrajudicial influence from a juror's statements that she might have heard something about the case, but could not be sure; and (2) counsel did not err in asking the trial court for only five minutes to consider his peremptory challenges because there was no evidence that he did not take the time given to him, he used all six of his challenges after the state's first tender, and defendant did not suggest that trial counsel did not consider striking someone he should have; given the overwhelming circumstantial evidence in the case, the appellate court could not say, but for trial counsel's failure to request a jury instruction on circumstantial evidence, there was a reasonable probability that the result of the trial would have been different. Turner v. State, 945 So. 2d 992 (Miss. Ct. App. 2007).

Post-conviction relief was denied because defendant did not receive ineffective assistance of counsel based on a failure to object to a prosecutor's closing argument since references to defendant's possible escape from prison did not compromise his right to a fair trial; moreover, the prosecutor did not "ramble on and on" about his personal experiences. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

In a case where defendant was convicted of two counts of lustful touching of a child and two counts of sexual battery, defendant received effective assistance of counsel, as counsel filed motions before trial, effectively cross-examined the State's witnesses, made many objections throughout the trial and gave a coherent opening statement along with a comprehensive closing argument, and filed post-trial motions, one of which resulted in the dismissal of the first count of defendant's indictment. Broderick v. State, 878 So. 2d 103 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 937 (Miss. 2004).

Whether counsel's performance was both deficient and prejudicial under Strickland test for ineffectiveness of counsel must be determined from totality of circumstances. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Target of appellate scrutiny in evaluating deficiency and prejudice prongs of Strickland test for ineffectiveness of counsel is counsel's "over-all" performance. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Supreme Court must determine whether counsel's performance was both deficient and prejudicial based upon totality of circumstances. Hughes v. State, 665 So. 2d 852 (Miss. 1995).

159. — — Different result or trial outcome, ineffectiveness of counsel.

It was not error for the same judge to hear an inmate's plea and motion for post-conviction relief, the inmate stated in his plea colloquy that he was satisfied with the assistance provided by his attorney, and a different result would not have occurred if the inmate's attorney would have objected to the judge presiding over both hearings, such that this did not rise to the level of ineffective assistance of counsel. Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 559 U.S. 1078, 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (2010).

Even if trial counsel were deficient, defendant failed to satisfy the second prong of the Strickland test, requiring that he show that counsel's deficient performance prejudiced his defense. The deficiencies defendant alleged failed to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Nichols v. State, 27 So. 3d 433 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836, 79 U.S.L.W. 3197 (U.S. 2010).

Defendant's ineffective assistance claims against a court-appointed attorney failed where he failed to show how his defense was adversely affected by an indictment amendment that changed the date of the alleged burglaries. Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Defendant's convictions for two counts of capital murder were upheld because while defendant was able to give several examples of what defendant perceived to be counsel's deficiencies, including counsel's failure to fully investigate through discovery motions what information the State had related to the case, defendant was not able to satisfy the second prong of the Strickland test; defendant failed to establish a reasonable probability that but for counsel's error he would have had a better result. Dahl v. State, 989 So. 2d 910 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 993 So. 2d 832, 2008 Miss. LEXIS 412 (Miss. 2008).

In a delinquency proceeding, defendant did not show that she received ineffective assistance of counsel based on a failure to file pretrial motions, subpoena witnesses, or compel or exclude the production of evidence because there was no showing that the result of the proceeding would have been different had these actions been taken; moreover, the evidence showed that counsel cross-examined a victim and called two witnesses to testify. In the Interest of K.G., 957 So. 2d 1050 (Miss. Ct. App. 2007).

Petitioner failed to demonstrate that his counsel was ineffective for failing to investigate the background of a police informant where petitioner did not argue that he would not have pled guilty but for the ineffective assistance of his counsel, or that he was prejudiced by his attorney's alleged failure. Elliott v. State, 939 So. 2d 824 (Miss. Ct. App. 2006).

Appellate court denied an inmate's petition for post-conviction relief on the grounds that he was denied effective assistance of counsel when the inmate could not establish that he was prejudiced by the allegedly ineffective representation. Steen v. State, 933 So. 2d 1052 (Miss. Ct. App. 2006).

Defendant's conviction for capital murder was appropriate because he failed to prove that his counsel was ineffective; the appellate court failed to see how examining additional photographs would have enabled defendant's counsel to more effectively cross-examine the state's experts to the extent that the trial outcome would have changed. Williams v. State, 937 So. 2d 35 (Miss. Ct. App. 2006).

Although petitioner claimed that she was denied her right to effective assistance of counsel under the Sixth Amendment and Miss. Const. Art. 3, § 26, due to her counsel's failure to actively pursue a change of venue, generally conduct an investigation of her case, conduct an adequate investigation in preparation for the guilt-innocence phase and the sentencing phase of her trial, and to object and preserve for appeal purposes the prosecutor's improper comments during the guilt phase of the trial, the court had determined each of petitioner's arguments was without merit because, in her efforts to meet the Strickland test criteria, petitioner failed to demonstrate that her trial counsel's actions were deficient and that the deficiency prejudiced the defense of her case. Unless petitioner made both showings, it could not be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. Byrom v. State, 927 So. 2d 709 (Miss. 2006), writ of certiorari denied by 549 U.S. 1056, 127 S. Ct. 662, 166 L. Ed. 2d 520, 2006 U.S. LEXIS 9076, 75 U.S.L.W. 3283 (2006).

Defendant's counsel did not provide ineffective assistance where, although the actions of defendant's counsel were not error-free, the error of untimely witness disclosure was not so egregious as to undermine the confidence in the outcome; the disallowed alibi testimony was very weak, unpersuasive given the strength of the opposing evidence, and even contradictory; the evidence against defendant was very persuasive. Ransom v. State, 919 So. 2d 887 (Miss. 2005), writ of certiorari denied by 548 U.S. 908, 126 S. Ct. 2931, 165 L. Ed. 2d 958, 2006 U.S. LEXIS 4985, 74 U.S.L.W. 3721 (2006).

Where defense counsel did not object to the prosecutor's reference in closing arguments to defendant's post-arrest silence, defendant's claim of ineffective assistance of counsel under Miss. Const. Art. III, § 26 and U.S. Const. amend. VI failed; defendant was not prejudiced by the prosecutor's brief mention of defendant's silence, as the statement did not constitute plain error affecting a fundamental right. Walker v. State, 880 So. 2d 1074 (Miss. Ct. App. 2004).

Where defendant asserted that defense counsel was ineffective under Miss. Const. Art. III, § 26 and U.S. Const. amend. VI for failing to object to the prosecution's use of leading questions on direct examination, the claim failed; defendant was not prejudiced, as leading questions did not create so distorted an evidentiary presentation as to deny defendant a fair trial. Walker v. State, 880 So. 2d 1074 (Miss. Ct. App. 2004).

In a robbery and assault case, defendant failed to demonstrate that the outcome of his trial would have been different if counsel had objected to the State's closing argument tactic, regarding comment on defendant's failure to testify, as the contention concerning the prosecutor's summation was without merit and there was compelling eyewitness testimony implicating defendant; therefore, defendant's ineffective assistance of counsel claim failed. Woods v. State, 883 So. 2d 583 (Miss. Ct. App. 2004).

Denial of postconviction relief was proper, because counsel was not ineffective, as petitioner told the judge that his lawyer had explained all the law related to the aggravated assault offense and any possible defenses; petitioner affirmed that the decision to enter a guilty plea was his; and the affidavits offered by petitioner and his mother, which asserted that the attorney would not permit the mother's joining the discussion between attorney and client, did not prove constitutional deficiency. Tenner v. State, 868 So. 2d 1067 (Miss. Ct. App. 2004).

Defendant's aggravated assault conviction was upheld as he was not denied effective assistance of counsel by counsel's failure to file a motion to dismiss based on speedy trial grounds, since his right to a speedy trial had not been violated; therefore, counsel had no basis for filing the motion. Jackson v. State, 864 So. 2d 1047 (Miss. Ct. App. 2004).

Defendant failed to meet his burden of proof regarding the allegation of ineffective assistance of counsel where his assertion that his attorney put up "no defense" during closing arguments other than to say "my client says he's innocent" was completely false; counsel said more in closing argument than defendant asserted and defendant did not show that counsel's performance was deficient. Armstead v. State, 869 So. 2d 1052 (Miss. Ct. App. 2004).

Defendant was not denied effective assistance of counsel where, once the youth court had jurisdiction, it did not lose jurisdiction of defendant after he turned 18, but retained jurisdiction until defendant reached age 20; therefore, defendant's assertion that his counsel was ineffective for failing to challenge the transfer was without merit. Hicks v. State, 870 So. 2d 1238 (Miss. Ct. App. 2004).

Where the evidence showed that defendant's trial counsel extensively cross-examined a victim in a sexual assault case and voiced objections to evidence when appropriate, there was nothing to support an ineffective assistance of counsel claim. McCoy v. State, 878 So. 2d 167 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 910 (Miss. 2004).

Defendants did not meet their burden of demonstrating deficient performance by trial counsel and resulting prejudice; counsel placed evidence before the jury that both witnesses had failed to identify a defendant and objected to questionable testimony. Powell v. State, 878 So. 2d 144 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 962 (Miss. 2004).

Where there was nothing in the record before the appellate court that would have permitted a meaningful analysis of what uncalled witnesses might have testified to or whether there might have been compelling reasons not to call them even if they were prepared to offer the testimony defendant in his brief contended they would, defendant's ineffective assistance of counsel claim could only be raised by means of a motion for postconviction relief. Sharp v. State, 862 So. 2d 576 (Miss. Ct. App. 2004).

Petition for post-conviction relief based on ineffective assistance of counsel was properly denied because an inmate failed to show that allegedly discoverable evidence would have been exculpatory in light of a co-defendant's statement that implicated the inmate in a murder. Hollingsworth v. State, 852 So. 2d 612 (Miss. Ct. App. 2003), writ of certiorari denied by 852 So. 2d 577, 2003 Miss. App. LEXIS 867 (Miss. Ct. App. 2003).

Defense counsel's failure to file a witness list until the morning of trial, which resulted in the trial court excluding defendant's alibi witnesses in defendant's trial for strong-arm robbery, did not constitute ineffective assistance of counsel because defendant was not prejudiced by counsel's negligence; both the victim and her boss had gotten a good look at defendant during the incident, the victim picked defendant out of a photo line-up, and both were able to identify defendant at trial, and the outcome of the trial would not have been different even if defendant's girlfriend and his family members were allowed to support defendant's alibi. Ransom v. State, — So. 2d —, 2003 Miss. App. LEXIS 459 (Miss. Ct. App. May 20, 2003), opinion withdrawn by, substituted opinion at 918 So. 2d 710, 2004 Miss. App. LEXIS 972 (Miss. Ct. App. 2004).

Defendant produced no evidence to show his attorney's representation was deficient, or why the substitution of counsel prejudiced him; the substitution of attorneys five days before trial did not result in a denial of effective assistance of counsel, and the jury instruction given was proper; had counsel objected, he would have placed defendant in jeopardy of receiving an enhanced sentence. Wolverton v. State, 859 So. 2d 1073 (Miss. Ct. App. 2003).

Because defendant was unable to show that counsel's performance in a murder trial was so deficient and prejudicial as to warrant a new trial, reversal of a murder conviction was not required. Schuck v. State, 865 So. 2d 1111 (Miss. 2003).

In a case where defendant was convicted of murder for the shooting death of his wife, counsel was not ineffective regarding venue because defendant presented no evidence of alleged pretrial publicity, regarding the admission of a revolver, regarding closing argument, or regarding jury instructions because defendant did not show the outcome of the trial would have been different if an instruction on his suicide theory had been given to the jury. Jones v. State, 857 So. 2d 740 (Miss. 2003).

In a capital murder case, a review of the record, the briefs, and the arguments showed that there were no individual errors which required reversal and that there was no aggregate collection of minor errors that would, as a whole, mandate a reversal of either the inmate's convictions or sentences; thus, the failure by the inmate's attorneys to present issues at the trial or appellate level that the inmate now presented to the supreme court in his post-conviction application was not deficient and could not pass the first prong of Strickland. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's attorneys did attempt to limit the victim impact evidence and asked for a continuing objection to the prosecutor's line of questioning, but the jury was entitled to know who the victim was and what impact her death had on her family; thus, the admission of the victim's family's testimony was proper and the inmate's counsel were not ineffective for failing to limit the State's use of victim impact evidence at trial and during the final argument. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate did not prove that he was prejudiced in any fashion by his attorneys' decision not to assert a Batson challenge, which might have been sound trial strategy; thus, the inmate's counsel were not ineffective for failing to challenge the State's use of peremptory challenges to exclude African-American venire members. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to rehabilitate a potential juror challenged as opposing the death sentence because the evidence showed that the juror was not excused based on her religious scruples or her views on the death penalty, but because she clearly indicated that she could not sit in judgment of someone if she did not see the crime happen and that she could not return a verdict. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for removing a request for a special venire under Miss. Code Ann. § 13-5-77 because nothing in the record indicated that the jury panel was insufficient or that a special venire was necessary. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to challenge the testimony of the county sheriff who was in charge of the investigation of the inmate because (1) the trial court's refusal to admit evidence of the sheriff's conviction seven years after his testimony in the inmate's case was not an abuse of discretion under Miss. R. Evid. 609(a)(1); (2) the sheriff's prior testimony was admissible under Miss. R. Evid. 804; (3) the inmate's confrontation clause rights were not violated because he had been present when the testimony was given and was able to confront the sheriff; and (4) evidence from a civil lawsuit involving one of the sheriff's deputies could have done little harm to the sheriff's credibility. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to seek a continuance in order to better prepare because there was no indication from the record that the inmate's attorneys were in need of additional time or that their failure to obtain a continuance was deficient; also, the inmate failed to demonstrate how the result of his sentencing trial would have been different had his attorneys obtained a continuance. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to properly develop and present mitigating evidence at trial because the inmate's attorneys did present mitigating evidence to the jury that the inmate's father was an abusive alcoholic; that the inmate's mother and father had marital problems throughout his childhood; that the inmate himself was an alcoholic and drug addict; that that inmate was suffering from extreme mental and emotional disturbances on the night of the murders; and that the inmate's capacity to appreciate the criminality of his conduct on the night of the murders was impaired. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to introduce rebuttal evidence regarding the inmate's interview with a journalist because evidence that the inmate was suicidal and suffered from severe depression might have backfired and might have made it easier for the jury to decide to sentence the inmate to death because he stated that he wanted to die and because counsel reasonably wanted to keep the information that the inmate had been previously sentenced to death from the jury. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to introduce rebuttal evidence regarding the State's experts because the inmate's attorneys did call two doctors to testify on the inmate's behalf and any failure to cross-examine the State's doctors was not deficient because it could have bolstered the State's doctors' testimonies and given the State more ammunition. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

In a capital murder case, the inmate filed an application for post-conviction relief based on ineffective assistance of counsel; however, several of the inmate's ineffective assistance of counsel claims were procedurally barred because they had been discussed on direct appeal, the inmate failed to meet his burden of providing authority to support his assignment of error, and the unsworn statements of witnesses were insufficient to support the inmate's allegations. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), writ of certiorari denied by 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678, 72 U.S.L.W. 3768 (2004).

Counsel was not ineffective in failing to object to defendant's conviction of armed carjacking and armed robbery arising out of the same episode on the grounds of double jeopardy where double jeopardy did not apply because the carjacking charge involved a delivery truck and the robbery involved money taken from one of the occupants of the truck; counsel would not be judged ineffective for making a spurious argument. McCline v. State, 856 So. 2d 556 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

Defendant failed to demonstrate a deficiency in his counsels' overall performance sufficient to undermine the integrity of his trial and conviction; there was testimony that defendant admitted shooting into the camp cabin and a confession stating likewise, and counsel's statements during closing presented an alternative defense theory, namely, that codefendant put the shotgun to defendant's head and ordered him to fire. Davis v. State, 849 So. 2d 1252 (Miss. 2003).

In a capital murder case, counsel was not ineffective at trial regarding the evidence, witnesses, Batson challenges, suppression of evidence, attorney-client privilege, voir dire, courtroom security, familiarity with capital cases, investigating, competency hearing, venue, opening statement, or closing argument. Russell v. State, 849 So. 2d 95 (Miss. 2003).

Where a defendant tries to introduce evidence, fails, and then testifies in accordance with the trial court's evidentiary rulings, this is not perjury and is not ineffective assistance of counsel. Russell v. State, 849 So. 2d 95 (Miss. 2003).

Defendant made no contention as to what efforts counsel could reasonably have been expected to produce in terms of evidence or information helpful to defendant's defense; counsel's failure to insist on further delay was not the deficient performance that would warrant relief and defendant failed to show the basis for the conclusion that any alternate courses of action had a reasonable chance of producing a result more favorable to him. Pickett v. State, 861 So. 2d 1049 (Miss. Ct. App. 2003).

Counsel for capital murder defendant was not ineffective for failing to investigate and develop fact of defendant's low intelligence quotient, where absence of that evidence did not reasonably undermine confidence in outcome of trial, in that it was merely additional evidence of defendant's mental aptitude, since counsel argued that defendant had very minimal education and deprived childhood. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Claim of ineffective assistance of counsel is judged by whether counsel's performance was deficient, and, if so, whether deficient performance was prejudicial to defendant in sense that court's confidence in correctness of outcome is undermined. Roland v. State, 666 So. 2d 747 (Miss. 1995).

Supreme Court will find ineffective representation by counsel only where there is reasonable probability that without counsel's errors, outcome of trial would have been different. Hughes v. State, 665 So. 2d 852 (Miss. 1995).

In prosecution for possession with intent to distribute marijuana, even though performance at trial by defendant's counsel may have been deficient, in view of, inter alia, failure to object to damaging hearsay testimony and allowing defendant to testify in own behalf and further incriminate himself, there was nevertheless sufficient evidence to support conviction, and therefore allegedly deficient performance did not prejudice defense under Strickland v. Washington (1984) 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, and Leatherwood v. State (Miss. 1985) 473 So. 2d 964. Alexander v. State, 503 So. 2d 235 (Miss. 1987).

160. — — Presumptions, ineffectiveness of counsel.

Record reflected that defendant's trial counsel filed numerous pre-trial motions, including his successful motion to offer evidence of past sexual behavior, that counsel presented numerous witnesses for the defense, and that counsel succeeded in having count two of the indictment dismissed; in his appellate brief, defendant merely asserted that trial counsel should have considered making certain requests or objections, but defendant did not demonstrate how he was prejudiced by his counsel's alleged errors. Thus, defendant did not overcome the presumption that his attorney's performance fell within a wide range of reasonably professional assistance and that the decisions made by his attorney were strategic; therefore, defendant's ineffective assistance of counsel claim failed. Poynor v. State, — So. 2d —, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006), opinion withdrawn by, substituted opinion at 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App. 2007).

There is strong, yet rebuttable, presumption that counsel's conduct falls within wide range of reasonable professional assistance, for purposes of applying Strickland test for ineffectiveness of counsel, as there is presumption that decisions made by defense counsel are strategic. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Burden to demonstrate ineffective assistance of counsel is on defendant, who faces strong but rebuttable presumption that counsel's performance falls within broad spectrum of reasonable professional assistance. Hughes v. State, 665 So. 2d 852 (Miss. 1995).

An attorney did not render ineffective assistance merely because he did not put the defendant on the witness stand during a hearing on the defendant's motion to suppress his confession, since the attorney's decision to keep the defendant off the stand may have been a deliberate trial strategy. Even if the attorney made a mistake, it did not rise to the level of ineffective assistance of counsel necessary to violate the Sixth Amendment right to counsel; there is a strong presumption that an attorney's performance was within the wide range of reasonable, professional, and acceptable conduct. Mohr v. State, 584 So. 2d 426 (Miss. 1991).

161. — — Burden of proof, ineffectiveness of counsel.

Defendant failed to meet the burden required by Strickland where the circuit court judge found defendant's counsel's testimony regarding his representation of defendant to be more credible than defendant's testimony. Hubanks v. State, 952 So. 2d 254 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 171 (Miss. 2007).

Inmate was not able to establish that his attorney rendered ineffective assistance of counsel prior to entering a guilty plea as his attorney was successful in getting other felony charges dismissed, and the inmate stated at the plea hearing that he was satisfied with his attorney's representation. Majors v. State, 946 So. 2d 369 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 50 (Miss. 2007).

Where defendant's counsel clearly presented the defendant's version of events, and a pretrial statement made by defendant to police, which was entered into evidence, allowed the jury to hear his version of the events despite his decision not to testify in his own defense, and defendant did not state what witnesses should have been called, or what additional evidence his counsel could have presented at trial, when viewed in the totality of the circumstances, the actions of defendant's counsel constituted reasonable trial strategy, and defendant did not meet his burden on appeal of showing how his counsel's decision not to call witnesses at trial was deficient performance. Townsend v. State, 933 So. 2d 986 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 982, 2006 Miss. LEXIS 371 (Miss. 2006).

To prove counsel was ineffective at trial, a defendant must show the existence of a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. Where a defendant convicted of sexual battery of a child failed to prove the prejudice arm of the ineffective counsel test by failing to show the outcome would have been different based on alleged deficiencies in his counsel's responses to rulings on the admission of evidence, his conviction was affirmed on appeal. Renfrow v. State, 863 So. 2d 1047 (Miss. Ct. App. 2004), opinion withdrawn by, substituted opinion at 882 So. 2d 800, 2004 Miss. App. LEXIS 919 (Miss. Ct. App. 2004).

Defendant did not prove ineffective assistance of counsel where defendant's assertion that he wanted to go to trial and advised his attorney was belied by the transcript of the plea hearing, which stated that defendant indicated to the trial judge that he did not want to go to trial; defendant was given the opportunity to present his case to the trial court and present any complaints to the trial court regarding his attorney's advice, which he did not do, but instead affirmatively expressed satisfaction with the representation of his attorney. Hill v. State, 850 So. 2d 223 (Miss. Ct. App. 2003).

Burden is on defendant to demonstrate both deficiency and prejudice prongs of

Strickland test for ineffectiveness of counsel. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Under prejudice prong of Strickland test for ineffectiveness of counsel, movant must show that there is reasonable probability that, but for counsel's unprofessional errors, result of proceedings would have been different, with "reasonable probability" being probability sufficient to undermine confidence in outcome. Cole v. State, 666 So. 2d 767 (Miss. 1995).

To successfully claim ineffective assistance of counsel, defendant must show deficiency of counsel's performance sufficient to constitute prejudice to defense. Hughes v. State, 665 So. 2d 852 (Miss. 1995).

In order to prove that he received ineffective assistance of counsel during the guilt phase of a capital murder prosecution, the defendant was required to show deficient performance and that his counsel's errors were so serious as to deprive him of a fair trial with a reliable result; unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

When a convicted defendant challenges his guilty plea on grounds of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity. Reynolds v. State, 521 So. 2d 914 (Miss. 1988).

In order to prevail on the claim that he was denied effective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Perkins v. State, 487 So. 2d 791 (Miss. 1986).

The burden of proving ineffective assistance of counsel is on the defendant to prove that the counsel's performance was (1) deficient, and (2) that the deficient performance prejudiced the defense, and a reversal of a conviction or sentence is not warranted upon failure to prove either component. Dufour v. State, 483 So. 2d 307 (Miss. 1985), cert. denied, 479 U.S. 891, 107 S. Ct. 292, 93 L. Ed. 2d 266 (1986).

162. — — Post-conviction remedies, ineffectiveness of counsel.

Pursuant to Miss. Const. Art. 3, § 26, defendant's claim that his probation officer failed to advocate his cause effectively at his revocation hearing had no merit because a claim of ineffective assistance simply would not be applicable to defendant's probation officer. Yance v. State, 30 So. 3d 370 (Miss. Ct. App. 2010).

Trial court did not err in denying an inmate's motion for post-conviction relief on the ground that his appellate counsel failed to note his trial counsel's failure to investigate and challenge a juror's inclusion on the jury because there was nothing in the record confirming that the juror actually served on the jury, and the inmate failed to show how the juror's alleged presence on the jury prejudiced his case. Lattimore v. State, 37 So. 3d 678 (Miss. Ct. App. 2010).

Where the record did not affirmatively show ineffectiveness of counsel of constitutional dimensions, but the parties did not stipulate that the record was adequate such that the appellate court could adequately weigh the trial judge's findings of fact, the appellate court affirmed defendant's conviction for the possession of stolen property without prejudice so as to allow him to further supplement the record with additional evidence and raise his ineffective assistance claim through appropriate postconviction proceedings. Tucker v. State, 47 So. 3d 164 (Miss. Ct. App. 2009), reversed by 47 So. 3d 135, 2010 Miss. LEXIS 573 (Miss. 2010).

Defendant's trial counsel was not ineffective for failing to file a motion for a new trial or a judgment notwithstanding the verdict because (1) defendant was granted an out-of-time appeal; and (2) even if trial counsel was deficient for failing to file post-trial motions, defendant did not shown how that deficiency resulted in prejudice to his defense since his issues on appeal were included in the record. Weaver v. State, 996 So. 2d 142 (Miss. Ct. App. 2008).

Although defendant argued that trial counsel was ineffective for failing to request an instruction telling the jury to regard a witness's testimony as an accomplice with heightened scrutiny, the court did not need to reach a disposition of this issue because the record was not ripe for review of this contention, and thus, the court affirmed without prejudice to defendant's right to raise this issue in post-conviction proceedings; there was no stipulation to the adequacy of the record by the State, post-conviction proceedings might give counsel a fair change to explain the lack of the instruction, and while normally it would be standard practice for counsel to request the instruction, on the record the court could not find that the absence of the instruction equated to ineffective assistance. Thompson v. State, 995 So. 2d 831 (Miss. Ct. App. 2008).

In an armed robbery case, defendant's ineffective assistance of counsel claim was not addressed because there was no stipulation by the parties that the record was accurate, and the record did not affirmatively show ineffectiveness of constitutional dimensions. Brownlee v. State, 972 So. 2d 31 (Miss. Ct. App. 2008).

In a petition for post-conviction relief, the inmate's counsel was not ineffective because he failed to allege ineffective assistance of counsel with enough specificity and the outcome of the proceedings would not have been different because defendant admitted that he was guilty of the crime of statutory rape; thus, under Miss. Code Ann. § 99-39-11(a), the trial court properly dismissed the ineffective assistance of counsel claim without an evidentiary hearing. Brooks v. State, 953 So. 2d 291 (Miss. Ct. App. 2007).

Where a defendant raised ineffective assistance of counsel on direct appeal, and raises it again in a post-conviction proceeding, supported by extraneous materials that were not available on direct appeal, an appellate court's consideration of the issue is not barred by res judicata; where the defendant raises ineffective assistance of counsel at the post-conviction stage, and it is the same issue raised on direct appeal but only rephrased, res judicata will apply. Hodges v. State, 949 So. 2d 706 (Miss. 2006), writ of certiorari denied by 552 U.S. 1061, 128 S. Ct. 705, 169 L. Ed. 2d 552, 2007 U.S. LEXIS 12873, 76 U.S.L.W. 3287 (2007).

Defendant was not entitled to post-conviction relief based on ineffective assistance when res judicata barred some of the claims such as counsel's failure to support a motion to suppress defendant's confession, counsel's failure to properly advise on plea bargains, counsel's failure to introduce victims' impact statement, and failure to properly prepare defendant to give his testimony; and defendant's remaining claims lacked merit. Hodges v. State, 949 So. 2d 706 (Miss. 2006), writ of certiorari denied by 552 U.S. 1061, 128 S. Ct. 705, 169 L. Ed. 2d 552, 2007 U.S. LEXIS 12873, 76 U.S.L.W. 3287 (2007).

Parties did not stipulate that the record was adequate to allow the appellate court to make the finding of ineffective assistance of counsel without consideration of the findings of fact of the trial judge, and the record did not affirmatively show ineffectiveness of constitutional dimensions; accordingly, defendant could raise his ineffective assistance of counsel claim in a post-conviction relief proceeding. Terrell v. State, 952 So. 2d 998 (Miss. Ct. App. 2006).

Denial of the inmate's motion for postconviction relief was proper because, notwithstanding the admissions and concessions contained within the inmate's petition and throughout his hearing, he further failed to offer any affidavits or additional proof in support of his claim of ineffective assistance of counsel other than his own beliefs. Ross v. State, 936 So. 2d 983 (Miss. Ct. App. 2006).

Defendant's convictions for murder and aggravated assault were proper where he failed to show that his counsel was ineffective on direct appeal. The court did not find the record to affirmatively show ineffectiveness of constitutional dimensions, nor did the court find any stipulation by the parties regarding the adequacy of the record. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

Post-conviction relief was properly denied in a burglary case because appellant did not receive ineffective assistance of counsel, as appellant responded to the trial judge's questioning that his attorney discussed the case with him thoroughly and completely, and that he was satisfied with his attorney's services. Appellant also did not contend that his attorney failed to show his innocence or any violations in his prosecution. Christie v. State, 915 So. 2d 1073 (Miss. Ct. App. 2005).

At the guilty plea hearing, the trial judge asked defendant whether he was satisfied with the services of his attorney, to which defendant indicated that he was satisfied with his attorney's representation. In his postconviction action, defendant failed to place before the trial court evidence of such weight as to establish that his prior sworn statement of satisfaction with his attorney should be disregarded and his assertion that counsel was ineffective for having had limited contact with defendant prior to the guilty plea hearing was rejected. Thomas v. State, 883 So. 2d 1197 (Miss. Ct. App. 2004).

Where defendant had a postconviction evidentiary hearing, defendant had no constitutional guarantee to appointed counsel, and as such, without a constitutional right to counsel, there could be no deprivation of effective assistance of counsel, and defendant's attorney was active and effective during trial, and he filed a brief providing the appellate court with logical arguments and the brief resulted in the reversal of one of defendant's convictions; therefore, defendant had not convinced it that but for his counsel's deficiency, a different result would have occurred. Mitchell v. State, 879 So. 2d 1082 (Miss. Ct. App. 2004).

Where an inmate offered no proof that an attorney failed to conduct an investigation, did not file certain motions, and encouraged him to plead guilty to manslaughter, a claim of ineffective assistance of counsel was properly denied in a motion seeking post-conviction relief. Young v. State, 877 So. 2d 552 (Miss. Ct. App. 2004).

In a case related to the sale of cocaine, postconviction relief was properly denied because appellant was not denied effective assistance of counsel as appellant's claims about his indictment were moot, appellant having responded in the affirmative when the trial judge asked if he was satisfied with counsel; further, the signed guilty plea petition indicated that appellant was informed of the sentence he could receive and he stated he was satisfied with the representation of his counsel. Waites v. State, 872 So. 2d 758 (Miss. Ct. App. 2004).

Defendant was not entitled to a free transcript in a postconviction relief setting because his postconviction motion could not withstand summary dismissal under Miss. Code Ann. § 99-39-11(2); defendant did not demonstrate ineffective assistance of counsel where he did not allege with any degree of specificity what constituted the mitigating evidence or the manner in which his counsel coerced him, and such naked allegations did not supply the "specificity and detail" required to establish a prima facie showing. McCray v. State, 869 So. 2d 442 (Miss. Ct. App. 2004).

Defendant's claim that the assistance received from counsel was ineffective because his attorney had failed to inform him that the sentence would be served without parole and had misinformed him about his eligibility for parole after a certain period of time was time barred; defendant's claim was required by Miss. Code Ann. § 99-39-5(1)(a) to be brought within three years of the guilty plea; the raising of a claim of ineffective assistance of counsel alone was insufficient to overcome the procedural bar where defendant provided as sole evidence his own version of the facts. Austin v. State, 863 So. 2d 59 (Miss. Ct. App. 2003).

Although defense counsel's failure to request a new trial after a murder conviction amounted to deficient performance, there was no ineffective assistance of counsel because defendant failed to demonstrate a substantial likelihood that the outcome would have been different if the motion had been granted. Johnson v. State, 876 So. 2d 387 (Miss. Ct. App. 2003), writ of certiorari denied by 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

In a capital murder case, defendant's petition for post-conviction relief was denied as the supreme court had already addressed the merits on direct appeal of his underlying ineffectiveness of counsel claims, which were found to be without merit; thus, defendant could not show the requisite deficient performance and resulting prejudice necessary to establish the ineffective assistance claims and they were res judicata. Walker v. State, 863 So. 2d 1 (Miss. 2003), writ of certiorari denied by 543 U.S. 842, 125 S. Ct. 281, 160 L. Ed.

2d 68, 2004 U.S. LEXIS 5982, 73 U.S.L.W. 3208 (2004).

Although all of petitioner death row inmate's arguments were procedurally barred either by res judicata or for failure to raise the arguments earlier, and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. Jackson v. State, 860 So. 2d 653 (Miss. 2003).

A post-conviction relief petitioner, who is seeking to overturn a conviction or sentence on the grounds of ineffective assistance of counsel, must demonstrate factual proof by a preponderance of the evidence of an identifiable lapse by counsel and of some actual adverse impact on the fairness of the trial resulting from that lapse. State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

The application of the procedural bar of Mississippi Code § 99-39-21(1) would be inappropriate to a defendant who had had no earlier meaningful opportunity to present issue of denial of effective assistance of counsel. Perkins v. State, 487 So. 2d 791 (Miss. 1986).

In a prosecution for possession with intent to deliver a controlled substance, in violation of §§ 41-29-115, 41-29-117, and 41-29-119, the record failed affirmatively to establish denial of defendants' right to effective assistance of counsel; nevertheless, affirmance of the judgment of conviction would not preclude defendants from litigating the issue via proper postconviction proceedings. Read v. State, 430 So. 2d 832 (Miss. 1983).

163. — Victim statements, ineffectiveness of counsel.

In defendant's capital murder case, where the trial court did not err in admitting the statement of the victim, appellate counsel was not ineffective for failing to raise it on direct appeal. Goodin v. State, 856 So. 2d 267 (Miss. 2003), writ of certiorari denied by 541 U.S. 947, 124 S. Ct. 1681, 158 L. Ed. 2d 375, 2004 U.S. LEXIS 2196, 72 U.S.L.W. 3598 (2004).

ATTORNEY GENERAL OPINIONS

Where alleged perjured testimony was given in Oktibbeha County, proper jurisdiction over the matter would lie in the Circuit Court of that county. Burns, Nov. 5, 2004, A.G. Op. 04-0544.

RESEARCH REFERENCES

ALR. Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial. 15 A.L.R. 495; 79 A.L.R. 1392; 122 A.L.R. 425; 159 A.L.R. 1240.

Right of defendant in criminal case to conduct defense in person. 17 A.L.R. 266; 77 A.L.R.2d 1233.

Effect of, and remedy for, infringement of right of accused to communicate with his attorney. 23 A.L.R. 1382; 54 A.L.R. 1225; 5 A.L.R.3d 1360.

Presence of accused during view by jury. 30 A.L.R. 1357, 90 A.L.R. 597.

Right of defendant in a criminal case to cross-examine a codefendant who has taken the stand in his own behalf. 33 A.L.R. 826.

Constitutional guaranty of right to appear by counsel as applicable to misdemeanor case. 42 A.L.R. 1157.

Remedy for delay in bringing accused to trial or to retrial after reversal. 58 A.L.R. 1510.

Right to take finger prints and photographs of accused before trial, or to retain same in police record after acquittal or discharge of accused. 83 A.L.R. 127.

Brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel. 84 A.L.R. 544.

Constitutionality of statute permitting state to take or use in evidence depositions in criminal case. 90 A.L.R. 377.

Brief voluntary absence of defendant from court room during trial of criminal case as ground of error. 100 A.L.R. 478.

Constitutional or statutory right of accused to speedy trial as affected by his incarceration for another offense. 118 A.L.R. 1037.

Waiver or loss of defendant's right to speedy trial in criminal case. 129 A.L.R. 572; 57 A.L.R.2d 302.

Relief in habeas corpus for violation of accused's right to assistance of counsel. 146 A.L.R. 369.

Duty of court when appointing counsel for defendant to name attorney other than one employed by, or appointed for, a codefendant. 148 A.L.R. 183.

Plea of guilty without advice of counsel. 149 A.L.R. 1403.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers. 152 A.L.R. 1208.

Privilege against self-incrimination as applicable to testimony that one has been compelled to give in another jurisdiction. 154 A.L.R. 994.

Exclusion of public during criminal trial. 156 A.L.R. 265, 48 A.L.R.2d 1436.

Right of defendant in criminal case to discharge of, or substitution of other counsel for, attorney appointed by court to represent him. 157 A.L.R. 1225.

Right to aid of counsel in application or hearing for habeas corpus. 162 A.L.R. 922.

Comment Note: Right to jury trial as to fact essential to action or defense but not involving merits thereof. 170 A.L.R. 383.

Requiring defendant in criminal case to exhibit self, or perform physical acts, during trial and in presence of jury. 171 A.L.R. 1144.

Suppression before indictment or trial of confession unlawfully obtained. 1 A.L.R.2d 1012.

Duty to advise as to right to assistance of counsel. 3 A.L.R.2d 1003.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege. 5 A.L.R.2d 1404.

Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction. 9 A.L.R.2d 661.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination. 13 A.L.R.2d 1439.

Pretrial requirement that suspect or accused wear or try on particular apparel as violating constitutional rights. 18 A.L.R.2d 796.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group. 19 A.L.R.2d 388.

Absence of counsel for accused at time of sentence as requiring vacation thereof or other relief. 20 A.L.R.2d 1240.

Absence of accused at return of verdict in felony case. 23 A.L.R.2d 456.

Finger prints as evidence. 28 A.L.R.2d 1115.

Right of witness to claim privilege against self-incrimination on subsequent criminal trial after testifying to same matter before grand jury. 36 A.L.R.2d 1403.

Waiver or loss of accused's right to speedy trial. 57 A.L.R.2d 302.

Representation by unlicensed counsel as compliance with constitutional right of accused to counsel. 68 A.L.R.2d 1141.

Testifying in civil proceeding as waiver of privilege against self-incrimination. 72 A.L.R.2d 830.

Duty of court to inform accused not represented by counsel of his right not to testify. 79 A.L.R.2d 643.

Criminal trial of deaf, mute, or blind person. 80 A.L.R.2d 1084.

Delay in filing of charge and arrest of accused as violation of right to speedy trial. 85 A.L.R.2d 980.

Exclusion or absence of defendant pending trial of criminal case, from courtroom or from conference between court and attorneys, during argument on question of law. 85 A.L.R.2d 1111.

Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation. 10 A.L.R.3d 1054.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification. 24 A.L.R.3d 1261.

Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Validity and construction of constitution or statute authorizing exclusion of public in sex offense cases. 39 A.L.R.3d 852.

XYY syndrome as affecting criminal responsibility. 42 A.L.R.3d 1414.

Propriety of requiring accused to give handwriting exemplar. 43 A.L.R.3d 653.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods. 43 A.L.R.3d 1375.

Determination of indigency of accused entitling him to appointment of counsel. 51 A.L.R.3d 1108.

Indigent accused's right to choose particular counsel appointed to assist him. 66 A.L.R.3d 996.

Admissibility, in state probation revocation proceedings, of incriminating statement obtained in violation of Miranda Rule. 77 A.L.R.3d 669.

Illness or incapacity of judge, prosecuting officer or prosecution witness as justifying delay in bringing accused speedily to trial-state cases. 78 A.L.R.3d 297.

Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights. 80 A.L.R.3d 1141.

Accused's right to represent himself in state criminal proceeding-modern state cases. 98 A.L.R.3d 13.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury. 3 A.L.R.4th 374.

Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial. 3 A.L.R.4th 601.

Mental subnormality of accused as affecting voluntariness or admissibility of confession. 8 A.L.R.4th 16.

Adequacy of defense counsel's representation of criminal client regarding plea bargaining. 8 A.L.R.4th 660.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense. 8 A.L.R.4th 1160.

Adequacy of defense counsel's representation of criminal client regarding hypnosis and truth tests. 9 A.L.R.4th 354.

Concern for possible victim (rescue doctrine) as justifying violation of Miranda requirements. 9 A.L.R.4th 595.

Adequacy of defense counsel's representation of criminal client regarding guilty pleas. 10 A.L.R.4th 8.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues. 12 A.L.R.4th 318.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies. 13 A.L.R.4th 533.

Adequacy of defense counsel's representation of criminal client regarding prior conviction. 14 A.L.R.4th 227.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 A.L.R.4th 582.

Continuances at instance of state public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial. 16 A.L.R.4th 1283.

Conditions interfering with accused's view of witness as violation of right of confrontation. 19 A.L.R.4th 1286.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 A.L.R.4th 955.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or actions for damages by himself or his family. 38 A.L.R.4th 267.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 A.L.R.4th 1170.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information. 39 A.L.R.4th 899.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecutions. 41 A.L.R.4th 1189.

Jury trial waiver as binding on later state civil trial. 48 A.L.R.4th 747.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness. 54 A.L.R.4th 1156.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant. 55 A.L.R.4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness. 55 A.L.R.4th 1196.

Closed-circuit television witness examination. 61 A.L.R.4th 1155.

Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time. 70 A.L.R.4th 632.

Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public. 74 A.L.R.4th 476.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed. 75 A.L.R.4th 91.

Right of indigent defendant in state criminal case to assistance of investigators. 81 A.L.R.4th 259.

What constitutes assertion of right to counsel following Miranda warnings — state cases. 83 A.L.R.4th 443.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 A.L.R.4th 19.

When does delay in imposing sentence violate speedy trial provision. 86 A.L.R.4th 340.

Necessity that waiver of accused's right to testify in own behalf be on the record. 90 A.L.R.4th 586.

Exclusion of public and media from voir dire examination of prospective jurors in state criminal case. 16 A.L.R.5th 152.

Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony—post-Kastigar cases. 29 A.L.R.5th 1.

Propriety of exclusion of press or other media representatives from civil trial. 39 A.L.R.5th 103.

Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief. 45 A.L.R.5th 531.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases. 47 A.L.R.5th 259.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions—post-Connelly cases. 48 A.L.R.5th 555.

Duty of prosecutor to present exculpatory evidence to state grand jury. 49 A.L.R.5th 639.

Adequacy of defense counsel's representation of criminal client — issues of mental matters concerning persons, other than counsel's client, who are involved in criminal case. 80 A.L.R.5th 55.

Examination and challenge of state case jurors on basis of attitudes toward homosexuality. 80 A.L.R.5th 469.

Adequacy of defense counsel's representation of criminal client — conduct at trial regarding issues of insanity. 95 A.L.R.5th 125.

Denial of, or interference with, accused's right to have attorney initially contact accused. 96 A.L.R.5th 327.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs — Drugs or narcotics administered as part of medical treatment and drugs or intoxicants administered by the police. 96 A.L.R.5th 523.

Validity and efficacy of minor's waiver of right to counsel — cases decided since application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). 101 A.L.R.5th 351.

Denial of accused's request for initial contact with attorney — drunk driving cases. 109 A.L.R.5th 611.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Motions and objections during trial and matters other than pretrial motions. 117 A.L.R.5th 513.

Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving-Cases focusing on presence of inculpatory statements. 124 A.L.R.5th 1.

Adoption and application of "tainted" approach or "dual motivation" analysis in determining whether existence of single discriminatory reason for peremptory strike results in automatic Batson violation when neutral reasons also have been articulated. 15 A.L.R.6th 319.

Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas - Coercion or Duress. 19 A.L.R.6th 411.

What Constitutes "Custodial Interrogation" at Hospital by Police Officer Within Rule of *Miranda v. Arizona* Requiring That Suspect Be Informed of His or Her Federal Constitutional Rights Before Custodial Interrogation - Suspect Injured or Taken Ill. 25 A.L.R.6th 379.

What Constitutes "Custodial Interrogation" of Juvenile by Police Officer Within Rule of *Miranda v. Arizona* Requiring that Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation - At Police Station or Sheriff's Office. 26 A.L.R.6th 451.

Comment Note: Construction and Application of Supreme Court's Ruling in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004), with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine. 30 A.L.R.6th 1.

What Constitutes "Custodial Interrogation" at Hospital by Police Officer Within Rule of Miranda v. Arizona Requiring that Suspect Be Informed of His or Her Federal Constitutional Rights Before Custodial Interrogation — Suspect Hospital Patient. 30 A.L.R.6th 103.

What Constitutes "Custodial Interrogation" by Police Officer Within Rule of Miranda v. Arizona Requiring that Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation — Upon Hotel Property. 45 A.L.R.6th 337.

When Does Use of Pepper Spray, Mace, or Other Similar Chemical Irritants Constitute Violation of Constitutional Rights. 65 A.L.R.6th 93.

What Constitutes 'Custodial Interrogation' Within Rule of Requiring that Suspect Be Informed of His or Her Federal Constitutional Rights Before Custodial Interrogation — At Border or Functional Equivalent of Border. 68 A.L.R.6th 607.

Adequacy of Defense Counsel's Representation of Criminal Client Regarding Search and Seizure Issues — Pretrial Motions — Suppression Motions Where No Warrant Involved. 71 A.L.R.6th 1.

Reverse-Franks Claims, Where Police Arguably Omit Facts from Search or Arrest Warrant Affidavit Material to Finding of Probable Cause with Reckless Disregard for the Truth — Underlying Sexual Offenses. 74 A.L.R.6th 69

Modern status of rule as to test in federal court of effective representation by counsel. 26 A.L.R. Fed. 218.

Accused's right, under 28 USCS § 1654, and similar predecessor statutes, to represent himself in federal criminal proceedings. 27 A.L.R. Fed. 485.

Right of witness in federal court to claim privilege against self-incrimination after giving sworn evidence on same matter in other proceedings. 42 A.L.R. Fed. 793.

Excludable periods of delay under Speedy Trial Act (18 USCS §§ 3161-3174). 46 A.L.R. Fed. 358.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel-federal cases. 53 A.L.R. Fed. 140.

Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination. 55 A.L.R. Fed. 742.

Effect on federal criminal proceeding of unavailability to defendant of alien witness through deportation or other government action. 56 A.L.R. Fed. 698.

Effect on operation of Speedy Trial Act (18 USCS §§ 3161 et seq.) of indictment returned by grand jury whose term has expired. 64 A.L.R. Fed. 916.

Propriety of federal court's exclusion of public from criminal or civil trial in order to protect trade secrets. 69 A.L.R. Fed. 892.

Application, to drug or narcotic records maintained by druggist or physician, of "required records" exception to privilege against self-incrimination. 96 A.L.R. Fed. 868.

When may dismissal for violation of Speedy Trial Act (18 USCS §§ 3161-3174) be with prejudice to government's right to reinstate action. 98 A.L.R. Fed. 660.

Right to jury trial on issue of damages in copyright infringement actions under 17 U.S.C.S. § 504. 163 A.L.R. Fed. 467.

Criminal Defendant's Right to Electronic Recordation of Interrogations and Confessions. 69 A.L.R.6th 579.

Reverse-Franks Claims, Where Police Arguably Omit Facts from Search or Arrest Warrant Affidavit Material to Finding of Probable Cause with Reckless Disregard for Truth — Underlying Drug Offenses. 73 A.L.R.6th 49.

Right of enemy combatant to counsel. 184 A.L.R. Fed. 527.

Am Jur. 21 Am. Jur. 2d, Criminal Law §§ 183 et seq.

30 Am. Jur. Trials 607, Defending against Claim of Ineffective Assistance of Counsel.

41 Am. Jur. Trials 394, Habeas Corpus: Pretrial Motions (right to speedy trial).

7 Am. Jur. Proof of Facts 2d, Prejudice Resulting from Unreasonable Delay in Trial, §§ 11 et seq. (proof of prejudice to defendant as result of unreasonable delay in trial).

CJS. C.J.S. Criminal Law §§ 177 to 186, 277, 578 to 621, 1115, 1120, 1134 to 1141.

C.J.S. Declaratory Judgments § 155.

C.J.S. Federal Civil Procedure §§ 943 to 954.

C.J.S. Indictments and Informations §§ 2, 4.

C.J.S. Juries §§ 2 to 310, 354 to 367, 396, 409, 443 to 461.

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Lawyers' Edition. Admissibility of pretrial confession in criminal case. 22 L. Ed. 2d 872.

Accused's right, under Federal Constitution, to be present at his trial. 25 L. Ed. 2d 931.

Distinction between "petty" and "serious" offenses for purposes of federal constitutional right to trial by jury. 26 L. Ed. 2d 916.

Validity, under Federal Constitution, of state recoupment statutes permitting state to recover counsel and other legal fees expended for benefit of indigent criminal defendants. 32 L. Ed. 2d 936.

Jury in second murder trial held to be impartial despite pretrial publicity and ambiguity in testimony of jurors challenged for cause. 81 L. Ed. 2d 847.

Accused's right, under Federal Constitution's Sixth Amendment, to compulsory process for obtaining witnesses in accused's favor — Supreme Court cases. 98 L. Ed. 2d 1074.

Federal Constitutional right to confront witnesses — Supreme Court cases. 98 L. Ed. 2d 1115.

Supreme Court's views as to what comments by prosecuting attorney violate accused's privilege against self-incrimination under Federal Constitution's Fifth Amendment. 99 L. Ed. 2d 926.

Supreme Court's views as to what constitutes valid waiver of accused's federal constitutional right to counsel. 101 L. Ed. 2d 1017.

Supreme Court's views as to accused's federal constitutional right to counsel on appeal. 102 L. Ed. 2d 1049.

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Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

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§ 26A. Victims' rights; construction of provisions; legislative authority

(1) Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process; and to be informed, to be present and to be heard, when authorized by law, during public hearings.

(2) Nothing in this section shall provide grounds for the accused or convicted offender to obtain any form of relief nor shall this section impair the constitutional rights of the accused. Nothing in this section or any enabling statute shall be construed as creating a cause of action for damages against the state or any of its agencies, officials, employees or political subdivisions.

(3) The Legislature shall have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section.

SOURCES: Laws, 1998, ch. 691, eff November 30, 1998.

Editor's Note — Laws, 1998, ch. 691, (Senate Concurrent Resolution No. 513), provides in pertinent part:

"BE IT FURTHER RESOLVED, That this amendment shall be submitted to the qualified electors at an election to be held on the first Tuesday after the first Monday of November 1998, as provided by Section 273 of the Constitution and by law.

"BE IT FURTHER RESOLVED, That the explanation of this proposed constitutional amendment for the ballot shall read as follows: 'This amendment gives victims of crimes the right to be informed, to be present and to be heard during the criminal process of the person accused of the crime, when authorized by law.' "

The 1998 insertion of Section 26A in Article 3 of the Mississippi Constitution of 1890 was proposed by Laws, 1998, ch. 691 (Senate Concurrent Resolution No. 513), and upon ratification by the electorate on November 3, 1998, was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

JUDICIAL DECISIONS

1. Victim's right to be present and be heard.

Trial court did not abuse its discretion by allowing the prosecution to display the injured child to the jury because: (1) under Miss. Const. Art. 3, § 26A and Miss. Code Ann. § 99-43-21 (Rev. 2007), the victim had the right to be present and be heard during the criminal proceedings; (2) the State was required to offer proof of serious bodily injury in order to convict defendant of aggravated assault; and (3) the probative value of the jury's viewing the child's injuries was not substantially outweighed by unfair prejudice to defendant. Harris v. State, 979 So. 2d 721 (Miss. Ct. App. 2008).

§ 27. Proceeding by indictment or information

No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of the court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment; but the legislature, in cases not punishable by death or by imprisonment in the penitentiary, may dispense with the inquest of the grand jury, and may authorize prosecutions before justice court judges, or such other inferior court or courts as may be established, and the proceedings in such cases shall be regulated by law.

SOURCES: 1817 art I § 12; 1832 art I § 12; 1869 art I § 31; Laws, 1977, ch. 590, eff December 22, 1978.

Editor's Note — The 1977 amendment to Section 27 of Article 3 of the Constitution of 1890 was proposed by Laws, 1977, ch. 590, (Senate Concurrent Resolution No. 590 of the 1977 regular session of the Legislature), and upon ratification by the electorate on November 7, 1978, was inserted by proclamation of the Secretary of State on December 22, 1978.

JUDICIAL DECISIONS

1. In general.
2. Dispensing with inquest by grand jury.
3. Necessity for indictment.
4. Sufficiency of indictment.
5. Amendment of indictments.
6. Surplus language.
7. Guilty plea.
8. Waiver of indictment.
9. Jurisdiction of inferior courts.
10. Jury trial in misdemeanor cases.

1. In general.

A proper reading of Article III § 27 of the Mississippi Constitution initially requires an indictment that charges the essential elements of the criminal offense. Once the indictment has been served on the defendant, a court having subject matter jurisdiction is empowered to proceed. A subsequent event such as a guilty plea to a lesser related offense in no way ousts the court of personal jurisdiction. This reading is consistent with the purposes which an indictment serves-the reasons it has been accorded the status of a constitutional right-(1) to furnish the accused with such a description of the charge against him or her as will enable the accused to make his or her defense and avail himself or herself of a conviction or acquittal for protection against a further prosecution for the same cause, (2) to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction if one should be obtained, and (3) to guard against malicious, groundless prosecution. Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

Grand jury which returned indictment is not shown to be illegal on hearing on motion for new trial after conviction of felonious assault by cutting with knife when circuit clerk merely stated that all jurors were white men, and it was neither shown nor intimated that there were no names of Negroes in jury box out of which grand and petit jury were drawn, but it did appear that jury boxes were practically exhausted after these juries had been drawn, it being common knowledge that number of Negroes who register and qualify for jury service are almost nominal in comparison with number of white persons who do so. Ferrell v. State, 208 Miss. 539, 45 So. 2d 127 (1950).

2. Dispensing with inquest by grand jury.

The section expressly authorizes the legislature to dispense with the inquest of a grand jury in the prosecution of misdemeanors. Coulter v. State, 75 Miss. 356, 22 So. 872 (1898).

3. Necessity for indictment.

Allegations of perjury that a former prison employee brought against a warden were beyond the scope of the employee's appeal of a decision denying her unemployment compensation benefits where the allegations were not in the form of an affidavit as required by Miss. Const. Art. 3, § 27. Henry v. Miss. Dep't of Empl. Sec., 962 So. 2d 94 (Miss. Ct. App. 2007).

Absent waiver, only grand jury can charge person with felony such as burglary. State v. Berryhill, 703 So. 2d 250 (Miss. 1997).

This section requires an indictment before prosecution for felonies. State v. Sansome, 133 Miss. 428, 97 So. 753 (1923).

4. Sufficiency of indictment.

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. State v. Shaw, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003), opinion withdrawn by, substituted opinion at 880 So. 2d 296, 2004 Miss. LEXIS 1027 (Miss. 2004).

Because the indictment charged defendant with operating "a motor vehicle while under the influence of intoxicating liquor," which was the language of the offense codified at Miss. Code Ann. § 63-11-30(1)(a), the statement adequately informed defendant of the elements that the State was required to prove and the indictment was sufficient as required by Miss. Const. art. 3, § 27. Harris v. State, 830 So. 2d 681 (Miss. Ct. App. 2002), writ of certiorari denied by 842 So. 2d 578, 2003 Miss. LEXIS 323 (Miss. 2003).

5. Amendment of indictments.

Neither the amendment of an indictment, nor Uniform Rule 7.09 of the Uniform Rules of Circuit and County Court Practice, under which a court may allow such an amendment, is unconstitutional. Burrell v. State, 727 So. 2d 761 (Miss. Ct. App. 1998).

In a prosecution for aggravated assault under § 97-3-7, the defendant's conviction would be reversed where the grand jury returned the indictment under § 97-3-7(2)(b), which requires purposeful, willful and knowing actions, on the morning of the trial the State moved to amend the indictment to allow the jury to convict under § 97-3-7(2)(a), which requires only that the defendant recklessly cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life, and, though there was no order allowing the amendment, the jury instructions clearly reflected the new element which was not contained in the original indictment and it was apparently that part of the instruction upon which the jury returned its verdict. The proposed amendment was a change of substance, rather than form, and therefore the court had no power to amend the indictment without the concurrence of the grand jury. Quick v. State, 569 So. 2d 1197 (Miss. 1990).

An amendment to an indictment which changes the offense cannot be made without the consent of the grand jury; identity of offense and of person is necessary. Blumenberg v. State, 55 Miss. 528 (1878).

The Legislature may authorize the amendment of indictments when they do not deprive the accused of any essential right necessary to the ends of justice. Miller v. State, 53 Miss. 403 (1876); Peebles v. State, 55 Miss. 434 (1877).

Indictments cannot be amended as to a matter of substance, in the absence of a statute authorizing it, without the consent of the grand jury. McGuire v. State, 35 Miss. 366, 72 Am. Dec. 124 (1858).

6. Surplus language.

Because the indictment gave clear notice that the charge was operating "a motor vehicle while under the influence of intoxicating liquor," in violation of Miss. Code Ann. § 63-11-30(1)(a), it was not fatally flawed by the inclusion of the surplus language that defendant "refused to submit to a chemical test of his breath;" the deletion of the surplus language from jury instruction was not an error. Harris v. State, 830 So. 2d 681 (Miss. Ct. App. 2002), writ of certiorari denied by 842 So. 2d 578, 2003 Miss. LEXIS 323 (Miss. 2003).

7. Guilty plea.

Defendant charged with automobile burglary and escape could properly waive the reading of the indictment and enter pleas of guilty to the charges. Spearman v. State, 840 So. 2d 823 (Miss. Ct. App. 2003).

A plea of guilty to a crime separate and distinct from the crime charged in the indictment and not a constituent offense thereof is void and of no effect since the

Mississippi Constitution requires indictment by a grand jury before a prosecution may be had. Grayer v. State, 519 So. 2d 438 (Miss. 1988).

A conviction upon a guilty plea to accessory after the fact of attempted armed robbery of one indicted for attempted armed robbery was void, since the two offences are separate and distinct and the accused therefore had pled guilty to an offence for which he had never been indicted. Box v. State, 241 So. 2d 158 (Miss. 1970), overruled on other grounds, Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

8. Waiver of indictment.

In a post-conviction relief proceeding in which an inmate had been represented by counsel and executed a sworn waiver of indictment and consented to be proceeded against by criminal information, he unsuccessfully argued that his guilty plea was not valid since he was not indicted for armed robbery and that his guilty plea was invalid because the information did not notify him that the first 10 years of his sentence were mandatory and because the information failed to cite the charging statute. Diggs v. State, 46 So. 3d 361 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 561 (Miss. 2010).

Defendant's motion for post-conviction relief based on an alleged violation of Miss. Const. Art. 3, § 27, was properly denied because the record reflected that defendant was represented by counsel when he waived indictment and that he executed a sworn statement that expressly waived indictment by a grand jury. Frazier v. State, 28 So. 3d 646 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 84 (Miss. 2010).

Defendant's guilty plea to armed robbery as charged in a criminal information rather than an indictment was proper under U.S. Const. Amend. V and Miss. Const. Art. 3, § 27, because defendant waived the indictment requirement. The trial court was not required under Miss. Unif. Cir. & Cty. R. 8.04 to discuss with defendant whether he was entitled to early release. Berry v. State, 19 So. 3d 137 (Miss. Ct. App. 2009).

Trial court did not err in summarily dismissing defendant's motion for post-conviction relief because defendant's burglary conviction was not unconstitutional; defendant, represented by counsel, had executed a sworn waiver of indictment to a charge of burglary brought by criminal information. Edwards v. State, 995 So. 2d 824 (Miss. Ct. App. 2008).

Where the defendant was indicted on two counts of armed robbery under the jurisdiction of the circuit court and thereafter voluntarily entered pleas of guilty to attempted robbery and accessory after the fact to armed robbery, waived the right to be indicted for the latter crimes the trial court had jurisdiction to accept his guilty pleas and impose sentence. Young v. State, 797 So. 2d 239 (Miss. Ct. App. 2001).

A defendant waived his right to indictment for grand larceny, and thus his conviction for grand larceny could be used subsequently to sentence the defendant as a habitual offender, where the defendant was originally indicted for the burglary of 2 automobiles, the defendant appeared before the circuit court and testified under oath that he understood that he was charged with burglary of an automobile in each case, that he wished to withdraw his pleas of not guilty and enter pleas of guilty to related charges of grand larceny, that he understood the nature of the offense of grand larceny, and that he in fact committed those crimes. Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

9. Jurisdiction of inferior courts.

The legislature may make mayors of municipalities ex officio justices of the peace in and for their municipalities, and give them criminal jurisdiction as such. Bell v. McKinney, 63 Miss. 187 (1885).

10. Jury trial in misdemeanor cases.

Jury trials may be dispensed with by law in a mayor's court. Marsh v. Whittington, 88 Miss. 400, 40 So. 326 (1906).

It is not essential that the law shall provide for a trial of misdemeanors by a jury before justices of the peace. Ex parte Wooten, 62 Miss. 174 (1884).

RESEARCH REFERENCES

ALR. Necessity of indictment with respect to the crime of driving an automobile while intoxicated. 42 A.L.R. 1512; 49 A.L.R. 1400; 68 A.L.R. 1356.

Constitutionality of statute relating to injunctions against crime or abatement of nuisance arising from violation of liquor law, with respect to authorizing punishment without indictment. 49 A.L.R. 635; 49 A.L.R. 635, at page 646.

Constitutional or statutory changes affecting grand jury or substituting information for indictment as an ex post facto law. 53 A.L.R. 716.

Statutes regarding form or substance of indictment as violation of constitutional requirement of "indictment." 69 A.L.R. 1392.

Failure or refusal of grand jury upon investigation to find indictment as affecting right to file information. 120 A.L.R. 713.

Right to waive indictment, information, or other formal accusation. 56 A.L.R.2d 837.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information. 44 A.L.R.4th 401.

CJS. C.J.S. Indictments and Informations § 6.

Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond. 56 Miss L. J. 73, April, 1986.

Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 4:1.

§ 28. Cruel or unusual punishment prohibited

Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed.

SOURCES: 1817 art I § 16; 1832 art I § 16; 1869 art I § 8.

JUDICIAL DECISIONS

1. In general.
2. Validity of ordinances.
3. Validity of statutes.
4. Youthful offenders.
5. Mentally ill and mentally deficient persons.
6. Indigent defendants.
7. Termination of parental rights.
8. Solitary confinement.
9. Sentence within statutory parameters.
10. Disproportionate sentence.
11. Recidivists generally.
12. Disproportionate forfeiture.
13. Habitual offenders.
14. Capital sentencing procedure.
15. Sentence upon retrial.
16. Excessive fines.

1. In general.

Defendant's life sentence for murder under Miss. Code Ann. § 97-3-21 was not cruel and unusual punishment because the jury was instructed on the crimes of murder and manslaughter, the jury could have properly found defendant guilty of murder without defendant's actually having fired the gun that killed the victim, and the sentence did not exceed the statutory maximum. Trotter v. State, 9 So. 3d 402 (Miss. Ct. App. 2008).

Where defendants were found guilty of possession of precursor chemicals with the intent to manufacture methamphetamines, their respective sentences of 25 years in the custody of the Mississippi Department of Corrections and a fine of $ 10,000, were well within the statutory limits of Miss. Code Ann. § 41-29-313(1)(b), and a perusal of Mississippi's case law clearly demonstrated that they were not subjected to sentences so excessive as to warrant the appellate court's review. Pittman v. State, 904 So. 2d 1185 (Miss. Ct. App. 2004).

Under Miss. Code Ann. § 97-3-79 (armed robbery), the trial judge had the authority to impose any sentence but life imprisonment. Thus, defendant's sentence of 40 years was within the limits prescribed by statute and did not constitute cruel and inhuman treatment; further, the sentence was within the purview of the trial judge to impose, since he had adjudged defendant's remaining life expectancy to be 42 years. Calhoun v. State, 881 So. 2d 308 (Miss. Ct. App. 2004).

Petitioner's argument that the sentence imposed was disproportionate to the sentences imposed on similarly situated defendants within the same circuit court district was rejected where petitioner's sentence for manslaughter was within the applicable statutory guidelines; the fact that other criminal defendants in the same county circuit court who pled guilty to manslaughter received shorter sentences than petitioner had no decisive bearing on whether or not petitioner's sentence was disproportionate. Jones v. State, 885 So. 2d 83 (Miss. Ct. App. 2004), writ of certiorari denied by 883 So. 2d 1180, 2004 Miss. LEXIS 1334 (Miss. 2004).

The defendant's sentence of three years' imprisonment for possession of cocaine did not constitute cruel and unusual punishment, notwithstanding that the defendant was initially placed in the general inmate population in the state penitentiary and remained there for approximately six months until the trial court entered an amended order and he was transferred into a Regimented Inmate Discipline Program. Franklin v. State, 773 So. 2d 970 (Miss. Ct. App. 2000).

A sentence of life imprisonment for the rape of a 10-year-old female did not violate the constitutional prohibition against cruel and unusual punishment. Horton v. State, 374 So. 2d 764 (Miss. 1979).

Imposing twenty year sentence on defendant convicted of manslaughter for driving truck while drunk and colliding with another car causing death of passenger in other car was not cruel and unusual punishment. Lester v. State, 209 Miss. 171, 46 So. 2d 109 (1950).

2. Validity of ordinances.

Fact that municipal ordinance provided for minimum punishment in excess of that prescribed by state law for the same offense did not constitute cruel and unusual punishment. Thomas v. Yazoo City, 95 Miss. 395, 48 So. 821 (1909).

3. Validity of statutes.

Miss. Code Ann. § 97-9-55, which makes it a criminal offense to intimidate a judge, was not unconstitutional where defendant was charged with a violation for making threats against two judges while speaking with a psychologist who treated inmates because states were permitted to ban true threats and because the protected status of threatening speech was not based upon the subjective intent of the speaker; rather, the speaker must have knowingly and intentionally communicated a potential threat that an objectively reasonable person would interpret as a serious expression of an intent to cause a present or future harm. Defendant's words posed a true threat because he was diagnosed as having the capacity to distinguish right from wrong, he intentionally communicated the threats to his psychologist and to members of the parole board, and an objectively reasonable person would interpret statements such as intending to "take care of the judges" or "take out the judges" as intending to inflict physical harm upon the judges. Hearn v. State, 3 So. 3d 722 (Miss. 2008).

State statute imposing 15 percent penalty on parties who appeal unsuccessfully from money judgment does not violate equal protection clause of Fourteenth Amendment. Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988).

Section 63-11-30, which imposes a maximum 5-year penalty for the operation of a vehicle in violation of the implied consent law coupled with negligently causing the death or mutilation of another, is not arbitrary and does not constitute cruel and unusual punishment. Banks v. State, 525 So. 2d 399 (Miss. 1988).

4. Youthful offenders.

Defendant's mandatory life sentence, imposed pursuant to Miss. Code Ann. § 97-3-21 after his murder conviction, was not cruel and unusual punishment for purposes of U.S. Const. Amend. VIII and Miss. Const. Art. 3, § 28 even though defendant was 14 years old at the time of the offense because Miss. Code Ann. § 97-3-21 did not afford the trial judge any sentencing discretion or make an exception for a defendant of tender years. Evans v. State, 109 So. 3d 1056 (Miss. Ct. App. 2011), reversed by, remanded by 109 So. 3d 1044, 2013 Miss. LEXIS 31 (Miss. 2013).

Defendant, convicted of murder, argued that, because of his young age, under Miss. Code Ann. § 47-5-139(1)(a)(1), he was subjected to greater punishment for his crime than others sentenced to life imprisonment at age 50 or older. However, the appellate court rejected his argument that the age distinction in the statute subjected a younger individual to a longer punishment which was cruel and unusual, since his life sentence fell within the statutory limits designated by the Mississippi Legislature. Knox v. State, 912 So. 2d 1004 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 686 (Miss. 2005).

Imposition of capital punishment upon a defendant who committed murder at 17 years of age did not offend the prohibition of the Eighth Amendment, U.S. Const. Amend. VIII, against cruel and unusual punishment, nor did it offend the similar provision in Miss. Const. Art. 3, § 28. Dycus v. State, 875 So. 2d 140 (Miss. 2004), vacated by, remanded by 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212, 73 U.S.L.W. 3528 (2005).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by vesting original jurisdiction in the circuit court when a person under 18 years of age is charged with a capital offense, rather than requiring a certification proceeding in youth court for transfer to the circuit court; Mississippi law allows a capital murder defendant who is under the age of 18 years to request a special hearing to consider his or her age, lack of prior offenses, likelihood of successful rehabilitation and other factors which favor sending the case to the youth court rather than continuing in circuit court. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by its failure to explicitly state a minimum age that a person may be subject to the death penalty, since the age at which one may receive a death sentence for the crime of capital murder is implied; no one under 13 years of age may receive the death penalty because a child under the age of 13 cannot even be charged with a felony. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Stay of execution not granted where alleged basis was that imposition of death sentence upon person too young to sit on jury violated Eighth Amendment proscription against cruel and unusual punishment, because it had never been raised before in this case and was therefore barred, and point had been summarily denied in prior cases. Johnson v. State, 508 So. 2d 1126 (Miss. 1987).

Commitment of a 16-year old minor to a state training school until age 20 did not violate constitutional prohibitions against cruel and unusual punishment, where the minor was adjudicated delinquent on the basis of a charge of driving under the influence of alcohol, where at the time of such offense an automobile accident occurred resulting in fatal injuries to a youthful passenger in the car, and where the minor had previously been adjudicated delinquent at age 13 for aiding an escaped felon. Pettit v. State, 351 So. 2d 1353 (Miss. 1977).

Three 13-year old youths found to be delinquent for violating a statute making it a misdemeanor to falsely report the placement of a bomb in a public place, were not subjected to cruel and unusual punishment or a deprivation of equal protection of the law by being sentenced to a training school until they attained the age of 20 years or until the earlier further orders of the court, despite the fact that the statute violated provided a penalty of imprisonment in the county jail not to exceed one year and a fine not to exceed $500, since there is a distinction and difference between the penal statutes and the juvenile delinquency statutes. In re Wilder, 347 So. 2d 520 (Miss. 1977).

25 year sentence for an attempted robbery by a defendant who was 16 years of age at the time the offense was committed did not constitute cruel or unusual punishment. Howard v. State, 319 So. 2d 219 (Miss. 1975), cert. denied, 425 U.S. 954, 96 S. Ct. 1733, 48 L. Ed. 2d 199 (1976).

5. Mentally ill and mentally deficient persons.

Circuit court's finding that a defendant, who had been convicted for capital murder and sentenced to death, failed to prove, to a preponderance of the evidence, that he was mentally retarded, was not clearly erroneous where the circuit court had considered expert testimony and ordered a forensic mental health evaluation of defendant. Doss v. State, — So. 2d —, 2008 Miss. LEXIS 608 (Miss. Dec. 11, 2008), opinion withdrawn by, substituted opinion at, remanded in part by 19 So. 3d 690, 2009 Miss. LEXIS 510 (Miss. 2009).

On the inmate's claim that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he was mentally retarded, he was entitled to and did not receive an Atkins hearing because the inmate met the requirements of Chase and its progeny; the inmate's claim was not procedurally barred under Miss. Code Ann. § 99-39-21(1) because he could not have raised the claim before the trial court, as the Atkins decision was decided 12 days after the inmate was sentenced to death. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Defendant's motion to suppress his confession, contending that his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, Miss. Const. Art. 3, §§ 14, 26 and 28, and Miss. Unif. Crim. R. Cir. Ct. Prac. 6.03 were violated was properly denied where a psychiatrist testified that defendant was not so impaired by mental disease or defect as to make him clearly incompetent to make a confession. Further, in defendant's original direct appeal, he challenged the admission of his confession on five separate grounds and that adverse decision constituted the law of the case. Thorson v. State, 895 So. 2d 85 (Miss. 2004), writ of certiorari denied by 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177, 74 U.S.L.W. 3203 (2005), remanded by 994 So. 2d 707, 2007 Miss. LEXIS 497 (Miss. 2007).

Where petitioner raped and murdered a 79-year-old victim, the burden was upon petitioner to prove that he was mentally retarded to such an extent as to avoid the death penalty. Where his IQ score of 81 placed him in the category of "low dull normal," and well above the maximum score for "mild" mental retardation, imposition of the death penalty was not cruel and unusual punishment. Further, the jury instructions given at the sentencing phase, in accordance with Miss. Code Ann. § 99-19-101(7), did not violate petitioner's Eighth Amendment rights since the factors contained in § 99-19-101(7) required that the jury find the requisite intent set forth in Enmund and Tison before a death penalty verdict could be returned.. Gray v. State, 887 So. 2d 158 (Miss. 2004), writ of certiorari denied by 545 U.S. 1130, 125 S. Ct. 2935, 162 L. Ed. 2d 870, 2005 U.S. LEXIS 4905, 73 U.S.L.W. 3733 (2005).

Petitioner's application for leave to file a motion to vacate death sentence on the ground of mental retardation was denied; petitioner was a normal, productive citizen who was never characterized as "mentally retarded" until such time as being mentally retarded became critically important in the realm of postconviction relief. Wiley v. State, 890 So. 2d 892 (Miss. 2004).

Defendant was entitled to a hearing on whether he was mentally retarded as he had presented expert testimony that he was in the borderline mentally retarded range and that he qualified, in terms of intellectual impairment, for a diagnosis of mental retardation. Doss v. State, 882 So. 2d 176 (Miss. 2004), writ of certiorari denied by 544 U.S. 1062, 125 S. Ct. 2513, 161 L. Ed. 2d 1113, 2005 U.S. LEXIS 4399, 73 U.S.L.W. 3693 (2005).

In defendant's postconviction relief action, defendant submitted to the Mississippi Supreme Court an affidavit of an expert who testified that defendant had received intelligence quotient (IQ) scores of below 75 percent, and who opined to a reasonable degree of psychological certainty that defendant was mentally retarded. While the Mississippi Supreme Court's decision in Chase v. State governed the determination of the case, and under Chase, there were other factors that defendant had to present to the trial court in order to prove mental retardation so as to avoid the death penalty, defendant minimally met defendant's burden of production so as to be entitled to an evidentiary hearing. Snow v. State, 875 So. 2d 188 (Miss. 2004).

Not being mentally retarded is not an aggravating factor necessary for imposition of the death penalty, and the Ring standard, requiring a finding of aggravating circumstances necessary for imposition of the death penalty to be found by a jury, has no application to an Atkins v. Virginia determination, prohibiting the execution of mentally retarded offenders. Russell v. State, 849 So. 2d 95 (Miss. 2003).

The execution of a defendant who had been repeatedly diagnosed as a chronic paranoid schizophrenic did not constitute cruel and unusual punishment, since every expert who testified stated that one could be a paranoid schizophrenic and still be competent to be executed under § 99-19-57. Billiot v. State, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996).

6. Indigent defendants.

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

The imprisonment of an indigent for failure to pay a fine did not constitute cruel and unusual punishment, where the indigent after pleading guilty to a misdemeanor charge was sentenced to a jail term and to pay a fine, and after serving her jail term was unable to pay the fine because she was indigent, in view of Code 1942, § 7899 which limits the time of confinement for failure to pay a fine for any one offense to 2 years. Wade v. Carsley, 221 So. 2d 725 (Miss. 1969).

Confining a county convict for two years for failure to pay fine is not cruel and inhuman punishment. Ex parte McInnis, 98 Miss. 773, 54 So. 260 (1911).

7. Termination of parental rights.

The termination of a mother's parental rights, in part because of her criminal acts and resulting imprisonment, did not amount to cruel and unusual punishment since the termination of her parental rights was a separate matter from that of her criminal conviction, and the action for termination of parental rights was not brought to further punish the mother, but was a reasonable exercise of the State's legitimate interest in providing for the welfare of the children. Vance v. Lincoln County Dep't of Pub. Welfare ex rel. Weathers, 582 So. 2d 414 (Miss. 1991).

8. Solitary confinement.

Inmates who are placed in administrative segregation have no constitutional basis for demanding the same privileges as those inmates in the general prison population since prison officials have the discretion to determine whether and when to provide prisoners with privileges such as showers, exercise, visitation, and access to personal property. Thus, the 5 hours a week of exercise plus nightly showers of 15 minutes which were provided to an inmate confined to administrative segregation did not constitute cruel and unusual punishment. Additionally, the procedures provided when the inmate was placed in administrative segregation satisfied the due process clause where the inmate received notice of detention and a hearing on the matter. Terrell v. State, 573 So. 2d 730 (Miss. 1990).

9. Sentence within statutory parameters.

Post-conviction relief was denied in a case where appellant inmate entered a guilty plea to three counts of selling cocaine because the imposition of three consecutive five year sentences did not amount to cruel and unusual punishment. The sentence was within the guidelines in Miss. Code Ann. § 41-29-139, and there was no evidence of excessiveness under the facts of the case. Ladner v. Grand Bear Golf Course/Grand Casino of Miss., 973 So. 2d 1008 (Miss. Ct. App. 2008).

Where a sentence of 10 years with five years suspended was entered in a case where defendant entered a guilty plea to the charge of uttering a forgery, defendant was unable to challenge the sentence in a motion for post-conviction relief since it was not raised at the time of sentence; at any rate, the issue of disproportionality was meritless because the sentence was within the limits of Miss. Code Ann. § 97-21-33. Tate v. State, 961 So. 2d 763 (Miss. Ct. App. 2007).

Defendant's sentence of 20 years in prison, with 10 years to be suspended and five years of post-release probation, for one count of burglary of an occupied dwelling was not grossly disproportionate where he had been involved in other domestic disturbances prior to the one in question; thus, the 20-year sentence was within the statutory guidelines. Edge v. State, 945 So. 2d 1004 (Miss. Ct. App. 2007).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Court rejected defendant's claim that the enhanced 10-year sentence imposed pursuant to Miss. Code Ann. § 41-29-142 upon his conviction for selling cocaine within 1,500 feet of a church in violation of Miss. Code Ann. § 41-29-139 was excessive. A pre-sentencing report was included in the record and the 10-year sentence was considerably less than the 30-year maximum provided in § 41-29-139, and defendant's sentence was well within the enhancement guidelines provided in Miss. Code Ann. § 41-29-142, which allowed a sentence of up to three times the sentence imposed under Miss. Code Ann. § 41-29-139. Moore v. State, 909 So. 2d 77 (Miss. Ct. App. 2005).

In an assault case, defendant's sentence did not constitute cruel and unusual punishment as the maximum sentence for aggravated assault was 20 years and defendant's 15-year sentence was not excessive or disproportionate to the crime. Lewis v. State, 897 So. 2d 994 (Miss. Ct. App. 2004), writ of certiorari denied by 896 So. 2d 373, 2005 Miss. LEXIS 225 (Miss. 2005).

Two consecutive 20-year sentences for defendant's convictions for manslaughter and aggravated assault where he shot and killed his wife's boyfriend and shot his wife in the neck did not constitute cruel and unusual punishment as the sentences imposed were within the statutory range for Miss. Code Ann. § 97-3-25 and Miss. Code Ann. § 97-3-7(2), and the trial judge articulated his reasoning for the sentences imposed. Lewis v. State, 905 So. 2d 729 (Miss. Ct. App. Nov. 16, 2004).

Sentences that are within the statutory limit are not considered cruel and unusual punishment. Hence, defendant's 20-year sentence for manslaughter was not excessive; law of Mississippi provides a maximum sentence of 20 years for manslaughter. Robinson v. State, 875 So. 2d 230 (Miss. Ct. App. 2004).

Consecutive sentences of 30 and 45 years for armed carjacking and armed robbery were within the statutory limits for those offenses and were not excessive despite the length of the sentences and regardless of the fact that defendant chose to go to trial rather than accept a plea bargain for 10 years on each count as his co-defendants elected to do. McCline v. State, 856 So. 2d 556 (Miss. Ct. App. 2003), writ of certiorari denied by 860 So. 2d 315, 2003 Miss. LEXIS 722 (Miss. 2003).

Without waiving the procedural bar to the inmate's claim that the inmate's sentence was unconstitutional, the court held that the inmate was properly charged under Miss. Code Ann. § 97-9-45 and entered a plea of guilty to the escape, and the sentence of three years was well within the maximum prescribed by the statute, which referred to prisoners sentenced to the Mississippi Department of Corrections and allowed a maximum sentence of five years, and thus the inmate was not entitled to post-conviction relief; although the inmate was in custody and on a work program for a county at the time of the escape, the inmate was considered under the Department's jurisdiction for purposes of § 97-9-45 because (1) the inmate's original burglary sentence required imprisonment in the "penitentiary" under Miss. Code Ann. § 97-17-23, which term meant any facility under the jurisdiction of the Department pursuant to Miss. Code Ann. § 47-5-3, (2) commitment to any institution within the jurisdiction of the Department was to the Department, not a particular institution pursuant to Miss. Code Ann. § 47-5-110, and (3) under Miss. Code Ann. § 47-5-541, the Department recommended rules concerning the participation of inmates in work programs. Gardner v. State, 848 So. 2d 900 (Miss. Ct. App. 2003).

Because defendant's sentence was well within the statutory maximum for his offense of possession of a controlled substance, it did not constitute cruel and unusual punishment; defendant acknowledged knowing the range of the possible sentences and knew that the prosecution was dropping a charge in return for his guilty plea. Ford v. State, 844 So. 2d 496 (Miss. Ct. App. 2003).

Denial of petitioner's motion for postconviction relief was proper where his sentence was within the trial court's discretion and was not facially disproportionate; therefore, his constitutional right against cruel and unusual punishment pursuant to Miss. Const. Art. 3, § 28 was not violated. Holifield v. State, 852 So. 2d 653 (Miss. Ct. App. 2003), writ of certiorari denied by 847 So. 2d 866, 2003 Miss. LEXIS 902 (Miss. 2003), writ of certiorari denied by 540 U.S. 957, 124 S. Ct. 409, 157 L. Ed. 2d 294, 2003 U.S. LEXIS 7587, 72 U.S.L.W. 3267 (2003).

Where defendant's 20-year sentence with only 14 years actually to serve was within the statutory parameters and was not grossly disproportionate to the crime, defendant failed to show that his sentence was disproportionately harsh for the crime charges, and therefore was not cruel and unusual. Alston v. State, 841 So. 2d 215 (Miss. Ct. App. 2003).

After a guilty plea to cocaine possession, an inmate's suspended eight-year sentence with probation was not excessive because it was well within the maximum sentence authorized by law. Gunter v. State, 841 So. 2d 195 (Miss. Ct. App. 2003).

Evidence that defendant pointed a gun at two store clerks, demanded money, and took money from the cash register drawer and the clerks' purses, supported the imposition of consecutive sentences of 30 years and 10 years against a defendant convicted of two counts of armed robbery; sentences were within the maximum range set forth in Miss. Code Ann. § 97-3-79 and were not cruel or unusual punishment under either the Eighth Amendment to the Constitution of the United States or Miss. Const. art. 3, § 28, nor were the sentences disproportionate to the offenses committed. Womack v. State, 827 So. 2d 55 (Miss. Ct. App. 2002).

Because defendant's seven-year sentence for burglary was within the limits set by the statute, the cruel and unusual provisions of U.S. Const. Amend. VIII or Miss. Const. Art. III, § 28 were not violated and it was inconsequential that this was defendant's first felony so that the appellate court was not bound to analyze the issue using the three-prong Eighth Amendment proportionality test. Nichols v. State, 826 So. 2d 1288 (Miss. 2002).

Where appellant had pleaded guilty to six counts of sale of cocaine, his sentence of 30 years on each count to run concurrently, with 10 years suspended and five years' probation, was within the statutory scheme and, hence, was not cruel and unusual punishment. Falconer v. State, 832 So. 2d 622 (Miss. Ct. App. 2002).

The sentence imposed on a 14 year old for manslaughter after he shot and killed an older neighborhood bully was not excessive where it was within the statutory limits. Jackson v. State, 740 So. 2d 832 (Miss. 1999).

A sentence of 15 years imprisonment and a $9,000 fine for conviction of sale of cocaine was within the provisions of the statute and within the sound discretion of the trial judge, and did not constitute cruel and inhuman punishment. Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

The imposition of a sentence by the trial judge does not constitute cruel and inhuman punishment and is not an abuse of discretion if it is within the statutory limits. Byrd v. State, 522 So. 2d 756 (Miss. 1988).

Sentence of 20 years on each of 2 counts of manslaughter, to run concurrently, did not amount to cruel and unusual punishment because sentence was permitted by statute, and therefore was within sound discretion of trial judge. Whitley v. State, 511 So. 2d 929 (Miss. 1987).

Sentence of life imprisonment for armed robbery was not cruel or unusual where statute under which defendant was charged imposed penalty of life imprisonment upon conviction, and conviction was based on testimony of accomplice who received only 5 years suspended sentence, because accomplice's description of events on night in question was corroborated by others. Reed v. State, 506 So. 2d 277 (Miss. 1987).

Sentence of 10 years following conviction of selling marijuana was a sentence within the limits of the statute and was not cruel or unusual punishment. Clanton v. State, 279 So. 2d 599 (Miss. 1973).

Since an 8 year sentence for sale of marijuana did not exceed the statutory limits, the sentence could not be either cruel or unusual punishment. McCormick v. State, 279 So. 2d 596 (Miss. 1973), overruled on other grounds, Hopson v. State, 625 So. 2d 395 (Miss. 1993).

A six year term for burglary, being within the limits set by statute, while it appeared on the face of the record to be severe in the light of a request for mercy from the jury, was neither cruel nor unusual punishment. Ealy v. State, 262 So. 2d 420 (Miss. 1972).

10. Disproportionate sentence.

Defendant's argument that his life sentence after he was convicted of capital murder was erroneous was improper because, upon the election of the district attorney to not pursue the death penalty, the trial court had only one choice, which was the lesser sentence of life without the possibility of parole. Sentences that did not exceed the maximum term allowed by statute would not be considered grossly disproportionate and would not be disturbed on appeal. Maye v. State, 49 So. 3d 1140 (Miss. Ct. App. 2009), vacated by, remanded by 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

Defendant's life sentence without parole for possession of less than 0.10 gram of cocaine in violation of Miss. Code Ann. § 41-29-139(c)(1)(A) was mandatory under the circumstances and did not arise solely from his conviction of possession of cocaine but based on his status as a habitual offender under Miss. Code Ann. § 99-19-83. Furthermore, defendant's claim was procedurally barred because he did not address all three factors of the proportionality analysis. Hudson v. State, 31 So. 3d 1 (Miss. Ct. App. 2009), reversed by 30 So. 3d 1199, 2010 Miss. LEXIS 160 (Miss. 2010).

Defendant was convicted of four counts of sexual battery for repeatedly sexually battering defendant's stepdaughter during a time period when she was 11 years of age by forcing her to engage in sex acts and sexual intercourse with defendant, and defendant was sentenced to two consecutive life sentences (the statutory maximum) and two consecutive 20-year terms; defendant also stated that he took pictures of the victim and possessed child pornography, and in light of the evidence put forth supporting defendant's guilt, and the nature of the crime of which defendant was convicted, defendant's sentences were not grossly disproportionate to the offenses or constitutionally violative. Evans v. State, 984 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by

984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

Motion for post-conviction relief was summarily dismissed since defendant was unable to show that his sentences for burglary and aggravated assault, which were within the ranges in Miss. Code Ann. § 97-17-23 and Miss. Code Ann. § 97-3-7 were grossly disproportionate; he could have received 45 years if the maximum terms had been run consecutively, and the facts showed that he broke into a house wielding a pistol and beat a victim. Denton v. State, 955 So. 2d 398 (Miss. Ct. App. 2007).

A death sentence for an aider and abettor who provided a gun that was used in a murder was not excessive or disproportionate under Miss. Code Ann. § 99-19-105(3)(c)and state and federal constitutional law because, when the jury returned the death sentence, it specifically found that defendant had intended to kill the victim and contemplated that lethal force would be used. Lynch v. State, 877 So. 2d 1254 (Miss. 2004), writ of certiorari denied by 543 U.S. 1155, 125 S. Ct. 1299, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1592, 73 U.S.L.W. 3495 (2005).

Prisoner's involvement was sufficient to justify the death sentence even if the actual killer did not receive the death sentence, where the prisoner took an active role in the killing. The prisoner chased the victim and brought him back after the victim had been hit in the head with a hammer for the first time, and the prisoner held the victim as he was being struck by the killer. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

Sentence imposed on defendant for the convictions of possession of a controlled substance and possession of precursor chemicals with intent to manufacture a controlled substance was not unduly harsh, given that defendant, not the girlfriend, was the driving force behind the drug activity at the couple's place of residence. Pipkins v. State, 878 So. 2d 119 (Miss. Ct. App. 2004), writ of certiorari denied by 878 So. 2d 67, 2004 Miss. LEXIS 946 (Miss. 2004).

Where appellant's sentences for several counts of armed robbery did not exceed the sentence set forth in Miss. Code Ann. § 97-3-75, it was not disproportionate; moreover, appellant was not entitled to receive a sentence proportionate to that imposed upon an accomplice. Booker v. State, 840 So. 2d 801 (Miss. Ct. App. 2003).

Sentence imposed for the sale of marijuana was not excessive or disproportionate because the sentence was within the limits set forth by Miss. Code Ann. § 41-29-147; Miss Code Ann. § 41-29-139 did not apply because defendant was a second or subsequent offender. Fields v. State, 840 So. 2d 796 (Miss. Ct. App. 2003).

Defendant's sentence of life in prison without the possibility of parole for possession of cocaine was not grossly disproportionate to the crime as defendant was a habitual offender who had committed prior felonies, including a crime involving violence. Oby v. State, 827 So. 2d 731 (Miss. Ct. App. 2002).

A life sentence without parole was not disproportionate where the defendant was convicted of possession of a controlled substance and was found to be a habitual offender on the basis of prior convictions for robbery and aggravated robbery. Wall v. State, 718 So. 2d 1107 (Miss. 1998).

The imposition of a 25-year sentence for the crime of possession of 5.7 grams of cocaine with intent to distribute did not constitute a denial of the defendant's constitutional rights on the ground that it was excessive and disproportionate where the defendant did not produce facts concerning sentences imposed on other criminals, the sentence was within the limits fixed by § 41-29-139(b), and the sentence was not "grossly disproportionate" or "shockingly excessive." Edwards v. State, 615 So. 2d 590 (Miss. 1993).

A death sentence for a conviction of murder was disproportionate to the penalty imposed in similar capital cases, considering both the crime and the defendant, where the defendant was 18 years old at the time of the crime, he suffered some mental illness and mental retardation, the murder was committed by another person, and the defendant did nothing physically to assist the other person in the assault. Reddix v. State, 547 So. 2d 792 (Miss. 1989).

Sentence of 30 years in prison without probation or parole, maximum term of imprisonment prescribed for offense of sexual battery, did not violate either United States Constitution or Mississippi Constitution; under standards set forth in Solem v. Helm (1983) 463 U.S. 277, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (superseded by statute as stated in Re Petition of Lauer (CA8) 788 F2d 135) sentence was not grossly disproportionate to crime of sexual battery where harshness of penalty was justified by gravity of offense, non-habitual offenders convicted under § 97-3-95 could be sentenced to up to 30 years in prison, and sentence was not so dissimilar to sentences for same crime in other states as to make it a disproportionate penalty. Davis v. State, 510 So. 2d 794 (Miss. 1987).

11. Recidivists generally.

Imposition of a life sentence in prison without parole or probation imposed upon defendant who was convicted of child fondling, and who had 2 prior convictions-one for assault with intent to commit sodomy and the other for indecency with a child-did not constitute cruel and unusual punishment. Bandy v. State, 495 So. 2d 486 (Miss. 1986).

A sentence of life imprisonment without probation or parole for a defendant convicted of carrying a concealed weapon after conviction of a prior felony did not constitute cruel and unusual punishment in violation of the United States and Mississippi Constitutions. Baker v. State, 394 So. 2d 1376 (Miss. 1981).

12. Disproportionate forfeiture.

With regard to forfeitures, the court would adopt a four part test to determine whether a particular forfeiture is disproportionate: (1) the nexus between the offense and the property and the extent of the property's role in the offense; (2) the role and culpability of the owner; (3) the possibility of separating the offending property from the remainder; and (4) whether, after a review of all relevant facts, the forfeiture divests the owner of property which has a value that is grossly disproportionate to the crime or grossly disproportionate to the culpability of the owner. One Charter Arms v. State ex rel. Moore, 721 So. 2d 620 (Miss. 1998).

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The forfeiture of a car was grossly disproportionate where (1) the owner of the car had only one rock of cocaine in his possession at the time of his arrest, (2) the cocaine was on his person, rather than concealed in the car, (3) he had no prior felony convictions, and (4) he paid a fine of $2,500 and was placed on probation for three years. One Charter Arms v. State ex rel. Moore, 721 So. 2d 620 (Miss. 1998).

The forfeiture of a van was not grossly disproportionate where the owner of the van pled guilty to conspiracy to distribute 500 grams or more of cocaine and the commission of a drug crime with a firearm, he drove the van to the site where the terms and details of the drug buy were negotiated, and he had over $90,000 in his possession at the time of his arrest. One 1979 Ford 15V v. State ex rel. Miss. Bureau of Narcotics, 721 So. 2d 631 (Miss. 1998).

13. Habitual offenders.

Defendant's 60-year prison sentence for possession of a controlled substance with intent to sell as a habitual offender was not grossly disproportionate to the crime where defendant was aware of defendant's own criminal history and chose to proceed to trial; defendant was also apprised of the perilous situation defendant faced if defendant was found guilty at trial. Baskin v. State, 986 So. 2d 338 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So.

2d 451, 2008 Miss. LEXIS 562 (Miss. 2008).

Motion for post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine under Miss. Code Ann. § 41-29-139(a) since his 20-year sentence was not illegal; because he was a habitual offender, defendant should have actually received a mandatory 30-year sentence. Rucker v. State, 955 So. 2d 958 (Miss. Ct. App. 2007).

Defendant's sentence of life in prison without the possibility of parole after he was convicted of grand larceny did not violate the Eighth Amendment to the U.S. Constitution where he was sentenced within the mandatory statutory limits set out in Miss. Code Ann. § 99-19-83 for habitual offenders; his sentence was not grossly disproportionate. Kelly v. State, 947 So. 2d 1002 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 89 (Miss. 2007).

Defendant's effective sentence of 60 years without parole for a drug offense where none of his prior convictions involved crimes of violence was within the statutory guidelines prescribed by the legislature under Miss. Code Ann. §§ 41-29-147 and 99-19-81; additionally, although harsh, defendant's sentence was not grossly disproportionate to his crime. It was within the legislature's prerogative to determine that three crimes such as those committed by defendant could result in a sentence of 60 years without parole or chance of early release; thus, defendant's sentence did not violate the federal or state constitutional prohibitions of cruel and unusual punishment. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Where defendant was convicted of grand larceny and had prior convictions for attempted rape and manslaughter, defendant's sentence of life imprisonment without the possibility of parole was not grossly disproportionate. Clay v. State, 881 So. 2d 354 (Miss. Ct. App. 2004).

In any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty; where a defendant is adjudged to be a habitual offender, the jury should be informed that a life sentence means "life, without probation or parole." Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A 15-year sentence without hope of parole, imposed upon a defendant as a habitual offender, for uttering a forged check in the amount of $500, did not constitute cruel and unusual punishment. Barnwell v. State, 567 So. 2d 215 (Miss. 1990).

The fact that a trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Thus, notwithstanding § 99-19-81, which requires habitual offenders to be sentenced to a maximum term, the trial court had authority, as a function of the Supremacy Clause, to review a particular sentence in light of constitutional principles of proportionality. Clowers v. State, 522 So. 2d 762 (Miss. 1988).

Sentence to 20 years imprisonment without reduction, revocation or parole imposed upon defendant convicted of arson and of being habitual criminal is not unconstitutionally excessive where arson conviction is based upon defendant's having set occupied house on fire at both front and back doors and where defendant has prior convictions for burglary and uttering forgery. Jenkins v. State, 483 So. 2d 1330 (Miss. 1986).

14. Capital sentencing procedure.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (2010).

With respect to a charge of capital murder committed during the course of a robbery, the use of the underlying felony as an aggravating sentencing factor did not constitute impermissible double prejudice. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

Post-conviction relief was denied on the issue of whether defendant's death sentence was unconstitutionally excessive in capital murder case based on the fact that it was felony murder because the issue was procedurally barred; even if it was not, the issue was meritless since this argument had been previously rejected, and the jury found all four factors under Miss. Code Ann. § 99-19-101. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Imposition of death penalty was not cruel and unusual punishment where the prisoner was an active participant in the victim's murder, he knew that the kidnapping was committed in order to teach the victim a lesson, he held the victim down while another man hit the victim in the head with a hammer, and he chased the victim and brought him back for the beating to continue. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

Proof in the record did not support a prisoner's claim of being mentally retarded as requiring remand to the trial court for an Atkins hearing where the prisoner only supported his claim with copies of school records and affidavits of family members. Bishop v. State, 882 So. 2d 135 (Miss. 2004), writ of certiorari denied by 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123, 73 U.S.L.W. 3513 (2005).

Although all of petitioner death row inmate's arguments were procedurally barred either by res judicata or for failure to raise the arguments earlier, and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. Jackson v. State, 860 So. 2d 653 (Miss. 2003).

In a capital murder case, a jury instruction cautioning not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling was properly given and did not violate defendant's rights, because it did not inform the jury that it had to disregard in toto sympathy. Flowers v. State, 842 So. 2d 531 (Miss. 2003), remanded by 2006 Miss. LEXIS 356 (Miss. June 29, 2006).

In a capital murder case where defendant was indicted separately for each of four murders, submission of the "great risk of death to many persons" aggravator was proper, as evidence regarding the other three killings was relevant in the case at bar during sentencing; there was evidence that the same weapon was used to commit all four murders, testimony linked defendant to the weapon, and eyewitness testimony placed defendant near the scene of the crime. Flowers v. State, 842 So. 2d 531 (Miss. 2003), remanded by 2006 Miss. LEXIS 356 (Miss. June 29, 2006).

Sexual battery could be used as underlying felony, to elevate murder to level of capital murder, and could be used again for sentencing purposes as an aggravator to support imposition of death penalty, without violating prohibition against cruel and unusual punishment. Walker v. State, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Submission of "robbery" aggravating circumstance during penalty phase of capital murder case did not violate constitutional prohibition against cruel and unusual punishment, although defendant was charged with murder while in commission of armed robbery. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Trial court did not abuse its discretion in capital murder case in allowing into evidence photographs depicting victim's gunshot wounds; photographs served to clarify and supplement coroner's testimony and described cause of victim's death. Holly v. State, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Use of robbery as both aggravating factor in sentencing and as essential element of crime of capital murder did not unconstitutionally fail to narrow class of death eligible offenders; required narrowing had been done legislatively. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A sentence of death was not improperly based on "vengeance and sympathy," in spite of the defendant's argument that the jury's sentencing determination was improperly predicated on the personal characteristics of the victim, where in response to the defendant's parents' request to the jury not to sentence their son to death the prosecutor merely noted that the defendant's parents were not the only ones who had suffered and grieved and that their "tears might be outweighed by the fact of the victim's murder," and he reminded the jury that the victim's parents had also suffered a loss and that they must not forget the "cold, calculated killing" of the victim. Foster v. State, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

New sentencing hearing was required where trial court had excluded relevant mitigating evidence about method for generating electricity from alternative energy source, defendant had been in contact with Tennessee Valley Authority over this invention, had entered into agreement with them about it, and witness was familiar with all details and would testify about them. Jordan v. State, 518 So. 2d 1186 (Miss. 1987), cert. denied, 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35 (1988).

15. Sentence upon retrial.

Judge may impose more severe sentence upon defendant following new trial and conviction for same charge for which defendant has successfully appealed original conviction but only if judge affirmatively states in record reasons for harsher sentence and only if reasons are based upon objective information concerning identifiable conduct on part of defendant occurring after time of original sentencing proceeding, or based upon objective information concerning events occurring after time of original sentencing proceeding that may throw new light upon defendant's life, health, habits, conduct, or mental and moral propensities. Ross v. State, 480 So. 2d 1157 (Miss. 1985).

Sentencing judge may impose harsher sentence following new trial based upon bad physical and mental condition of victim of crime only if it is shown that victim's condition has deteriorated since first trial. Ross v. State, 480 So. 2d 1157 (Miss. 1985).

16. Excessive fines.

Decision by the Mississippi State Board of Dental Examiners to suspend the license of a dentist to practice dentistry for five years was not the equivalent of an excessive fine. Holt v. Miss. State Bd. of Dental Exam'rs, 131 So. 3d 1271 (Miss. Ct. App. 2014).

The forfeiture of a vehicle violated the excessive fines clause since the forfeited vehicle did not have a sufficiently close relationship to any illegal activity where (1) the vehicle was used by the owner to drive his wife to the location where she sold the drugs, (2) the owner of the vehicle drove the vehicle to the location, but he did not know about his wife's intentions to sell the drugs, (3) the owner of the vehicle was not physically present when the actual drug sale occurred, and (4) it was not illegal for the owner's wife to possess the medication that had been prescribed to her and which she sold and, therefore, no illegal activity actually occurred in the vehicle. Galloway v. City of New Albany, 735 So. 2d 407 (Miss. 1999).

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§ 29. Excessive bail prohibited; revocation or denial of bail

(1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses (a) when the proof is evident or presumption great; or (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.

(2) If a person charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year or more in the penitentiary or any other state correctional facility is granted bail and (a) if that person is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the person has committed a felony while on bail, then the court shall revoke bail and shall order that the person be detained, without further bail, pending trial of the charge for which bail was revoked. For the purposes of this subsection (2) only, the term "felony" means any offense punishable by death, life imprisonment or imprisonment for more than five (5) years under the laws of the jurisdiction in which the crime is committed. In addition, grand larceny shall be considered a felony for the purposes of this subsection.

(3) In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offense would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.

(4) In any case where bail is denied before conviction, the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court. The provisions of this subsection (4) do not apply to bail revocation orders.

SOURCES: 1817 art I § 16; 1832 art I § 16; 1869 art I § 8; Laws, 1987, ch. 674; Laws, 1995, ch. 636, eff December 5, 1995.

Editor's Note — The 1987 amendment of Section 29 in Article 3 of the Mississippi Constitution of 1890 was proposed by Laws, 1987, Ch. 674 (Senate Concurrent Resolution No. 534), and upon ratification by the electorate on November 3, 1987, was inserted as part of the Constitution by proclamation of the Secretary of State on December 4, 1987.

The 1995 amendment of Section 29 in Article 3 of the Mississippi Constitution of 1890 was proposed by Laws, 1995, ch. 636 (House Concurrent Resolution No. 42), and upon ratification by the electorate on November 7, 1995, was inserted as a part of the Constitution by proclamation of the Secretary of State on December 5, 1995.

JUDICIAL DECISIONS

1. Right to bail generally.
2. Post-conviction bail.
3. Capital cases.
4. Excessiveness of bail.
5. Revocation of bail.

1. Right to bail generally.

Since the purpose of allowing bail is to secure the presence at trial of the accused, who is presumed innocent until found guilty by a jury, the amount of bail to be required must be governed largely by the character of the offense committed and the financial ability of the accused. Calvin v. Associates Disct. Corp., 235 So. 2d 718 (Miss. 1970).

A defendant charged with armed robbery should be granted bail where the proof of his guilt was not evident or the presumption thereof great on the record. Wooton v. Bethea, 209 Miss. 374, 47 So. 2d 158 (1950).

Mere mistrial, without more, is insufficient to entitle one accused of murder to bail. New Orleans & N.E.R. Co. v. Boliver, 44 So. 2d 527 (Miss. 1950).

It is a question of fact for the jury whether a sheriff should have accepted and approved bail bond tendered him under circumstances shown. Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745 (1947).

Bail is a matter of right to the prisoner, except in capital cases where the proof is evident or the presumption is great. Ex parte Wray, 30 Miss. 673 (1856); Street v. State, 43 Miss. 1 (1870); Ex parte Bridewell, 57 Miss. 39 (1879).

2. Post-conviction bail.

The right to bail as defined by this section is confined to the period prior to conviction. Ex parte Willette, 219 Miss. 785, 63 So. 2d 52 (1953).

The right to bail after conviction is not within the section. Ex parte Dyson, 25 Miss. 356 (1852); Hill v. State, 64 Miss. 431, 1 So. 494 (1886); State v. Key, 93 Miss. 115, 46 So. 75 (1908); Ex parte Willette, 219 Miss. 785, 63 So. 2d 52 (1953).

3. Capital cases.

Capital sentencing scheme in which prosecutor has discretion as to which murders he can try as capital offenses did not grant unfettered discretion to prosecutor and did not violate constitutional protections, where discretion was statutorily limited, manslaughter instruction had to be given if warranted by facts, and imposition of death penalty was channelled through weighing of aggravating and mitigating circumstances. Berry v. State, 703 So. 2d 269 (Miss. 1997).

Mississippi Code § 1-3-4 does not amend the constitution by redefining the term “capital offense” with respect to Article III § 29; such term continues to mean an offense for which the death penalty is permitted. Ex parte Dennis, 334 So. 2d 369 (Miss. 1976).

The fact that defendant who was charged with murder was an elderly man with a heart condition was a factor that might be considered by the trial judge in passing upon bail. Blackwell v. Sessums, 284 So. 2d 38 (Miss. 1973).

Even though the death penalty is no longer imposed, nevertheless, murder falls within a class of cases referred to as capital cases that are not bailable offenses when the proof is evident or presumption of guilt is great. Blackwell v. Sessums, 284 So. 2d 38 (Miss. 1973).

Where the evidence is in conflict on the question of whether the proof is evident or presumption of guilt is great, the judge at the habeas corpus hearing is the trier of fact, and it is presumed that he has properly applied the law to the facts as found. Blackwell v. Sessums, 284 So. 2d 38 (Miss. 1973).

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), reh'g denied, 409 U.S. 902, 93 S. Ct. 89, 34 L. Ed. 2d 163 (1972); Hudson v. McAdory, 268 So. 2d 916 (Miss. 1972).

Where the record established that a murder had been committed and suggested that the accused had both a motive and the intent at least to do harm to the decedent, but failed to connect the accused with the act of murder, there was no justification for denial of bail to the accused, held before indictment on a charge of accessory before the fact of murder, on the theory that the proof was evident and the presumption great. Huff v. Edwards, 241 So. 2d 654 (Miss. 1970).

One whose confession and testimony indicate the commission of rape is properly denied a release on bond in habeas corpus proceedings. Reed v. Gilfoy, 246 Miss. 46, 148 So. 2d 714 (1963).

Where prisoner brought habeas corpus proceedings for enlargement upon bail on ground that jury disagreed at his trial for murder resulting in mistrial, defendant's demurrer was properly sustained when petition charged nothing else and failed wholly to charge that proof of his guilt of murder was not evident and presumption thereof was not great, or set forth wherein it was so deficient. New Orleans & N.E.R. Co. v. Boliver, 44 So. 2d 527 (Miss. 1950).

Determination by chancellor in habeas corpus proceedings that the proof of accused's guilt of the crime of murder was neither evident nor the presumption great, was not justified by the evidence, and allowance of bail was erroneous under the facts disclosed. Ex parte Vinson, 192 Miss. 507, 6 So. 2d 114 (1942).

Accused charged with murder held not entitled to bail where facts disclosed that accused leveled gun and shot and mortally wounded father with whom he had been conversing while father's hands were held up, and no justification or explanation of killing was made. Motley v. Smith, 172 Miss. 148, 159 So. 553 (1935).

A prisoner, if indicted for a capital offense, when proof is evident or presumption great, should not be admitted to bail, except under special and extraordinary circumstances, or other causes making it reasonable that he should be bailed; but, if the proof is not evident nor the presumption great, he is entitled to bail as a matter of right. Martin v. State, 97 Miss. 567, 52 So. 258 (1910); Ex parte Bridewell, 57 Miss. 39 (1879).

Circumstances such that decision of chancellor denying bail would not be disturbed. Martin v. State, 97 Miss. 567, 52 So. 258 (1910); Ex parte Carter, 103 Miss. 302, 60 So. 324 (1912).

But bail should not be granted in such case unless there be exceptional circumstances apart from the offense that seem to demand it. Ex parte Bridewell, 57 Miss. 39 (1879); Ex parte Pattison, 56 Miss. 161 (1878); Ex parte Hamilton, 65 Miss. 147, 3 So. 241 (1887).

Bad health or sickness from confinement is not a sufficient ground for granting bail unless it is likely to produce fatal or serious consequences. Ex parte Pattison, 56 Miss. 161 (1878).

Even if the jury in capital cases are authorized to fix the punishment at imprisonment for life, bail in such cases is not thereby made a matter of right. Ex parte Fortenberry, 53 Miss. 428 (1876).

Granting or refusing bail in capital cases where the proof is evident or the presumption great is a matter of discretion with the court. Ex parte Wray, 30 Miss. 673 (1856); Ex parte Bridewell, 57 Miss. 39 (1879).

If a well founded doubt exists that the crime charged is capital, the prisoner should be admitted to bail. Ex parte Wray, 30 Miss. 673 (1856); Ex parte Bridewell, 57 Miss. 39 (1879).

The court has the discretion to grant bail where the evidence is such that the jury might, and perhaps ought, to convict. Ex parte Wray, 30 Miss. 673 (1856); Moore v. State, 36 Miss. 137 (1858); Beall v. State, 39 Miss. 715 (1861); Street v. State, 43 Miss. 1 (1870).

Circumstances in capital case warranted granting of bail. Ex parte Wray, 30 Miss. 673 (1856); Ex parte Patterson, 22 So. 186 (Miss. 1897); Ex parte Jack, 22 So. 188 (Miss. 1897); Ex parte Majors, 34 So. 151 (Miss. 1903); Parker v. Tullos, 150 Miss. 680, 116 So. 531 (1928).

4. Excessiveness of bail.

The setting of $10,000 bail for an 18-year-old, indicted for the unlawful sale of marijuana, who had resided in the city for about 17 years, who had no prior convictions except a misdemeanor charge which was then pending on appeal, who was unemployed and owned no property except a motorcycle valued at $100, and who was unable to make bond, was excessive, and would be reduced to $1,500. Calvin v. Associates Disct. Corp., 235 So. 2d 718 (Miss. 1970).

Bond in the sum of $500 in case of aggravated assault and battery, resulting in death, not excessive. Ex parte Smith, 79 Miss. 373, 30 So. 710 (1901).

5. Revocation of bail.

Revocation of defendant's bail was proper pursuant to Miss. Const. Art. III, § 29(2) due to his indictment for the felony charge of perjury. Dendy v. State, 931 So. 2d 608 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 346 (Miss. 2006).

ATTORNEY GENERAL OPINIONS

Section 29 of Mississippi Constitution of 1890 does not prohibit justice or municipal court from denying bail. Mitchell Oct. 13, 1993, A.G. Op. #93-0668.

The 1995 amendment to Article 3, Section 29 of the Mississippi Constitution does not enlarge the authority of a municipal court judge or a justice court judge to deny bail to a defendant. Brewer, July 2, 1999, A.G. Op. #99-0280.

Justice court judges and municipal court judges do have the authority to deny bail in a case coming within paragraph (1) of Section 29, to-wit, Brewer, July 2, 1999, A.G. Op. #99-0280.

A defendant who has had his bond revoked under this section may not be released on a recognizance or other bond while awaiting trial if the charges for the second offense are still pending. If a grand jury fails to indict a defendant on the second offense charges, the circuit court may, in its discretion, dismiss the second offense charges and reset bond for the first offense charges. McCormick, June 6, 2003, A.G. Op. 03-0265.

If a person is granted bail by a municipal court on a charge of aggravated assault and while out on bail a justice court finds probable cause that the person has committed commercial burglary, the justice court should revoke bail for the aggravated assault charge and shall order the person detained, without bail, on the commercial burglary charge, pending trial on the aggravated assault charge. Turnage, June 26, 2006, A.G. Op. 06-0246.

The exceptions to the right to bail do not include shoplifting offenses. Brooks, Oct. 6, 2006, A.G. Op. 06-0475.

The exceptions to the right to bail do not include shoplifting offenses. Sorrell, Oct. 6, 2006, A.G. Op. 06-0451.

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Rape as bailable offense. 118 A.L.R. 1115.

Constitutional or statutory provisions regarding release on bail as applicable to children subject to Juvenile Delinquency Act. 160 A.L.R. 287.

Validity, construction, and application of statutes regulating bail bond business. 13 A.L.R.3d 618.

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§ 30. Imprisonment for debt

There shall be no imprisonment for debt.

SOURCES: 1817 art I § 18; 1832 art I § 18; 1869 art I § 11.

JUDICIAL DECISIONS

1. In general.
2. Validity of statutes.
3. Debts within constitutional prohibition.
4. Alimony and child support.
5. Contempt.

1. In general.

A circuit court's transfer of the issue of punitive damages to a chancery court denied plaintiff an opportunity to litigate an important substantive right, which was an error other than as to jurisdiction within the meaning of Miss Const, Art 6, § 147, requiring reversal of the judgment and a remand to the circuit court for trial on the merits. Thompson v. First Miss. Nat'l Bank & Mut. Sav. Life Ins. Co., 427 So. 2d 973 (Miss. 1983), overruled on other grounds, Tideway Oil Programs v. Serio, 431 So. 2d 454 (Miss. 1983).

2. Validity of statutes.

Section 97-5-3 is not an unconstitutional infringement upon chancery court jurisdiction, nor is it imprisonment for debt. The State has a legitimate interest in criminally prosecuting financially able parents who willfully desert or fail to support their children when in destitute or necessitous circumstances. Bryant v. State, 567 So. 2d 234 (Miss. 1990).

The maker of a check given in payment of debt for services rendered which was returned marked "no acct." could not be convicted under the "Bad Check Law," Code 1942, § 2153, as amended by Laws 1948, c 403, since conviction would violate this section. Blakeney v. State, 206 Miss. 85, 39 So. 2d 767 (1949).

Worthless Check Act, not requiring intent to defraud or knowledge of insufficiency of funds, and providing for dismissal of prosecution on payment of check, violates constitutional provision prohibiting imprisonment for debt. State v. Johnson, 163 Miss. 521, 141 So. 338 (1932).

A statute making it a crime for guardians and others exercising public employment to fail to pay over money which comes to their hands by virtue of their office or employment, when lawfully required to do so, does not violate the section. Money so due is not a debt within its meaning. State v. Gillis, 75 Miss. 331, 24 So. 25 (1898).

3. Debts within constitutional prohibition.

Where defendant had been convicted of possession of controlled substance with intent to distribute, and had been sentenced to seven years in prison, with two years suspended upon payment of a $3000 fine, the appellate court would hold that imprisonment for a fine was not violative of Article 3, § 30, on the basis that the constitutional section did not extend to a pecuniary obligation imposed by the state as a punishment for crime. Payne v. State, 462 So. 2d 902 (Miss. 1984).

The term "debt" does not extend to or embrace any pecuniary obligation imposed by the state as a punishment for crime, whether the money, the payment of which is demanded, be for fines or costs, or even, in certain quasi criminal proceedings, other penalties of a moneyed nature which may be lawfully inflicted by a court. Ex parte Diggs, 86 Miss. 597, 38 So. 730 (1905).

The costs of the prosecution are not a debt within the meaning of this section, but the costs of the defense are. Ex parte Meyer, 57 Miss. 85 (1879).

4. Alimony and child support.

Constitutional prohibition against imprisonment for debt does not prevent a commitment to prison for nonpayment of alimony. Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823 (1943).

Debtors of a party against whom alimony had been decreed could not be held in contempt of court for failure to pay complainant. Allen v. Luckett, 94 Miss. 868, 48 So. 186, 136 Am. St. R. 605 (1908).

A judgment under the statute (Code 1906, § 280) ordering the payment of money by the father for the support of a bastard child is not a debt within the meaning of the section. Ex parte Bridgforth, 77 Miss. 418, 27 So. 622, 78 Am. St. R. 532 (1900).

5. Contempt.

In a divorce action, a finding of contempt against the husband was proper because his claims of an inability to pay lacked independent corroboration. Testimony at the divorce trial indicated that the husband was often paid in cash, and his prior statements regarding his income had lacked candor, at best; moreover, prior to the divorce judgment, the husband had been paying a significant amount under the temporary order, but after the divorce, he immediately began paying less, suggesting an unwillingness rather than an inability to pay. Seghini v. Seghini, 42 So. 3d 635 (Miss. Ct. App. 2010).

Incarceration pursuant to an order of contempt for failure to make court-ordered payments under an agreed judgment violated the constitutional prohibition against imprisonment for debts. In re Nichols, 749 So. 2d 68 (Miss. 1999).

Individual held in prison for civil contempt was improperly held without being afforded opportunity to prove present inability to pay. While defendant may avoid judgment of contempt by establishing that he is without present ability to discharge obligation, he has burden of proving his inability to pay, and such showing must be made with particularity and not in general terms. Where contemnor is unable to pay, even if that present inability is due to his misconduct, imprisonment cannot accomplish purpose of civil contempt decree, which is to compel obedience. Jones v. Hargrove, 516 So. 2d 1354 (Miss. 1987).

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Constitutionality of "worthless check" act. 23 A.L.R. 459, 76 A.L.R. 1229.

Alimony or maintenance as debt within constitutional or statutory provisions against imprisonment for debt. 30 A.L.R. 130.

Constitutionality of statute penalizing unsuccessful appeal to courts from action of administrative board. 39 A.L.R. 1181.

Constitutional provision against imprisonment for debt as applicable to nonpayment of tax, fee, or other obligation to government. 40 A.L.R. 77.

Validity of regulations affecting wholesale produce dealers. 48 A.L.R. 449.

Constitutionality, construction, and applicability of statute making refusal to pay for commodities a criminal offense. 76 A.L.R. 1338.

Constitutionality of statute providing for proceedings supplementary to execution. 106 A.L.R. 383.

Constitutional provision against imprisonment for debt as applicable in bastardy proceeding. 118 A.L.R. 1109.

Validity, construction, and effect of body execution statutes allowing imprisonment based on judgment, debt, or the like — modern cases. 79 A.L.R.4th 232.

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 402-404.

CJS. C.J.S. Constitutional Law §§ 487 to 490.

Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Munford and Wiggs, Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond. 56 Miss L. J. 73, April, 1986.

§ 31. Trial by jury

The right of trial by jury shall remain inviolate, but the Legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

SOURCES: 1817 art I § 28; 1832 art I § 28; 1869 art I § 12; Laws, 1916, ch 158.

JUDICIAL DECISIONS

1. Construction and application.
2. Validity of statutes.
3. Number of jurors.
4. Powers and duties of the court.
5. Right of trial by jury generally.
6. Directed verdict or summary judgment.
7. Contempt proceedings.
8. Guilty verdict.
9. Death qualification of jurors.
10. Habitual offender status.
11. Sentence enhancement.
12. Impairment of rights.
13. Fair and impartial jury.
14. Jury conduct.
15. Voir dire.
16. Quotient verdict.
17. Impeachment of verdict.
18. Waiver of jury right.

1. Construction and application.

So important is the right to a jury trial to the democratic form of government; so clear is the mandate from this section, that Kolberg v. State, 829 So. 2d 29 (Miss. 2002) is overruled to the extent that it provides harmless error analysis when the trial court fails to instruct a jury as to elements of a charged crime; it is always and in every case reversible error for the courts of Mississippi to deny an accused the right to have a jury decide guilt as to each and every element. Harrell v. State, 134 So. 3d 266 (Miss. 2014).

Chancellor erred by failing to transfer a dispute over contractual obligations to a circuit court because a former member did not bring most of the claims derivatively under Miss. Code Ann. § 79-4-7.40 since he was seeking a personal recovery, and the proper procedures were not followed; moreover, the parties would have been deprived of the right to a jury trial if transfer was not obtained. ERA Franchise Sys. v. Mathis, 931 So. 2d 1278 (Miss. 2006).

Defendant failed to produce such evidence to overcome the presumption that the trial judge performed his duty in swearing in the jury where the record showed that during voir dire defendant asked the trial judge whether the jury had been properly sworn in and the trial judge responded in the affirmative but asked the clerk, and the clerk responded that the jury had been sworn and that two oaths were given, one to the panel "to answer the questions and the oath to the petit jury." Further, the final judgment stated that the jury was sworn. Robertson v. State, 921 So. 2d 348 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 165 (Miss. 2006).

In a case involving the destruction of trees, a trial court did not err in failing to grant a new trial based on a failure to allow a challenge for cause for a juror that knew one of the parties; the right to an impartial jury was not violated, and there was no prejudice shown since a peremptory challenge was ultimately used. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

Chancery court had concurrent jurisdiction over a suit by the client of a real estate agency seeking damages and other relief at law based on an alleged failure to properly supervise an employee because the client also made a proper request for an equitable accounting; transfer of the action to a circuit court so that the realtors could try the case to a jury trial was not required because the relators did not have an absolute right to a jury trial in a civil action. RE/Max Real Estate Partners., Inc. v. Lindsley, 840 So. 2d 709 (Miss. 2003).

Mississippi Constitution Article VI, § 147, which precludes reversal of a "judgment or decree" of a chancery or circuit court, applies primarily (although not necessarily exclusively) to final judgments or decrees. Reading § 147 to apply only to final judgments, or cases where, by litigation, a party has gained some other substantial advantage, gives maximum life to Mississippi Constitution Article III, § 31, which provides for the right to trial by jury, and Mississippi Constitution Article VI, § 162, which provides that causes "brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court." Tillotson v. Anders, 551 So. 2d 212 (Miss. 1989).

The constitutional right to trial by jury requires that jury shall consist of twelve impartial men, neither more nor less, and that the verdict shall be unanimous. Markham v. State, 209 Miss. 135, 46 So. 2d 88 (1950).

United States Supreme Court decisions, construing provisions of Federal Constitution as to jury trial, are not binding on State courts in construing substantially same provision of State Constitution. Masonite Corp. v. Lochridge, 163 Miss. 364, 140 So. 223 (1932).

A case in which it is held that § 147 of the Constitution modifies this section with reference to cases erroneously transferred from the circuit court to the chancery court. Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 113 So. 433 (1927).

This section secures the right to a jury in all cases to which at common law a jury trial was necessary. Isom v. Mississippi Cent. R.R., 36 Miss. 300 (1858).

2. Validity of statutes.

The chancery court erred in assuming jurisdiction over a personal injury action by two minors arising out of an automobile accident, notwithstanding ordinary chancery court jurisdiction over a minor's business under Constitution 1890 § 159(d), where no equitable relief was involved or required; however, Constitution 1890 § 147 prevents reversal solely on the ground of want of jurisdiction, even though the wrongful assertion of equitable jurisdiction deprives the parties of the right to trial by jury as guaranteed under Constitution 1890 § 31. McLean v. Green, 352 So. 2d 1312 (Miss. 1977).

The Workmen's Compensation Law does not violate constitutional provision that the right of trial by jury shall remain inviolate inasmuch as that provision guarantees a jury trial only in those cases where a jury was necessary according to the principles of common law. Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).

Chapter 270, Laws of 1914 conferring right of eminent domain on drainage districts does not violate this section. Riverside Drainage Dist. v. Buckner, 108 Miss. 427, 66 So. 784 (1914).

The section does not affect the jurisdiction conferred on the chancery court by § 163. McBride v. Adams, 70 Miss. 716, 12 So. 699 (1893).

A statute limiting peremptory challenges is not violative of the section.

Dowling v. State, 13 Miss. (5 S. & M.) 664 (1846).

3. Number of jurors.

Defendant in paternity action not entitled to 12 person jury, because § 93-9-15 does not suggest number of jurors that may be required but only ensures that defendants are entitled to trial by jury; nor does § 31 of Constitution mandate juries of 12 persons in any court. Clark v. Whiten, 508 So. 2d 1105 (Miss. 1987).

Defendant in a personal injury action did not waive his right to be tried before 12 jurors when, after the jury was reduced to 11 members, he made only a general objection and did not move for a mistrial. Brame v. Garwood, 339 So. 2d 978 (Miss. 1976).

It is unnecessary for the jury before justices of the peace, or inferior courts, to consist of twelve men; it may in such courts be wholly dispensed with. Ex parte Wooten, 62 Miss. 174 (1884).

Consent to a trial in a felony case by less than twelve jurors is void. Hunt v. State, 61 Miss. 577 (1883), overruled on another point in Arbuckle v. State, 80 Miss. 15, 20, 31 So. 437 (1902); Scott v. State, 70 Miss. 247, 11 So. 657 (1892); Jones v. State, 27 So. 382 (Miss. 1900).

A jury within the meaning of the law is composed of twelve men. Wolfe v. Martin, 2 Miss. (1 Howard) 30 (1834); Byrd v. State, 2 Miss. (1 Howard) 163 (1834).

4. Powers and duties of the court.

Public policy in favor of a plaintiff being able to choose his or her forum did not outweigh the insurer's constitutional right to a jury trial; each of the insureds' claims, even the equitable claims of unjust enrichment and constructive trust, arose from the sale and alleged breach of an insurance contract, and it was more appropriate for a circuit court to hear equity claims than it was for a chancery court to hear actions at law since circuit courts have general jurisdiction but chancery courts enjoy only limited jurisdiction. Union Nat'l Life Ins. Co. v. Crosby, 870 So. 2d 1175 (Miss. 2004).

Court has duty to see that competent, fair and impartial jury is empaneled. Tighe v. Crosthwait, 665 So. 2d 1337 (Miss. 1995).

On a motion for judgment notwithstanding the verdict, the trial court, under § 11-7-17 and Miss Const Art 3 § 31, must consider all the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion, and if the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable men could not have arrived at a contrary verdict, granting the motion is proper, but if there is substantial evidence opposed to the motion, such that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied, and it is no answer to say that the jury's verdict involves speculation or conjecture. City of Jackson v. Locklar, 431 So. 2d 475 (Miss. 1983).

Under this section it is the duty of the court to see that a competent, fair and impartial jury is impaneled. Mississippi Power Co. v. Stribling, 191 Miss. 832, 3 So. 2d 807 (1941).

By the Constitution itself, the trial judge, and upon review the Appellate Court, must apply to the evidence, all parts of it considered together, a calm, deliberate and impersonal judgment founded in the lessons of long experience and observation in the lives of men in all their various ranks, and measure them according to sound human standards of reasonable probability. Faulkner v. Middleton, 186 Miss. 355, 188 So. 565 (1939), error overruled, 186 Miss. 365, 190 So. 910 (1939).

Instructions, covering power of nine or more jurors to agree on verdict and return it as verdict of jury, should conform substantially to constitutional language. Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814 (1936).

A "trial by jury" in a court of superior original jurisdiction means a jury of twelve qualified persons who shall decide the facts under superintendence of trial judge, who shall have sole power to declare the law, and, although legislature may regulate manner and method of instructing jury upon the law, it cannot prohibit judge's exercise of such power. Dement v. Summer, 175 Miss. 290, 165 So. 791 (1936), overruled, Newell v. State, 308 So. 2d 71 (Miss. 1975).

Circuit judge cannot instruct jury of his own motion, but only when written requests are made. Masonite Corp. v. Lochridge, 163 Miss. 364, 140 So. 223 (1932).

Supreme Court's constructions of subsequently readopted constitutional provision as to jury trial became part of readopted action. Masonite Corp. v. Lochridge, 163 Miss. 364, 140 So. 223 (1932).

Appellate court may review verdict only where it is without support of competent evidence, where it is without support of reasonable, believable proof, or where the verdict is against overwhelming weight of evidence. Williams Yellow Pine Co. v. Henley, 155 Miss. 893, 125 So. 552 (1930).

5. Right of trial by jury generally.

Appellant was not entitled to a jury trial in his suit against the State under Miss. Code Ann. § 11-44-7(1), alleging wrongful conviction and imprisonment, because the right to a jury trial applies only to those cases in which a jury trial was necessary at common law, and at common law, sovereign immunity prevented citizens from suing the State. Hymes v. State, 121 So. 3d 938 (Miss. Ct. App. 2013).

Land company sought declaratory and injunctive relief against a county; the county alleged that it was entitled to damages because the land company violated ordinances. Jurisdiction was proper in the chancery court; if an ordinance applied to the land company, the issue of damages could be decided by the chancellor. Issaquena Warren Counties Land Co., LLC v. Warren County, 996 So. 2d 747 (Miss. 2008).

Because the offense of stalking under Miss. Code Ann. § 97-3-107(1), with which defendant was being charged, was punishable by up to one year in jail, defendant had a right to a jury trial, a circuit court had no discretion to deny him that right and the circuit court erred in refusing defendant's request for a jury trial. Ude v. State, 992 So. 2d 1213 (Miss. Ct. App. 2008), remanded by 93 So. 3d 891, 2012 Miss. App. LEXIS 189 (Miss. Ct. App. 2012).

Defendant's argument on appeal was that there was no personal in-court identification of him as one of the men who participated in the robbery. However, the judge had recessed court for lunch and defendant failed to return to court on his bond, and upon a motion by the State, trial proceeded in his absence; because defendant chose not to return for his trial, he could not complain that he was not personally identified in court, where it was a consequence of his own voluntary act. McCoy v. State, 881 So. 2d 312 (Miss. Ct. App. 2004).

Where an appellate court determined that a deputy who assaulted an individual in attempting to force the individual to sit for a casino security photograph, was acting for the casino, and not in his official capacity for the county, the deputy was not entitled to immunity and the individual was entitled to a jury trial. Kirk v. Crump, 886 So. 2d 741 (Miss. Ct. App. 2004), writ of certiorari denied by 887 So. 2d 183, 2004 Miss. LEXIS 1384 (Miss. 2004).

Where all but one of the counts in the non-movant's complaint were at law, and the one equitable count was insufficient to state claim, the chancery court's exercise of jurisdiction over the matter could have denied the movants the right to a jury trial under Miss. Const. Art. III, § 31, as a jury trial was discretionary in the chancery court. Briggs & Stratton Corp. v. Smith, 854 So. 2d 1045 (Miss. 2003).

Chancery court had concurrent jurisdiction over a suit by the client of a real estate agency seeking damages and other relief at law based on an alleged failure to properly supervise an employee because the client also made a proper request for an equitable accounting; transfer of the action to a circuit court so that the realtors could try the case to a jury was not required because the realtors did not have an absolute right to a jury trial in a civil action. RE/Max Real Estate Partners., Inc. v. Lindsley, 840 So. 2d 709 (Miss. 2003).

A city was not entitled to a jury trial in the circuit court where the court was sitting as an appellate court pursuant to § 11-51-75 and where the cause of action at issue derived from statutory, rather than common, law. City of Durant v. Laws Constr. Co., 721 So. 2d 598 (Miss. 1998).

Neither Art. 3, § 31 of the Mississippi Constitution nor M.R.C.P. 38, both of which provide for the right to a jury trial, require that right extend to appellate proceedings. Cockrell v. City of Southaven, 730 So. 2d 1119 (Miss. 1998), writ of certiorari denied by 528 U.S. 817, 120 S. Ct. 57, 145 L. Ed. 2d 50, 1999 U.S. LEXIS 5010, 68 U.S.L.W. 3223 (1999).

Claimants who were asserting uninsured motorists claims were not entitled to a jury trial in chancery court or to have the case transferred to circuit court in order to provide them with a jury trial in an interpleader action brought by the insurer where the facts of the case were not disputed and only the law applicable to those facts was questioned by the parties. Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879 (Miss. 1989).

The right to a trial by a fair and impartial jury is guaranteed by Mississippi Constitution Article III, § 14, § 26, and § 31. Hudson v. Taleff, 546 So. 2d 359 (Miss. 1989).

A child who brought an action to establish heirship had no right to a trial by jury. Estate of Robinson ex rel. Jennings v. Gusta ex rel. Gusta, 540 So. 2d 30 (Miss. 1989).

In disciplinary proceedings, attorneys have no right to trial by jury. Mississippi State Bar v. Young, 509 So. 2d 210 (Miss. 1987), petition dismissed, 523 So. 2d 323 (Miss. 1988).

In an action for damages arising out of an automobile accident wherein the defendant's motion to dismiss for lack of jurisdiction or, alternatively, to transfer the case to the circuit court had been denied by the chancery court, the Petition for Interlocutory Appeal would be denied but the cause would be remanded with directions that the chancellor should transfer the case to the circuit court to prevent impairment of the defendant's right to trial. Robertson v. Evans, 400 So. 2d 1214 (Miss. 1981).

No right to jury trial in a proceeding for the annexation of territory to a city. In re City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959).

In litigation, growing out of death and injuries sustained in a collision of two automobiles, filed in the chancery court in the county where letters of administration of the decedent's estates were issued, complainants charged that the accident was due to the negligence of a construction company, through its agent, in obstructing the highway, charged negligence in the operation of his automobile on the part of another defendant, who it was alleged was an agent of a nonresident insurance company, and also charged, on information and belief, that another defendant had money and effects of the nonresident insurance company, and prayed for an attachment, where, upon appeal from the decrees in favor of complainants, the Supreme Court found no reversible error in the record, the judgment would not be reversed in view of Mississippi Constitution § 147, and while the chancery court might have directed the trial of the case by jury, such was within the chancery court's discretion, and error could not be predicated upon the refusal of a jury trial. Mathews v. Thompson, 231 Miss. 258, 95 So. 2d 438 (1957).

A jury trial in the chancery court is discretionary unless specially provided for by statute. Carradine v. Estate of Carradine, 58 Miss. 286, 38 Am. R. 324 (1880).

This section does not extend to questions in the trial of which a jury is not necessary by a common law. Lewis v. Garrett, 6 Miss. (5 Howard) 434 (1841); Isom v. Mississippi Cent. R.R., 36 Miss. 300 (1858); Aldridge v. Bogue Phalia Drainage Dist., 106 Miss. 626, 64 So. 377 (1914).

6. Directed verdict or summary judgment.

Trucker's right to a jury trial under Miss. Const. Art. 3, § 31 was not violated when summary judgment was granted in a case alleging malicious prosecution and false arrest because there was probable cause to arrest the trucker when a company's products were found on his truck. Moreover, informing the police about the potentially stolen product did not amount to an untruthful statement to support a defamation claim, the communication of the information to the police was privileged, there was no claim for tortious interference with business relations absent evidence of an intent to damage the trucker's business, and an intentional infliction of emotional distress claim failed since there was no evidence of any conduct on the part of a superintendent or a company that evoked outrage or revulsion. Richard v. Supervalu, Inc., 974 So. 2d 944 (Miss. Ct. App. 2008).

Trial court improperly granted summary judgment, pursuant to Miss. R. Civ. P. 56, to a paint company with respect to a child's claims of injury resulting from ingestion of lead found in paint that the company manufactured because the child's claims were not barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49, as the child was a minor when the claims accrued, and therefore the claims were subject to the savings statute, Miss. Code Ann. § 15-1-59; because the child's claims were improperly dismissed, he was denied his right to a jury trial as set forth in Miss. Const. Art. III, § 31, but the claims of the child's mother were properly dismissed as time-barred. Pollard v. Sherwin-Williams Co., 955 So. 2d 764 (Miss. 2007).

In ruling upon an insurer's request for a directed verdict, the trial court found that factual issues were present for jury determination. Aetna Cas. & Sur. Co. v. Day, 487 So. 2d 830 (Miss. 1986).

Trial judges must be sensitive to the notion that summary judgment may never be granted in derogation of a party's constitutionally protected right to trial by jury; however, there is no violation of the right of trial by jury when judgment is entered summarily in cases where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Brown v. Credit Ctr., Inc., 444 So. 2d 358 (Miss. 1983).

The inviolability of the right to a jury trial does not preclude judicial determination of the existence of reasonable, believable evidence to support a verdict. Mississippi State Hwy. Comm'n v. Valentine, 239 Miss. 890, 124 So. 2d 690 (1960).

7. Contempt proceedings.

In determining whether a person cited for contempt has the right to a jury trial, which determination must be based on whether the contempt is to be treated as a serious or a petty offense, the court must look to the maximum sentence which could be imposed under the statute if a maximum penalty has been set, and if no maximum penalty has been set, the court should look to the penalty actually imposed as the best evidence of the seriousness of the offense. McGowan v. State, 258 So. 2d 801 (Miss. 1972), cert. denied, 409 U.S. 1006, 93 S. Ct. 430, 34 L. Ed. 2d 298 (1972).

A defendant who, in a trial without a jury was found guilty of contempt for violating an injunction prohibiting him from conducting the unlawful business of keeping and selling intoxicating liquor on certain premises, and was sentenced to 5 months imprisonment and a fine of $750, was not entitled to a jury trial, but was entitled to have his fine reduced to $500. McGowan v. State, 258 So. 2d 801 (Miss. 1972), cert. denied, 409 U.S. 1006, 93 S. Ct. 430, 34 L. Ed. 2d 298 (1972).

In contempt proceedings the defendant does not have the right to a trial by jury. O'Flynn v. State, 89 Miss. 850, 43 So. 82, 119 Am. St. R. 727, 11 Am. Ann. Cas. 530 (1907).

8. Guilty verdict.

A guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial, and the right that the prosecution prove each element of the offense beyond a reasonable doubt. Jefferson v. State, 556 So. 2d 1016 (Miss. 1989).

9. Death qualification of jurors.

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution did not deprive the defendant of a jury composed of a fair cross section of the community. Minnick v. State, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

10. Habitual offender status.

Prior convictions were a recognized exception to the requirement of a jury determination of enhancing sentencing factors, and accordingly it was not necessary that a jury determine whether the inmate qualified for enhanced sentencing as a habitual offender under Miss. Code Ann. § 99-19-83; thus, the trial court did not err when it did not empanel a jury for that purpose. Issac v. State, 968 So. 2d 951 (Miss. Ct. App. 2007).

An accused has no constitutional right to a trial by jury on the question of whether he or she is a habitual offender. All that is required is that the accused be properly indicted as a habitual offender, that the prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof. Keyes v. State, 549 So. 2d 949 (Miss. 1989).

11. Sentence enhancement.

Although a conviction for the sale of a controlled substance, under Miss. Code Ann. § 41-29-139, was affirmed, defendant's rights under the Sixth Amendment were violated because he did not receive a jury hearing on the issue of a thirty-year sentence enhancement, pursuant to Miss. Code Ann. § 41-29-142, for selling a controlled substance within 1,500 feet of a church. Brown v. State, 995 So. 2d 698 (Miss. 2008).

12. Impairment of rights.

Decision of the Mississippi Supreme Court rendering it harmless for a person in Mississippi to be convicted of a crime with the Court, rather than the jury, deciding the sufficiency of the evidence against the person impairs, infringes upon, violates, and renders broken the right to a jury trial Harrell v. State, 134 So. 3d 266 (Miss. 2014).

Trial court's failure to instruct the jury as to the elements of the underlying felony of burglary during defendant's trial for capital murder deprived defendant of due process in the form of his right to a jury trial because the failure of a jury to find a criminal defendant guilty on each element of the charged crime led to mandatory reversal; the Constitution gives the courts no discretion, and in Mississippi, the right to a jury trial must remain inviolate. Harrell v. State, 134 So. 3d 266 (Miss. 2014).

In a breach of contract case in which a Mississippi corporation filed an interlocutory appeal of a chancery court's order transferring the case to the circuit court and two individuals, in opposing the appeal, argued that their right to a jury trial would be infringed if the case remained in chancery court, that argument failed. In chancery court, with some few statutory exceptions, the right to jury was purely within the discretion of the chancellor, and if one was empaneled, its findings were totally advisory; however, no jury trial was required by Miss. Const. Art. 3, § 31 for cases within the chancery court's jurisdiction, and chancellors historically had jurisdiction over claims for specific performance of a real estate contract. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

Judgment against defendants was not subject to reversal on ground that suit should have been brought in circuit court rather than chancery court and that defendants' right to jury trial had thereby been denied where action had been litigated over course of several years during which Supreme Court had refused to grant defendants' interlocutory appeal to transfer case. Aetna Cas. & Sur. Co. v. Berry, 669 So. 2d 56 (Miss. 1996).

Trial court erred by refusing to allow medical malpractice plaintiff to ask questions during voir dire to determine if prospective jurors had been exposed to and/or affected by media campaign on tort reform; however, error was harmless, as advertisements in question were geared towards reducing amount of damages and did not suggest that jurors should find defendants not liable, and plaintiff was allowed to ask jurors whether they belonged to any tort reform group, whether they had personal feelings that there were too many lawsuits, whether they felt medical doctors should not be sued, and whether they should give large damages if they were justified by proof. Tighe v. Crosthwait, 665 So. 2d 1337 (Miss. 1995).

A plaintiff in a medical malpractice case was denied her right to an impartial jury where there were over 40,000 persons in the county from which a jury could have been drawn and the plaintiff was limited to a jury pool of 25, 48 percent of which were connected in some way to the defendant doctor, because of the "statistical aberration" of the makeup of the venire and the strong likelihood that the opportunity for undue influence over other jurors in the case was too great. Hudson v. Taleff, 546 So. 2d 359 (Miss. 1989).

An order for transfer by the Circuit Court to the Chancery Court of an action regarding a credit life insurance policy was erroneous, where the complaint clearly stated a claim against defendants for punitive damages, and where the order operated to deprive plaintiff of her right to trial by jury secured by Miss Const, Art 3, § 31. The Mississippi Circuit Courts should give strict scrutiny to a transfer movant's denomination of a claim as one involving a complicated accounting. Thompson v. First Miss. Nat'l Bank & Mut. Sav. Life Ins. Co., 427 So. 2d 973 (Miss. 1983), overruled on other grounds, Tideway Oil Programs v. Serio, 431 So. 2d 454 (Miss. 1983).

The assumption of jurisdiction by the chancery court over a minor's tort claim improperly deprived the defendant of his right to a trial by jury; however, absent other error, such improper exercise of jurisdiction over a matter not involving equitable relief was not reversible error. Louisville & N.R. Co. v. Hasty, 360 So. 2d 925 (Miss. 1978), cert. denied, 439 U.S. 1003, 99 S. Ct. 614, 58 L. Ed. 2d 679 (1978).

Reasonable regulation does not constitute denial or impairment of right of jury trial. City of Jackson v. Clark, 152 Miss. 731, 118 So. 350 (1928).

Conviction under indictment charging in general terms that defendant on a day named did unlawfully sell intoxicating liquors in Leflore County, Miss., where proof showed more than one offense or sale, did not violate this section. Buford v. State, 146 Miss. 66, 111 So. 850 (1927).

It is not a violation of this section to reverse a case and grant a new trial on the issue of amount of damages only. Yazoo & Miss. V. Ry. v. Scott, 108 Miss. 871, 67 So. 491, Am. Ann. Cas. 1917E,880 (1915).

The legislature cannot authorize a judgment, on a motion, without a jury, in favor of a surety against the principal for money paid. Smith's Adm'r v. Smith, 2 Miss. (1 Howard) 102 (1834).

13. Fair and impartial jury.

Defendant's right to a fair and impartial jury was not violated by an alleged relationship between one juror and a witness for the State because none of the facts asserted by defendant with regard to the relations between the juror and the police officer, who was the witness, could be found in or supported by the record. Hill v. State, 4 So. 3d 1063 (Miss. Ct. App. 2009).

Trial court did not err when it allowed the State to use peremptory strikes on five African American venire members and denied defendant's Batson challenges because the State provided a racially neutral reason for the challenged strike and defendant failed to rebut the State's explanations. Defendant was charged with possession of cocaine and three of the potential jurors that were removed by the State's challenges were involved with drugs, one had problems with the prosecutor, and one had voted not guilty in another strong case. Watson v. State, 991 So. 2d 662 (Miss. Ct. App. 2008).

Physician and a clinic failed to make a prima facie showing of purposeful discrimination that a deceased patient's family improperly used three of their four peremptory challenges against white members of the venire, after the deceased's family provided race-neutral explanations for the peremptory challenges; the strike percentages alone did not provide a prima facie case of discrimination because the trial record did not reflect the racial makeup of the venire, the empaneled jury, the community at large, or any other factor that might suggest these percentages alone suggested discrimination. Estate of Jones v. Phillips, 992 So. 2d 1131 (Miss. 2008).

Appellate court rejected defendant's Batson's challenge to the State's exercise of a peremptory challenge against an African-American venireman. The prosecutor explained that a defendant with the same last name as the venireman had recently been indicted on armed robbery; the defense did not offer any argument to rebut the State's race-neutral explanation. Williams v. State, 903 So. 2d 752 (Miss. Ct. App. 2005).

In a capital murder case, no racial bias was found in the use of peremptory strikes against minority jurors because the prosecutor cited race-neutral reasons as to each juror, including the desire to get off the jury, employment hardship, the prosecutor's past professional difficulties with a juror, physical disability, and unemployment. Lynch v. State, 877 So. 2d 1254 (Miss. 2004), writ of certiorari denied by

543 U.S. 1155, 125 S. Ct. 1299, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1592, 73 U.S.L.W. 3495 (2005).

In defendant's pro se appeal from his conviction for sale of cocaine, defendant failed to establish a prima facie case that he had been deprived of a jury that was representative of a fair, racial cross-section of the community. Steen v. State, 873 So. 2d 155 (Miss. Ct. App. 2004).

In a personal injury action against an automobile manufacturer arising out of a one-vehicle accident, the automobile manufacturer was not afforded the fair and impartial jury to which it was entitled where a substantial number of the jurors had in the past been represented by the attorney for the plaintiff, or had a family member who was represented by the attorney; due to the number of persons on the venire and the jury who had been represented by the plaintiff's attorney or whose family members had been clients of the attorney, there was a "statistical aberration" in the make-up of the venire and the jury, so that the opportunity for these jurors to exercise their influence over the remainder of the jury was too great a risk to be taken. Toyota Motor Corp. v. McLaurin, 642 So. 2d 351 (Miss. 1994).

Under this constitutional provision, it is the duty of the court to see that a competent, fair and impartial jury is impanelled; thus, in a personal injury action, the trial court erred in overruling defendant's motion for a new trial, where, subsequent to the jury's verdict it was determined that plaintiff's counsel had represented one juror in a matter which had been settled two weeks earlier and where this juror had remained silent during voir dire, despite questioning as to past and present representation by counsel; plaintiff's counsel was under a duty to disclose this prior representation of the juror and failure to do so warranted reversal. Marshall Durbin, Inc. v. Tew, 381 So. 2d 152 (Miss. 1980).

14. Jury conduct.

Trial judge's observation that a juror was awake provided sufficient evidence to deny defendant's motion for mistrial based on the fact that the juror slept through the trial. Williams v. State, 919 So. 2d 250 (Miss. Ct. App. 2005).

It is within the sound discretion of the trial judge to permit jurors to take notes during the trial in cases where it is deemed desirable or necessary in complicated matters or where both parties agree that jurors may take notes. When jurors are allowed to take notes, the judge should give directions and set limitations on the use of the notes. Wash v. State, 521 So. 2d 890 (Miss. 1988), overruled on other grounds, Wharton v. State, 734 So. 2d 985 (Miss. 1998).

15. Voir dire.

Trial court did not err when it allowed the State to ask jurors if they could convict a thug for shooting a thug during voir dire because although Miss. Unif. Cir. & County Ct. Prac. R. 3.05 prohibited the posing of hypothetical questions to the venire panel during voir dire that required a juror to pledge a particular verdict, the State asked a hypothetical question about thugs and did not specifically request a verdict during voir dire. Anderson v. State, 1 So. 3d 905 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 15 (Miss. 2009).

Appellate court did not have the necessary facts to hold that a trial court erred in failing to find that a prima facie case of racial discrimination was made based on the State's exercising four of the five peremptory challenges against African American jurors because the record did not state how many potential veniremen were African American or the number of African American jurors who were actually seated on the jury. Willis v. State, 999 So. 2d 411 (Miss. Ct. App. 2008).

Trial court properly denied defendant's request to question a venireman for which the State exercised a peremptory strike, as the record indicated the trial court had relied not only upon information provided by an outside sources (information for the strike was provided to the State by both a criminal investigator with the district attorney's office and the sheriff's department), but also upon the demeanor of the venire person. Thus, the State's reason for the strike was race neutral; as to another peremptory strike, the State was properly allowed to call a witness who worked at the district attorney's office to explain the

State's reasons for the strike, there were no signs of discrimination; the trial court also properly denied defendant's request to question that venireman. Avant v. State, 910 So. 2d 695 (Miss. Ct. App. 2005).

In defendant's trial for the sale of cocaine, the prosecutor's reasons for striking two potential jurors, based on age and marital status in one instance, and because a juror had had regular contact with defendant in a second instance, were sufficiently race-neutral to survive defendant's Batson challenges. Rogers v. State, 891 So. 2d 268 (Miss. Ct. App. 2004).

Where four African-Americans were struck from jury, the State's arguments that it had prosecuted many defendants in area with their last names, that one was related to a prior defendant who made accusations against the judicial system, and one was unemployed and failed to complete questionnaire, the reasons were sufficiently race neutral to survive defendant's Batson challenge. Clay v. State, 881 So. 2d 354 (Miss. Ct. App. 2004).

Neither the United States Supreme Court nor the Mississippi Supreme Court have yet [sic] to eliminate the practice of peremptory challenges and the appellate court may not depart from precedent and eliminate peremptory challenges in Mississippi state courts. Batson v. Kentucky places appropriate restrictions on the exercise of peremptory challenges to prevent the exclusion of potential jurors due to their race or gender and a defendant's right to a fair and impartial jury is not violated by the use of peremptory challenges. Burton v. State, 875 So. 2d 1120 (Miss. Ct. App. 2004).

To ensure party's right to fair trial and impartial jury, free of bias and prejudice, Mississippi law allows broad latitude on voir dire. Tighe v. Crosthwait, 665 So. 2d 1337 (Miss. 1995).

While it is error to refuse to allow party to question prospective jurors to determine whether they are biased, prejudiced or have any interest in outcome of case, counsel is not free of limits during voir dire; rather, voir dire examination is subject to reasonable limitations, especially in insurance cases. Tighe v. Crosthwait, 665 So. 2d 1337 (Miss. 1995).

While a prospective juror is not per se precluded from serving on the jury where the juror or a member of his or her family has been represented by an attorney who is involved in the case, a trial judge should carefully consider those instances in which a prospective juror or a family member has been represented by one of the attorney's involved in the matter before him or her; despite a prospective juror's honest and sincere belief that he or she can be completely fair and impartial, that person may find it very difficult to return a verdict against the client of an attorney to whom that person or a family member has turned for legal counsel in the past. Toyota Motor Corp. v. McLaurin, 642 So. 2d 351 (Miss. 1994).

16. Quotient verdict.

Defendant in a criminal case is entitled to have the jury charged that all twelve jurors must agree before they can return a verdict of guilty, and the refusal of such an instruction is erroneous where the record does not disclose whether the verdict was unanimous. Markham v. State, 209 Miss. 135, 46 So. 2d 88 (1950).

Instruction that verdict of nine jurors should be verdict of jury where harmless, where it did not appear instruction was acted on. Cresswell v. Cresswell, 164 Miss. 871, 140 So. 521 (1932).

17. Impeachment of verdict.

A verdict rendered cannot be impeached by any one of the twelve jurors. Ulmer v. Pistole, 115 Miss. 485, 76 So. 522 (1917).

18. Waiver of jury right.

Defendant mortgage borrowers' claims against plaintiff bank could be arbitrated even though the arbitration agreements waived rights to a jury trial; the Seventh Amendment did not confer the right to a trial, but only the right to have a jury hear the case once it was determined that the litigation should proceed before a court, and the bank's motion to compel arbitration was granted. New South Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636 (S.D. Miss. 2005).

Waiver of the right to a jury trial is not binding on a litigant when an appellate court reverses for a new trial. State v. Caldwell, 492 So. 2d 575 (Miss. 1986).

RESEARCH REFERENCES

ALR. Right to jury trial in proceeding for removal of public officer. 3 A.L.R. 232, 8 A.L.R. 1476.

Constitutionality of statute conferring on chancery courts power to abate public nuisances. 5 A.L.R. 1474; 22 A.L.R. 542; 75 A.L.R. 1298.

Right to jury trial in case of seizure of property alleged to be illegally used. 17 A.L.R. 568, 50 A.L.R. 97.

Right to waive trial by jury in criminal cases, and effect of waiver upon jurisdiction of court to proceed without a jury. 48 A.L.R. 767, 58 A.L.R. 1031.

Constitutionality of statute relating to injunctions against crime or abatement of nuisance arising from violation of liquor law. 49 A.L.R. 635.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 A.L.R. 20; 82 A.L.R. 345; 116 A.L.R. 209; 132 A.L.R. 91; 139 A.L.R. 673.

Right to jury in will contest. 62 A.L.R. 82.

Constitutionality of corrupt practices act. 69 A.L.R. 377.

Right to consent to trial of criminal case before less than twelve jurors; and effect of consent upon jurisdiction of court to proceed with less than twelve. 70 A.L.R. 279, 105 A.L.R. 1114.

Constitutionality of compulsory arbitration or appraisal provision of standard policy. 77 A.L.R. 619.

Statutes in relation to subject-matter or form of instructions by court as impairing constitutional right to jury trial. 80 A.L.R. 906.

Validity of statute empowering administrative officials to transfer to penitentiary inmate of reformatory. 95 A.L.R. 1455.

Comment Note: Right to jury trial as to fact essential to action or defense but not involving merits thereof. 170 A.L.R. 383.

Right to jury trial in action under Fair Labor Standards Act. 174 A.L.R. 421.

Right of accused to insist, over objection of prosecution or court, upon trial by court without a jury. 51 A.L.R.2d 1346.

Constitutionality of arbitration statutes. 55 A.L.R.2d 432.

Right in equity suit to jury trial of counterclaim involving legal issue. 17 A.L.R.3d 1321.

Right to a jury trial on motion to vacate judgment. 75 A.L.R.3d 894.

Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case, as ground of complaint by accused. 99 A.L.R.3d 1261.

Validity of agreement, by stipulation or waiver in state civil case, to accept verdict by number or proportion of jurors less than that constitutionally permitted. 15 A.L.R.4th 213.

Right to jury trial in stockholder's derivative action. 32 A.L.R.4th 1111.

Right to jury trial in action for declaratory relief in state court. 33 A.L.R.4th 146.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury. 37 A.L.R.4th 304.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecutions. 41 A.L.R.4th 1189.

Small claims: jury trial rights in, and on appeal from, small claims court proceeding. 70 A.L.R.4th 1119.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed. 75 A.L.R.4th 91.

Contractual jury trial waivers in state civil cases. 42 A.L.R.5th 53.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases. 47 A.L.R.5th 259.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law. 54 A.L.R.5th 631.

Right to jury trial in child neglect, child abuse, or termination of parental rights proceedings. 102 A.L.R.5th 227.

Complexity of civil action as affecting Seventh Amendment right to trial by jury. 54 A.L.R. Fed. 733.

Effect of Foreign Sovereign Immunities Act (28 USCS §§ 1330, 1441(d), 1602 et seq.) on right to jury trial in action against foreign state. 56 A.L.R. Fed. 679.

Plaintiff's right to jury trial in civil action under § 502(a)(1)(B) of Employee Retirement Income Security Act (29 USCS § 1132(a)(1)(B)). 56 A.L.R. Fed. 880.

Right to jury trial on issue of damages in copyright infringement action under 17 USCS § 504. 64 A.L.R. Fed. 310.

Waiver of right to trial by jury as affecting right to trial by jury on subsequent trial of same case in federal court. 66 A.L.R. Fed. 859.

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§ 32. Construction of enumerated rights

The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people.

SOURCES: 1817 art I; 1832 art I; 1869 art I § 32.

JUDICIAL DECISIONS

1. Power of state—In general.
2. — — Alcohol or drugs, power of state.
3. — — Obscenity, power of state.
4. — — Federal laws, power of state.
5. Rights of people—In general.
6. — — Alcohol or drugs, rights of people.
7. — — Freedom of religion, rights of people.
8. — — Abortion, rights of people.

1. Power of state—In general.

The State is sovereign over matters confided or reserved to it by the Tenth Amendment to the Federal Constitution. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

State sovereignty cannot be bargained away or surrendered by the legislature. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

2. — — Alcohol or drugs, power of state.

Law authorizing state in liquor prosecution to give evidence of offenses committed before date alleged in indictment held constitutional. Buford v. State, 146 Miss. 66, 111 So. 850 (1927).

3. — — Obscenity, power of state.

Statute (Code 1906, § 1292) making it a misdemeanor to sell, distribute, etc., obscene literature does not violate this section. Williams v. State, 130 Miss. 827, 94 So. 882 (1923).

4. — — Federal laws, power of state.

The Federal Social Security Act may name a provision governing the grant of aid or advantages to a State, which is free to accept or reject it, provided it does not infringe the State Constitution or rights reserved in the Tenth Amendment. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

5. Rights of people—In general.

The informed consent rule applicable to medical practitioners reflects Mississippi's "respect for the individual's right to be free from unwanted bodily intrusions no matter how well intentioned," which is rooted in the right to privacy recognized by state common law and Article 3, § 32 of the Mississippi constitution. Fox v. Smith, 594 So. 2d 596 (Miss. 1992).

Statute, which provided that when a political party registers no other political party may use that name which has already been registered, as applied, prevented a political party which had used the word Republican in its name for many years, from using the name because another organization had registered the word Republican, was not unconstitutional as destroying liberty of members of political parties to organize, associate themselves with others for political purposes and as denying them the right to freely exercise their franchise. Hoskins v. Howard, 214 Miss. 481, 59 So. 2d 263 (1952), cert. denied, 344 U.S. 915, 73 S. Ct. 334, 97 L. Ed. 705 (1953).

6. — — Alcohol or drugs, rights of people.

Section 67-3-13 did not deny a defendant, who was convicted of possession of beer in a "dry" part of the county while traveling home after having legally purchased the beer in a "wet" city, equal protection under the laws and constitution of the State of Mississippi and the Constitution of the United States, nor was there any invasion of the defendant's constitutional right of privacy. Dantzler v. State, 542 So. 2d 906 (Miss. 1989).

The mere fact that possession was not expressly outlawed before the Constitution of 1890, and was not therein treated does not, ipso facto, make the possession of intoxicating liquors protected by this section. Stepp v. State, 202 Miss. 725, 33 So. 2d 307 (1948).

Statute (Code 1942 § 2613) prohibiting possession of intoxicating liquor, even by one solely for his own use and consumption, does not violate this section adopted at a time when such possession was not contrary to law. Stepp v. State, 202 Miss. 725, 33 So. 2d 307 (1948).

7. — — Freedom of religion, rights of people.

Jehovah's Witness has right, based upon freedom of religion, to undergo surgery but refused to be given blood transfusion and such right outweighs interest of state in insuring that wounded Witness receive transfusion in order to insure that Witness is alive to testify in subsequent criminal trial. In re Brown, 478 So. 2d 1033 (Miss. 1985).

8. — — Abortion, rights of people.

Sale of sexual devices, or the right of access to such devices by users, is not encompassed by the constitutionally protected right of privacy; advertising of the devices, or their sale is not constitutionally protected speech. PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004).

Autonomous bodily integrity is protected under the right to privacy, and protected within the right of autonomous bodily integrity is an implicit right to have an abortion. Pro-Choice Miss. v. Fordice, 716 So. 2d 645 (Miss. 1998).

Because the mandatory consultation and 24 hour delay ensures that a woman has given thoughtful consideration in deciding whether to obtain an abortion, § 41-41-33 does not create an undue burden and is therefore constitutional. Pro-Choice Miss. v. Fordice, 716 So. 2d 645 (Miss. 1998).

The two-parent consent law for abortions for minors is not too restrictive and passes the undue burden test for determining state constitutionality. Pro-Choice Miss. v. Fordice, 716 So. 2d 645 (Miss. 1998).

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ARTICLE 4.

LEGISLATIVE DEPARTMENT.

In General.
Qualifications and Privileges of Legislators.
Rules of Procedure.
Injunctions.
Local Legislation.
Prohibitions.
Miscellaneous.

IN GENERAL

SEC.
33. Composition of Legislature
34. Composition of House of Representatives
35. Composition of Senate
36. Sessions
37. Elections for members
38. Election of officers by each house
39. President pro tempore of Senate

§ 33. Composition of Legislature

The legislative power of this state shall be vested in a Legislature which shall consist of a Senate and a House of Representatives.

SOURCES: 1817 art III § 4; 1832 art III § 4; 1869 art IV § 1.

JUDICIAL DECISIONS

1. In general.
2. Specific applications of legislative power—In general.
3. Attorney disciplinary proceedings, specific applications of legislative power.
4. Appointment of public officials, specific applications of legislative power.
5. Sovereign immunity, specific applications of legislative power.
6. Public health and welfare, specific applications of legislative power.
7. Crimes and criminal procedure, specific applications of legislative power.
8. Rights and remedies, specific applications of legislative power.

9. Delegation of legislative power—In general.
10. Livestock sanitary board, delegation of legislative power.
11. Crimes and criminal procedure, delegation of legislative power.
12. Insurance, delegation of legislative power.
13. Sovereign immunity, delegation of legislative power.
14. Taxation, delegation of legislative power.
15. Waterworks, delegation of legislative power.
16. Education, delegation of legislative power.
17. Political subdivisions, delegation of legislative power.
18. Rules and regulations, delegation of legislative power.
19. Powers and functions of courts—In general.
20. Determining constitutionality of statutes, powers and functions of courts.
21. Effect of determination of unconstitutionality, powers and functions of courts.
22. Construction of statutes, powers and functions of courts.
23. Retroactive effect of laws, powers and functions of courts.

1. In general.

State Constitution does not grant specific legislative powers, but limits them. Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949).

Legislative department is primarily charged with duty of determining by what means promotion of welfare of citizens can be accomplished. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

This section delegates all power to the legislature to enact legislation not withheld by a specific provision of the Constitution. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

For a history of this section with reference to an effort to amend it by inaugurating an initiative and referendum see Power v. Robertson, 130 Miss. 188, 93 So. 769 (1922).

Chapter 159, Laws of 1916, known as the Initiative and Referendum Amendment, violates this section of the Constitution. Power v. Robertson, 130 Miss. 188, 93 So. 769 (1922).

It is for the legislature to decide what laws are necessary within the police power of the state. State ex rel. Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 76 So. 258 (1917); Heidelberg v. Batson, 119 Miss. 510, 81 So. 225 (1919).

All the power of the legislature prior to the Constitution it will continue to exercise as before, unless restricted by the Constitution. State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152 (1906).

The legislature may make the operation of statutes dependent upon future contingencies. Ormond v. White, 85 Miss. 276, 37 So. 834 (1905).

The legislature has all political power not denied it by the state or national Constitution. Hinton v. Board of Supvrs., 84 Miss. 536, 36 So. 565 (1904).

2. Specific applications of legislative power—In general.

The legislature may use its power to grant exemptions in a manner which divests its political subdivisions of certain taxing authority they would otherwise hold. Morco Indus., Inc. v. City of Long Beach, 530 So. 2d 141 (Miss. 1988).

Mississippi Const. § 204 vests in the legislature, as to county superintendents of education, the full legislative power of the state which is granted by this section. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

Power is vested in legislature, and not courts, to shorten periods within which, or methods by which, appeals can be taken to Supreme Court. Gaudet v. Mayor & Bd. of Aldermen, 43 So. 2d 900 (Miss. 1950).

Supreme Court has no right or power to nullify or repeal valid statute or enact new one, as this power is vested in legislature alone. Gaudet v. Mayor & Bd. of Aldermen, 43 So. 2d 900 (Miss. 1950).

It is within the power of the legislature within constitutional limits to provide for the issuance and validation of public corporation bonds. Bacot v. Board of Supvrs., 124 Miss. 231, 86 So. 765 (1921).

The legislature has authority to authorize the railroad commission to determine the class to which a railroad falls, for purpose of license. New Orleans, M. & C.R. Co. v. State, 110 Miss. 290, 70 So. 355 (1915).

The legislature may authorize a commission form of government of cities. Mayor of City of Jackson v. State, 102 Miss. 663, 59 So. 873, Am. Ann. Cas. 1915A,1213 (1912).

The legislature may authorize creation of drainage districts. Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911).

The legislature may lawfully regulate the time, manner and extent of the taking of fish in running streams and lakes with outlets into other waters. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. R. 700 (1905).

The legislature has the right to prescribe the terms upon which creditors shall undertake to use and employ the extraordinary remedy of attachment against their debtors. Stadder v. Jacobs, 70 Miss. 429, 12 So. 444 (1893).

The power to create other offices than those provided for by the Constitution, subject to the limitation mentioned by the court, results from the grant to the legislature of legislative power. State ex rel. Revenue Agent v. Hill, 70 Miss. 106, 11 So. 789 (1892).

3. Attorney disciplinary proceedings, specific applications of legislative power.

The Rules of Discipline for the Mississippi State Bar do not violate due process or § 33 of the Mississippi Constitution; attorney disciplinary proceedings are an integral part of the functioning of the judicial branch and thus are not subject to the "legislative power" vested in § 33. Hall v. Mississippi Bar, 631 So. 2d 120 (Miss. 1993).

It is competent for legislature to confer exclusive jurisdiction of disbarring or reinstating attorneys. Ex parte Marshall, 165 Miss. 523, 147 So. 791 (1933).

4. Appointment of public officials, specific applications of legislative power.

The Board of Trustees of State Institutions of Higher Learning is an executive rather than a legislative body as indicated by the enumeration of the Board of Trustees' powers and duties contained within the Mississippi Constitution and applicable statutes; thus, appointment of the Board of Trustees by the Governor rather than the legislature is not an encroachment upon the powers of the legislative branch of the government. Van Slyke v. Board of Trustees of State Insts. of Higher Learning, 613 So. 2d 872 (Miss. 1993).

5. Sovereign immunity, specific applications of legislative power.

The portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) requiring that all claims against the State be governed by case law governing sovereign immunity as it existed immediately prior to the decision in Pruett v. City of Rosedale (Miss. 1982) 421 So. 2d 1046 is unconstitutional as it violates the doctrine of separation of powers and the prohibition against reviving or amending a law by reference to its title only. Presley v. Mississippi State Hwy. Comm'n, 608 So. 2d 1288 (Miss. 1992).

6. Public health and welfare, specific applications of legislative power.

Boards of health may be established by legislative authorities. Hawkins v. Hoye, 108 Miss. 282, 66 So. 741 (1914), error overruled, 66 So. 1015 (Miss. 1915).

The legislature may enact laws regulating and providing for the safety, morals, health and general welfare of the public under the police power of the state. State v. J.J. Newman Lumber Co., 102 Miss. 802, 59 So. 923 (1912), error overruled, 103 Miss. 263, 60 So. 215 (1912).

7. Crimes and criminal procedure, specific applications of legislative power.

Legislature, in exercise of its power to declare what shall constitute crime or punishable offense, must inform citizen with reasonable precision what acts it intends to prohibit, so that he may have certain understandable rule of conduct and know what acts it is his duty to avoid. State ex rel. Dist. Att'y v. Winslow, 208 Miss. 753, 45 So. 2d 574 (1950).

8. Rights and remedies, specific applications of legislative power.

The act of 1884 is not unconstitutional because it provided that the jury might render a special verdict and assess punitive damages against the plaintiff in attachment in certain cases and that "any verdict they may assess shall stand" unless the court shall certify that it is grossly unconscionable or unwarranted by the facts. Stadder v. Jacobs, 70 Miss. 429, 12 So. 444 (1893).

9. Delegation of legislative power—In general.

Code 1942, section 1108, known as "Fair Trade Act," permitting producer, manufacturer or owner to contract with retailer as to resale price of his own product which is in fair and open competition with commodities of same general class produced by others, does not violate this section. W.A. Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950).

The execution of some portions of a statute may be made to depend upon the vote of the people. Alcorn v. Hamer, 38 Miss. 652 (1860); Barnes v. Board of Supvrs., 51 Miss. 305 (1875); Schulherr v. Bordeaux, 64 Miss. 59, 8 So. 201 (1886).

The legislature cannot delegate to the whole or any portion of the people, or to any other department of the government its power to make laws. Alcorn v. Hamer, 38 Miss. 652 (1859).

10. Livestock sanitary board, delegation of legislative power.

Jurisdiction to enforce by injunction the lawful orders of the livestock sanitary board may be conferred by the legislature on the chancery court. McMillan v. Live Stock San. Bd., 119 Miss. 500, 81 So. 169 (1919).

Laws of 1908 creating a livestock sanitary board does not delegate legislative power contrary to the Constitution. Abbott v. State, 106 Miss. 340, 63 So. 667 (1913).

11. Crimes and criminal procedure, delegation of legislative power.

Under the Uniform Controlled Substances Law, the penalties prescribed for violations thereof are inextricably tied to the various schedules, and therefore the portions of Code 1972, § 41-29-111 by which the state board of health is given the authority to move a substance from one schedule to another, to add substances to any schedule, and to delete substances from any schedule are an unconstitutional attempt to delegate the authority to define crimes and fix the punishments therefor which is vested exclusively in the legislature; such unconstitutional portions are separable from the remaining provisions of the Uniform Controlled Substances Law. Howell v. State, 300 So. 2d 774 (Miss. 1974).

The legislature can constitutionally confer on municipalities the power, by ordinance, to punish as an offense against the municipality an act which constitutes a crime against the state. Town of Ocean Springs v. Green, 77 Miss. 472, 27 So. 743 (1900).

12. Insurance, delegation of legislative power.

The last two sentences of Code 1942, § 5825, providing that the Insurance Commission shall obtain from every stock fire company authorized to do business in the state a written opinion as to the amount of commission each company should pay local agents and that the majority opinion shall fix the amount or rate of commissions to paid local agents in the state are unconstitutional, since even assuming some power to fix agents' commission rates is delegated to the Insurance Commission, the statute constitutes an improper delegation of legislative authority because it fails to provide adequate standards for the guidance of the administrative agency and constitutes an improper delegation of legislative authority to private groups. State v. Allstate Ins. Co., 231 Miss. 869, 97 So. 2d 372 (1957).

13. Sovereign immunity, delegation of legislative power.

The provision in § 11-46-6 [repealed] providing that, until the Sovereign Immunity Act (§§ 11-46-1 et seq.) becomes effective, all claims against the State and political subdivisions "shall not be affected by this act but shall continue to be governed by the case law governing sovereign immunity as it existed immediately prior to the decision in the case of Pruett v. City of Rosedale, 421 So. 2d 1046" and relevant statutory law governing sovereign immunity delegates all authority to the court, as the court is told to apply the "case law," which is not even confined to Mississippi case law, on sovereign immunity as it existed on November 10, 1982; the court is required to go beyond the 4 corners of the statute to find the substantive law governing sovereign immunity, a legislatively imposed responsibility on the court "which comes perilously close to delegation to the court the power to legislate on this particular subject," which under the Mississippi Constitution only the legislature may do. Presley v. Mississippi State Hwy. Comm'n, 608 So. 2d 1288 (Miss. 1992).

14. Taxation, delegation of legislative power.

Equal protection of the laws is denied by a statute authorizing the chairman of the Tax Commission in his discretion to impose a penalty of not less than 10 or more than 25 per cent for delay in the payment of state income tax, without prescribing any standard for fixing the amount. Donegan v. Donegan, 238 Miss. 167, 117 So. 2d 881 (1960).

Statutes under which county supervisor's order granting statutory tax exemption to new enterprises of public utility becomes effective within specified time in absence of petition for election were not unconstitutional as granting legislative power. Rawlings v. Claggett, 174 Miss. 845, 165 So. 620 (1936).

The authority given the state tax commission to prescribe the form of the assessment roll is not a delegation to the commission of legislative power and does not violate this section of the Constitution. Bailey & Bean v. Wilson, 128 Miss. 49, 90 So. 362 (1922).

The legislature had the right to create a state revenue agent and to arm him with power to bring any action which the state or any of its political subdivisions could bring. State ex rel. Revenue Agent v. Hill, 70 Miss. 106, 11 So. 789 (1892).

15. Waterworks, delegation of legislative power.

A statute directing organization of a water district if the court finds the project feasible from an engineering standpoint and practical, and that its creation will meet a public necessity and be conducive to the public welfare of the state as a whole, is not unconstitutional as conferring on the judiciary authority to answer legislative questions. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

It is held that the Drainage Act of 1912 is not a delegation of legislative power. Jones v. Belzoni Drainage Dist., 102 Miss. 796, 59 So. 921 (1912).

16. Education, delegation of legislative power.

Section 9, Chapter 10, Laws of 1953 prescribing, in effect, that the state department of education, the administrative arm of the board of education, has the power to define in its rules and regulations a Class A Certificate for Administrators and setting forth certain requirements for such certificate, is not an unconstitutional delegation of legislative powers to state board of education. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

17. Political subdivisions, delegation of legislative power.

On appeal from quashing of certiorari to review proceedings of Board of County Commissioners in calling election to determine whether sales of beer and light wines should be abolished, Supreme Court would not determine whether statute authorizing election was unconstitutional delegation of legislative authority where question was raised for first time on appeal. Adams v. Board of Supvrs., 177 Miss. 403, 170 So. 684 (1936).

It is no delegation of legislative power to confer on counties, under the supervision of the land commissioner, control of the 16th section. Jefferson Davis County v. James-Sumrall Lumber Co., 94 Miss. 530, 49 So. 611 (1909).

Statutes providing for the establishment of stock-law districts by petition and vote do not violate this section. Ormond v. White, 85 Miss. 276, 37 So. 834 (1905).

Statutes providing for the amendment of the charters of municipalities not governed by the code chapter on municipalities were not unconstitutional as delegating the exercise of legislative powers to municipalities. Yazoo City v. Lightcap, 82 Miss. 148, 33 So. 949 (1903).

18. Rules and regulations, delegation of legislative power.

The legislature has the power to delegate to an administrative agency the right to promulgate such reasonable rules and regulations as might be necessary to accomplish the purposes for which the agency is created. Unemployment Comp. Comm'n v. Barlow, 191 Miss. 156, 1 So. 2d 241 (1941).

19. Powers and functions of courts—In general.

It is not for the courts to determine whether a statute is wise or unwise. Mississippi Fire Ins. Co. v. Planters' Bank, 138 Miss. 275, 103 So. 84 (1925).

It is not for the courts to define the limits of the legislative discretion, or to declare void an act though morally wrong and unjust, in the absence of a constitutional inhibition. Martin v. Dix, 52 Miss. 53, 24 Am. R. 661 (1876).

20. Determining constitutionality of statutes, powers and functions of courts.

A statute susceptible of two reasonable constructions, one rendering it unconstitutional or gravely impairing its constitutionality, and the other saving it and making it applicable to the case, a court should adopt that construction which will not impair constitutional rights. Staple Cotton Coop. Ass'n v. Hemphill, 142 Miss. 298, 107 So. 24 (1926); Robinson v. State, 143 Miss. 247, 108 So. 903 (1926).

The courts cannot declare a law passed by the legislature invalid except when it is clearly in conflict with the Constitution. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

One not affected by the constitutionality of a provision of a statute cannot raise the question of its constitutionality. State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

Where a judgment complained of can be justified on other legal authority, the constitutionality of a statute will not be passed upon in deciding the case. Jackson Coca-Cola Bottling Co. v. Renna, 97 So. 674 (Miss. 1923).

In determining the meaning of an amendment to the Constitution the court must consider other sections thereof, and if possible, harmonize and give effect to all. State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1 (1919).

It will be presumed that the legislature observed all constitutional requirements where it has passed a bill, and the presumption prevails, until it is overcome by clear and convincing testimony. Postal Tel.-Cable Co. v. Robertson, 116 Miss. 204, 76 So. 560 (1917).

In considering a statute the court, if possible, should uphold it and not destroy it. State ex rel. Forman v. Wheatley, 113 Miss. 555, 74 So. 427 (1917).

As to the constitutionality of an act in part see State ex rel. Melton v. Rombach, 112 Miss. 737, 73 So. 731 (1917) and Johnston v. Long Furn. Co., 113 Miss. 373, 74 So. 283 (1917).

21. Effect of determination of unconstitutionality, powers and functions of courts.

A tax levied under an unconstitutional law and paid under a protest may be recovered back. Pearl River County v. Lacey Lumber Co., 124 Miss. 85, 86 So. 755 (1921).

22. Construction of statutes, powers and functions of courts.

Mississippi Supreme Court did not have the power to declare that section dealing with a chancery court's lack of power to enter a partition by order for spouses was against the public policy favoring the alienability of land because it only had the power of judicial review. Noone v. Noone, 127 So. 3d 193 (Miss. 2013).

For definition of "preamble" see Dean v. Town of Senatobia, 142 Miss. 815, 108 So. 178 (1926).

Where possible, a statute must be construed to make all its parts harmonize and rendered consistent with its purpose and scope. Coker v. Wilkinson, 142 Miss. 1, 106 So. 886 (1926).

The last act of the legislature amending a statute prevails. Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925), citing Lang

v. Harrison County, 114 Miss. 341, 75 So. 126.

If the legislature subsequently covers the entire scheme dealt with in former acts, the former act will be repealed by the later one. A later statute, although not repugnant to the provisions of a former one, but clearly intended to prescribe the only rule in the case provided for, repeals the former statute. State ex rel. Knox v. Wyoming Mfg. Co., 138 Miss. 249, 103 So. 11 (1925), citing Mobile & O.R.R. v. Weiner, 49 Miss. 725 (1874) and Myers v. Marshall County, 55 Miss. 344 (1877).

While the intent of a statute is to be determined from its language if its meaning is clear and unmistakable, yet if its language is capable of more than one meaning, the purpose and spirit of the statute, as gathered from all its provisions and history, must be ascertained and declared by the court. Robertson v. Texas Oil Co., 141 Miss. 356, 106 So. 449 (1925).

Where there is such repugnancy between statutes, the former will be construed repealed by implication. Dugger v. Board of Supvrs., 139 Miss. 552, 104 So. 459 (1925).

Where there are irreconcilable conflicts between two statutes enacted at the same session, the one last approved will prevail. Green v. Hutson, 139 Miss. 471, 104 So. 171 (1925).

An unjust or unwise purpose will not be imputed to the legislature if a reasonable construction will avoid such imputation. Huber v. Freret, 138 Miss. 238, 103 So. 3 (1925).

The re-enactment of the statute, previously construed by the Supreme Court, carries with it an indorsement of the legislature of such construction. Womack v. Central Lumber Co., 131 Miss. 201, 94 So. 2 (1922).

All statutes in pari materia must be considered together in determining their meaning. Barrett v. Cedar Hill Consol. Sch. Dist., 123 Miss. 370, 85 So. 125 (1920).

The courts of Mississippi have the preeminent right to construe Mississippi statutes. Becker v. Columbia Bank, 112 Miss. 819, 73 So. 798 (1917).

23. Retroactive effect of laws, powers and functions of courts.

A retroactive effect should not be given a statute which imposes an additional burden in respect to past transactions, unless such meaning plainly appears. Power v. Calvert Mtg. Co., 112 Miss. 319, 73 So. 51 (1916).

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Formalities and requisites of the creation of legislative committees. 28 A.L.R. 1154.

Power to extend boundaries of municipal corporations. 64 A.L.R. 1335.

Power of legislature, absent constitutional provision in that regard, to authorize or require court or justices thereof to render advisory opinion upon request of governor or of either house of legislature. 103 A.L.R. 1087.

Legislative power to abridge, limit, or regulate power of courts with respect to contempt. 121 A.L.R. 215.

Mandamus to members or officer of legislature. 136 A.L.R. 677.

Delegating authority to county or municipal corporation to make violation of ordinance crime or to provide criminal punishment. 174 A.L.R. 1343.

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 218 et seq.

CJS. C.J.S. Constitutional Law §§ 54, 58, 59, 111 to 168, 188.

C.J.S. States §§ 80, 81.

Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Southwick and Welsh, Methods of Constitutional Revision: Which Way Mississippi? 56 Miss L. J. 17, April, 1986.

§ 34. Composition of House of Representatives

The House of Representatives shall consist of members chosen every four years by the qualified electors of the several counties and representative districts.

SOURCES: 1869 art IV § 2.

Editor's Note — Chapter 18, Laws of 1962 1st Extraordinary Session, which proposed to amend this section of the constitution, was not approved by the electorate.

Cross References — Apportionment of house of representatives, see Miss. Const. Art. 13, § 254.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 90-93.

§ 35. Composition of Senate

The Senate shall consist of members chosen every four years by the qualified electors of the several districts.

SOURCES: 1869 art IV § 4.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 90-93.

§ 36. Sessions

The Legislature shall meet at the seat of government in regular session on the Tuesday after the first Monday of January of the year A.D., 1970, and annually thereafter, unless sooner convened by the Governor; provided, however, that such sessions shall be limited to a period of one hundred twenty-five (125) calendar days for regular 1972 session and every fourth year thereafter, but ninety (90) calendar days for every other regular session thereafter. Provided further that the House of Representatives, by resolution with the Senate concurring therein, and by a two-thirds (⅔) vote of those present and voting in each house, may extend such limited session for a period of thirty (30) days with no limit on the number of extensions to each session.

SOURCES: 1869 art IV § 6; Laws, 1912, ch 414; Laws, 1968, ch 634.

Editor's Note — The 1968 amendment to Section 36 of Article 4 of the Constitution of 1890 was proposed by House Concurrent Resolution No. 36 of the 1968 regular session of the Legislature, and upon ratification by the electorate on June 4, 1968, was inserted by a proclamation of the Secretary of State on June 13, 1968, by virtue of the authority vested in him by Section 273 of the Constitution.

Cross References — Governor's power to convene Legislature, see Miss. Const. Art. 5, § 121.

RESEARCH REFERENCES

ALR. Power of legislature or branch thereof as to time of assembling, and length of session. 56 A.L.R. 721.

CJS. C.J.S. States §§ 103-107.

§ 37. Elections for members

Elections for members of the Legislature shall be held in the several counties and districts as provided by law.

SOURCES: 1869 art IV § 8.

Cross References — Elections for state and county officers, see Miss. Const. Art. 4, § 102.

RESEARCH REFERENCES

CJS. C.J.S. Elections § 73, 74.

§ 38. Election of officers by each house

Each house shall elect its own officers, and shall judge of the qualifications, return and election of its own members.

SOURCES: 1869 art IV § 10.

Cross References — Officers of Legislature, see Miss. Const. Art. 4, § 99.

JUDICIAL DECISIONS

1. In general.
2. Residency requirements.
3. Primary elections.

1. In general.

Statute governing proceedings with respect to election of member of legislature does not provide for legislature to elect its own members, but rather merely allows legislature to examine elective process after winner is certified to determine if illegal or corrupt practices have taken place, and does not violate provision of State Constitution under which legislature may not elect any other than its own officers and state librarian. Esco v. Blackmon, 692 So. 2d 74 (Miss. 1997).

The term "house" means one branch of the legislature as distinguished from the other. Green v. Weller, 32 Miss. 650 (1856).

2. Residency requirements.

Because a candidate for Mississippi Senate was unable to establish "without contingencies" and with "absolute proof" that residency in a certain district would have been established by the time of an election, a political party and its executive committee properly declined to place the candidate's name on the ballot; evidence of a purchase contract for a home in the district was insufficient because the sale could have fallen through. Cameron v. Miss. Republican Party, 890 So. 2d 836 (Miss. 2004).

Mississippi Constitution Article 4 § 38 vests competence of a candidate's qualifications for office, including whether the candidate meets residency qualifications-in the Senate. Thus, the circuit court did not have subject matter jurisdiction of an election contest wherein it was alleged that candidates did not meet the residency requirements for service in the Senate as prescribed in Article 4 § 42 of the Mississippi Constitution. Foster v. Harden, 536 So. 2d 905 (Miss. 1988).

3. Primary elections.

Circuit court did not have subject matter jurisdiction over an election contest arising out of a primary election for state representative in which the issue was which candidate received the most votes, inasmuch as the question was one peculiarly within the competence of Legislature itself. Henry v. Henderson, 697 So. 2d 447 (Miss. 1997).

Voting Rights Act was not implicated in Supreme Court decision holding that circuit court did not have subject matter jurisdiction over election contest arising out of primary election for state senate, inasmuch as question was one peculiarly within competence of senate itself, as decision merely altered state governmental body to which contest should be directed but did not affect manner of holding elections, impose additional candidacy qualifications or requirement, disturb composition of electorate or increase or diminish number of officials for whom electorate may vote. Henry v. Henderson, 697 So. 2d 447 (Miss. 1997).

RESEARCH REFERENCES

CJS. C.J.S. States § 81.

§ 39. President pro tempore of Senate

The Senate shall choose a President pro tempore to act in the absence or disability of its presiding officer.

SOURCES: 1869 art IV § 11.

Cross References — Officers of Legislature, see Miss. Const. Art. 4, § 99.

RESEARCH REFERENCES

CJS. C.J.S. States § 41.

QUALIFICATIONS AND PRIVILEGES OF LEGISLATORS

SEC.	
40.	Oath of office
41.	Qualifications of House of Representatives members
42.	Qualifications of senators
43.	Person liable for public monies ineligible for office
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46.	Salaries of members
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50.	Impeachment grounds
51.	Removal from office
52.	Persons to preside in impeachment proceedings
53.	Removal of judges for reasonable cause

§ 40. Oath of office

Members of the Legislature, before entering upon the discharge of their duties, shall take the following oath: "I, ________ , do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and of the State of Mississippi; that I am not disqualified from holding office by the Constitution of this state; that I will faithfully discharge my duties as a legislator; that I will, as soon as practicable hereafter, carefully read (or have read to me) the Constitution of this State, and will endeavor to note, and as a legislator to execute, all the requirements thereof imposed on the Legislature; and I will not vote for any measure or person because of a promise of any other member of this Legislature to vote for any measure or person, or as a means of influencing him or them so to do. So help me God."

JUDICIAL DECISIONS

1. One person — one vote.

In directing the Mississippi Legislature to reapportion itself to conform to the "one person-one vote" rule enunciated in Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691, the court presumed that each member of the Legislature would do his sworn duty to support the Constitution of the United States. Connor v. Johnson, 256 F. Supp. 962 (S.D. Miss. 1966), supplemented, 265 F. Supp. 492 (1967).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 90-93.

§ 41. Qualifications of House of Representatives members

No person shall be a member of the House of Representatives who shall not have attained the age of twenty-one (21) years, and who shall not be a qualified elector of the State, and who shall not have been a resident citizen of the State for four (4) years, and within the district such person seeks to serve for two (2) years, immediately preceding his election. The seat of a member of the House of Representatives shall be vacated on his removal from the district from which he was elected.

SOURCES: 1817 art III § 7; 1832 art III § 7; 1869 art IV § 3; Laws, 1987, ch. 674, eff December 4, 1987.

Editor's Note — The 1987 amendment of Section 41 in Article 4 of the Mississippi Constitution of 1890 was proposed by Laws, 1987, Ch. 674 (House Concurrent Resolution No. 41), and upon ratification by the electorate on November 3, 1987, was inserted as part of the Constitution by proclamation of the Secretary of State on December 4, 1987.

Cross References — Qualified electors, see Miss. Const Art. 12, § 250 and Art. 14, § 265.

JUDICIAL DECISIONS

1. In general.

Candidate was not qualified to run for the House of Representatives under Miss. Code Ann. § 23-15-299(7) because he had not lived in the district for two years prior to the elections as required by Miss. Const. Art. 4, § 41; the candidate worked outside of the district, and until his separation the candidate lived in a marital house that was outside of the district and for which he tried to claim a homestead exemption. Edwards v. Stevens, 963 So. 2d 1108 (Miss. 2007).

Filing of homestead exemption conclusively establishes domicile for electoral purposes in county of filing, regardless of circumstances indicating that certain ties to other counties still exist, and political candidate cannot revoke his application for homestead exemption and effect thereof on his domicile by repaying amount credited under exemption. Gadd v. Thompson, 517 So. 2d 576 (Miss. 1987).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 90-93.

§ 42. Qualifications of senators

No person shall be a senator who shall not have attained the age of twenty-five years, who shall not have been a qualified elector of the State four years, and who shall not be an actual resident of the district or territory he may be chosen to represent for two years before his election. The seat of a Senator shall be vacated upon his removal from the district from which he was elected.

SOURCES: 1817 art III § 14; 1832 art III § 14; 1869 art IV § 5.

Cross References — Qualifications of officers, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

JUDICIAL DECISIONS

1. In general.

Because a candidate for the Mississippi Senate was unable to establish "without contingencies" and with "absolute proof" that residency in a certain district would have been established by the time of an election, a political party and its executive committee properly declined to place the candidate's name on the ballot; evidence of a purchase contract for a home in the district was insufficient because the sale could have fallen through. Cameron v. Miss. Republican Party, 890 So. 2d 836 (Miss. 2004).

Mississippi Constitution Article 4 § 38 vests competence of a candidate's qualifications for office, including whether the candidate meets residency qualifications-in the Senate. Thus, the circuit court did not have subject matter jurisdiction of an election contest wherein it was alleged that candidates did not meet the residency requirements for service in the Senate as prescribed in Article 4 § 42 of the Mississippi Constitution. Foster v. Harden, 536 So. 2d 905 (Miss. 1988).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 90-93.

§ 43. Person liable for public monies ineligible for office

No person liable as principal for public moneys unaccounted for shall be eligible to a seat in either house of the legislature, or to any office of profit or trust, until he shall have accounted for and paid over all sums for which he may have been liable.

SOURCES: 1817 art III § 28; 1832 art III § 28; 1869 art IV § 16.

JUDICIAL DECISIONS

1. In general.
2. Disqualification for fees.
3. Judicial determination of liability.

1. In general.

The prohibition applies to private citizens as well as to officers. Hoskins v. Brantley, 57 Miss. 814 (1880).

2. Disqualification for fees.

A person disqualified under this section, though a de facto officer, cannot maintain an action for fees. Matthews v. Board of Supvrs., 53 Miss. 715, 24 Am. R. 715 (1876).

3. Judicial determination of liability.

A judicial determination of the liability is not essential. Brady v. Howe, 50 Miss. 607 (1874).

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees §§ 21, 22, 36, 46.

C.J.S. States §§ 90-93.

§ 44. Ineligibility for office of person convicted of certain crimes

(1) No person shall be eligible to a seat in either House of the Legislature, or to any office of profit or trust, who shall have been convicted of bribery, perjury, or other infamous crime; and any person who shall have been convicted of giving or offering, directly, or indirectly, any bribe to procure his election or appointment, and any person who shall give or offer any bribe to procure the election or appointment of any person to office, shall, on conviction thereof, be disqualified from holding any office of profit or trust under the laws of this state.

(2) No person who is convicted after ratification of this amendment in another state of any offense which is a felony under the laws of this state, and no person who is convicted after ratification of this amendment of any felony in a federal court, shall be eligible to hold any office of profit or trust in this state.

(3) This section shall not disqualify a person from holding office if he has been pardoned for the offense or if the offense of which the person was convicted was manslaughter, any violation of the United States Internal Revenue Code or any violation of the tax laws of this state unless such offense

also involved misuse or abuse of his office or money coming into his hands by virtue of his office.

SOURCES: 1817 art VI §§ 4, 5; 1832 art VII § 4; 1869 art IV §§ 17, 18; Laws, 1992, ch. 591, eff December 8, 1992.

Editor's Note — The 1992 amendment of Section 44 in Article 4 of the Mississippi Constitution of 1890, was proposed by Laws, 1992, ch. 591 (House Concurrent Resolution No. 46), and upon ratification by the electorate on November 3, 1992, was inserted as part of the Constitution by proclamation of the Secretary of State on December 8, 1992.

JUDICIAL DECISIONS

1. In general.
2. Suspension of sentence.

1. In general.

The section applies to "any office of profit or trust," which includes the office of sheriff. Mauney v. State ex rel. Moore, 707 So. 2d 1093 (Miss. 1998).

The term "infamous crime" includes all felonies other than those specifically excluded in subsection 3. Mauney v. State ex rel. Moore, 707 So. 2d 1093 (Miss. 1998).

Under the provisions of Mississippi Constitution § 44 that no person shall be eligible to a seat in either house of the legislature who shall have been convicted of bribery, perjury, or other infamous crime, a plea of guilty to a federal charge did not preclude a person from holding the office of state senator. State ex rel. Muirhead v. State Bd. of Election Comm'rs, 259 So. 2d 698 (Miss. 1972), cert. denied, 409 U.S. 851, 93 S. Ct. 64, 34 L. Ed. 2d 94 (1972).

A pardon removes the ineligibility. Jones v. Board of Registrars, 56 Miss. 766, 31 Am. R. 385 (1879).

A judicial conviction is essential under this section. Brady v. Howe, 50 Miss. 607 (1874).

2. Suspension of sentence.

The fact that a sentence to the state penitentiary was suspended does not remove the conviction from the status of an infamous crime. Mauney v. State ex rel. Moore, 707 So. 2d 1093 (Miss. 1998).

ATTORNEY GENERAL OPINIONS

Based on Section 44 of Article 4 of Mississippi Constitution, person convicted of crime of aggravated assault on law enforcement officer is disqualified from holding public office; therefore, if election officials find, as matter of fact, that potential candidate has been convicted of such crime, they could not legally allow that person's name to be placed on ballot; in order for person with such conviction to again become eligible to hold public office person must obtain full pardon from Governor. Chaney, Mar. 9, 1993, A.G. Op. #93-0119.

Potential candidates for membership on a municipal party executive committee are subject to the provisions of this section of the Constitution and § 23-15-309 as they pertain to criminal convictions. James, Oct. 18, 2002, A.G. Op. #02-0597.

If a municipal party executive committee finds that a potential candidate for membership on said committee who has filed his or her statement of intent has been convicted of any felony covered by this section of the Constitution and § 23-15-309, said committee could not lawfully qualify that individual as a candidate. James, Oct. 18, 2002, A.G. Op. #02-0597.

An individual who was convicted of a felony offense in a federal court prior to December 8, 1992, would be eligible to hold elective office in the State of Mississippi. Walls, July 7, 2003, A.G. Op. 03-0337.

Issuance of a certificate of rehabilitation pursuant to Section 97-37-5 only restores the right to possess a weapon and does not remove a conviction and does not allow a convicted felon to be qualified as a candidate for public office. Ramsey, Apr. 1, 2005, A.G. Op. 05-0143.

Absent a felony conviction, a candidate is not disqualified from seeking election, assuming all other qualifications to hold the sought office are met. A candidate convicted after December 8, 1992 of a felony in another state, which is also a felony in Mississippi, is disqualified from seeking election to an office of profit or trust. Walsh, March 16, 2007, A.G. Op. #07-000143, 2007 Miss. AG LEXIS 114.

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees §§ 28-30.

C.J.S. States §§ 90-93.

§ 45. Member eligibility for offices created during term of office

No Senator or Representative, during the term for which he was elected, shall be eligible to any office of profit which shall have been created, or the emoluments of which have been increased, during the time such senator or representative was in office, except to such offices as may be filled by an election of the people.

SOURCES: 1817 art III § 26; 1832 art III § 26; 1869 art IV § 38.

Cross References — Election by House of Representatives, see Miss. Const. Art. 5, § 142.

JUDICIAL DECISIONS

1. In general.
2. Offices within section.

1. In general.

The extension of the prohibition contained in § 45 of the Constitution to include employment is a matter for the legislature to consider, since it declares the public policy of the state. Golding v. Armstrong, 231 Miss. 889, 97 So. 2d 379 (1957).

In case of the creation of a new county by the legislature, a member thereof cannot be appointed to one of the county offices. Brady v. West, 50 Miss. 68 (1874).

An office is a continuing charge or employment the duties of which are defined by rules prescribed by law and not by contract. Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169 (1858).

2. Offices within section.

Since Chapter 365, Laws of 1956 (Code 1942 §§ 9028-31-9028-48), creating, and vesting authority and responsibility in, the State Sovereignty Commission, gives the Commission authority to employ necessary personnel, but is silent as to the creation of any office, one, occupying the position of Executive Director, is a mere employee working at the pleasure and under the direction of the Commission, and does not hold "office" within the meaning of this section. Golding v. Armstrong, 231 Miss. 889, 97 So. 2d 379 (1957).

ATTORNEY GENERAL OPINIONS

A member of the legislature may be appointed as a public service commissioner even during the same term as the emoluments of such position were increased since public service commissioner is an office which "may be filled by an election of the people". Hewes, Aug. 22, 1997, A.G. Op. #97-0446.

RESEARCH REFERENCES

ALR. Constitutional or statutory inhibition of change of compensation of public officer as applicable to one appointed or elected to fill vacancy. 166 A.L.R. 842.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 69-71.

42 Am. Jur. (1st ed), Public Officers §§ 66-68.

CJS. C.J.S. Officers and Public Employees § 41.

§ 46. Salaries of members

The members of the Legislature shall severally receive from the State Treasury compensation for their services, to be prescribed by law, which may be increased or diminished; but no alteration of such compensation of members shall take effect during the session at which it is made.

SOURCES: 1817 art III § 25; 1832 art III § 25; 1869 art IV § 20.

JUDICIAL DECISIONS

1. In general.

Since the Lieutenant Governor exercised legislative powers in certain situations with the consent of the Mississippi Senate, it was not a violation of the Mississippi Constitution to include holders of that office in a supplemental retirement plan that was established especially for legislators. Dillard v. Musgrove, 838 So. 2d 261 (Miss. 2003).

RESEARCH REFERENCES

ALR. Per diem compensation of public officer. 1 A.L.R. 276.

Power to appropriate public money for expenses of legislators not covered by constitutional compensation. 50 A.L.R. 1238, 60 A.L.R. 416.

Right to salary of one illegally elected or appointed to legislature. 7 A.L.R. 1682.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 360 et seq.

42 Am. Jur. (1st ed), Public Officers §§ 340 et seq.

CJS. C.J.S. States §§ 90-93.

§ 47. Fees or rewards prohibited

No member of the Legislature shall take any fee or reward, or be counsel in any measure pending before either house of the legislature, under penalty of forfeiting his seat, upon proof thereof to the satisfaction of the house of which he is a member.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 90-93.

§ 48. Immunity of members from arrest for certain crimes

Senators and Representatives shall, in all cases, except treason, felony, theft, or breach of the peace, be privileged from arrest during the session of the Legislature, and for fifteen days before the commencement and after the termination of each session.

SOURCES: 1817 art III § 19; 1832 art III § 19; 1869 art IV § 19.

ATTORNEY GENERAL OPINIONS

A legislator may be arrested at any time, including during a legislative session, for misdemeanor violations of the Implied Consent Law. Ryan, July 21, 1997, A.G. Op. #97-0422.

RESEARCH REFERENCES

ALR. Immunity of public officer from criminal arrest. 1 A.L.R. 1156.

Service of a subpoena as an arrest within constitutional or statutory immunity of members of legislature or others from arrest. 79 A.L.R. 1214.

Immunity of legislators from service of civil process. 94 A.L.R. 1470.

CJS. C.J.S. States §§ 96, 97.

§ 49. Power of impeachment

The House of Representatives shall have the sole power of impeachment; but two-thirds of all the members present must concur therein. All impeachments shall be tried by the Senate, and, when sitting for that purpose, the senators shall be sworn to do justice according to law and the evidence.

SOURCES: 1817 art "Impeachment," §§ 1, 2; 1832 art VI §§ 1, 2; 1869 art IV § 27.

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 171 et seq.

42 Am. Jur. (1st ed), Public Officers §§ 175 et seq.

CJS. C.J.S. Officers and Public Employees §§ 212-219.

§ 50. Impeachment grounds

The Governor and all other civil officers of this State, shall be liable to impeachment for treason, bribery, or any high crime or misdemeanor in office.

SOURCES: 1817 art "Impeachment," § 3; 1832 art VI § 3; 1869 art IV § 28.

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 171 et seq.

42 Am. Jur. (1st ed), Public Officers §§ 175 et seq.

CJS. C.J.S. Officers and Public Employees §§ 212-219.

C.J.S. States §§ 171-173, 240-243.

§ 51. Removal from office

Judgment in such cases shall not extend further than removal from office and disqualification to hold any office of honor, trust, or profit in this State; but the party convicted shall, nevertheless, be subject to indictment, trial, judgment, and punishment according to law.

SOURCES: 1817 art "Impeachment," § 3; 1832 art VI § 3; 1869 art IV § 30.

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 171 et seq.

42 Am. Jur. (1st ed), Public Officers §§ 175 et seq.

CJS. C.J.S. Officers and Public Employees §§ 212-219.

C.J.S. States §§ 171-173, 240-243.

§ 52. Persons to preside in impeachment proceedings

When the Governor shall be tried, the Chief Justice of the Supreme Court shall preside; and when the Chief Justice is disabled, disqualified, or refuses to act, the judge of the Supreme Court next oldest in commission shall preside; and no person shall be convicted without concurrence of two-thirds of all the Senators present.

SOURCES: 1869 art IV § 29.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 171-173, 240-243.

§ 53. Removal of judges for reasonable cause

For reasonable cause, which shall not be sufficient ground of impeachment, the Governor shall, on the joint address of two-thirds of each branch of the Legislature, remove from office the judges of the Supreme and inferior courts; but the cause or causes of removal shall be spread on the journal, and the party charged be notified of the same, and have an opportunity to be heard by himself or counsel, or both, before the vote is finally taken and decided.

SOURCES: 1832 art IV § 27; 1869 art IV § 31.

JUDICIAL DECISIONS

1. In general.

Nothing in Sections 53 or 177A, the two sections which specifically provide for the removal of judges, suggests that they are exclusive. In re Higginbotham, 716 So. 2d 631 (Miss. 1998).

A judge's use of county prisoners to carry out personal labors on his own behalf justified removal of the judge from office. In re Collins, 524 So. 2d 553 (Miss. 1987).

RESEARCH REFERENCES

ALR. Power of court to remove or suspend judge. 53 A.L.R.3d 882.

Abuse or misuse of contempt power as ground for removal or discipline of judge. 76 A.L.R.4th 982.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness. 82 A.L.R.4th 567.

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties. 87 A.L.R.4th 727.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 177 et seq.

42 Am. Jur. (1st ed), Public Officers §§ 181 et seq.

CJS. C.J.S. Judges §§ 95-98, 112, 113.

Law Reviews. Note: 1991 Mississippi Supreme Court Review: Misconduct of attorneys and judges. 61 Miss. L. J. 686, Winter, 1991.

RULES OF PROCEDURE

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§ 54. Quorum

A majority of each House shall constitute a quorum to do business; but a less number may adjourn from day to day, and compel the attendance of absent members in such manner and under such penalties as each shall provide.

SOURCES: 1869 art IV § 12.

RESEARCH REFERENCES

CJS. C.J.S. States § 82.

§ 55. Determination of rules by each house

Each House may determine rules of its own proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds of the members present, expel a member; but no member, unless expelled for theft, bribery, or corruption, shall be expelled the second time for the same offense. Both houses shall, from time to time, publish journals of their proceedings, except such parts as may, in their opinion, require secrecy; and the yeas and nays, on any question, shall be entered on the journal, at the request of one-tenth of the members present; and the yeas and nays shall be entered on the journals on the final passage of every bill.

SOURCES: 1817 art III §§ 16, 17; 1832 art III §§ 15, 16, 17; 1869 art IV § 14.

JUDICIAL DECISIONS

1. In general.

Constitutional provision augments inherent authority that Senate possesses to direct manner of exercise of its powers; Senate possesses power to make rules regarding the exercise of legislative powers that inhere in it, and it may confer these powers upon one or more of its members, one of which is Lieutenant Governor by virtue of § 129 of Constitution; therefore, separation of powers doctrine is not violated by Lieutenant Governor's exercising power in Senate pursuant to Senate rules. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

RESEARCH REFERENCES

ALR. Resort to constitutional or legislative debate, committee reports, journals, etc., as aid in construction of constitution or statute. 70 A.L.R. 5.

CJS. C.J.S. States § 83.

Law Reviews. 1987 Mississippi Supreme Court Review, Civil procedure. 57 Miss. L. J. 443, August, 1987.

§ 56. Style of laws

The style of the laws of the State shall be: "Be it enacted by the Legislature of the state of Mississippi."

SOURCES: 1832 art III § 4; 1869 art IV § 32.

JUDICIAL DECISIONS

1. In general.
2. Political subdivisions.
3. Confirmation of appointments.

1. In general.

Legislative journals cannot be resorted to by courts to determine if act was properly passed. State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1 (1919).

It is not required that the legislature should literally adhere to the words as to the style of the laws; statutes should show on their face the authority by which they were adopted. Swann v. Buck, 40 Miss. 268 (1866).

The term "house" means one branch of the legislature as distinguished from the other. Green v. Weller, 32 Miss. 650 (1856).

2. Political subdivisions.

This section has no application to municipal ordinances. City of Corinth v. Sharp, 107 Miss. 696, 65 So. 888 (1914).

3. Confirmation of appointments.

Senate may adopt rule providing for a reconsideration of confirmation of appointment by governor, and such confirmation does not become final until disposition of motion to reconsider or expiration of time therefor. Witherspoon v. State, 138 Miss. 310, 103 So. 134 (1925).

RESEARCH REFERENCES

CJS. C.J.S. Statutes §§ 60, 61.

Law Reviews. Legislator Guilty of Misdemeanor if He Has Direct Interest in Contract Authorized by Legislature. 52 Miss. L. J. 659, September 1982.

§ 57. Adjournments; meeting place

Neither House shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SOURCES: 1817 art III § 22; 1832 art III § 22; 1869 art IV § 13.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 103-107.

§ 58. Open door policy; disorderly behavior

The doors of each House, when in session, or in committee of the whole, shall be kept open, except in cases which may require secrecy; and each House may punish, by fine and imprisonment, any person not a member who shall be guilty of disrespect to the House by any disorderly or contemptuous behavior in its presence, or who shall in any way disturb its deliberations during the session; but such imprisonment shall not extend beyond the final adjournment of that session.

SOURCES: 1817 art III § 20; 1832 art III §§ 20, 21; 1869 art IV § 15.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 103-107, 113, 114.

§ 59. Introduction and passage of bills

Bills may originate in either House, and be amended or rejected in the other, and every bill shall be read by its title on three (3) different days in each House, unless two-thirds (⅔) of the house where the same is pending shall dispense with the rules; and every bill shall be read in full immediately before the vote on its final passage upon the demand of any member; and every bill, having passed both Houses, shall be signed by the President of the Senate and the Speaker of the House of Representatives during the legislative session.

SOURCES: 1817 art III § 23; 1832 art III § 23; 1869 art IV § 23; Laws, 1990, ch. 688, eff December 19, 1990.

Editor's Note — The 1990 amendment to Section 59 of Article 4 of the Mississippi Constitution of 1890 was proposed by Laws, 1990, Ch. 688 (Senate Concurrent Resolution No. 506), was ratified by the electorate on November 6, 1990, and was inserted as a part of the Constitution by proclamation of the Secretary of State on December 19, 1990.

Cross References — Amendments to constitution, see Miss. Const. Art. 15, § 273.

JUDICIAL DECISIONS

1. In general.

A ruling by the Lieutenant Governor that this section did not require reading a conference report at the request of a senator, was not a grossly unreasonable interpretation of this section. Tuck v. Blackmon, 798 So. 2d 402 (Miss. 2001).

This section has no application to an act adopting and putting in force a code of laws. Hunt v. Wright, 70 Miss. 298, 11 So. 608 (1892).

RESEARCH REFERENCES

Am Jur. 73 Am. Jur. 2d, Statutes § 55.

CJS. C.J.S. Statutes §§ 12, 13, 25, 29.

§ 60. Amendment of bill; orders, votes and resolutions

No bill shall be so amended in its passage through either house as to change its original purpose, and no law shall be passed except by bill; but orders, votes, and resolutions of both houses, affecting the prerogatives and duties thereof, or relating to adjournment, to amendments to the Constitution, to the investigation of public officers, and the like, shall not require the signature of the governor; and such resolutions, orders, and votes, may empower legislative committees to administer oaths, to send for persons and papers, and generally make legislative investigations effective.

SOURCES: 1832 art V § 16; 1869 art IV § 25.

JUDICIAL DECISIONS

1. In general.

The section has no application to an act adopting and putting in force a code of laws. Hunt v. Wright, 70 Miss. 298, 11 So. 608 (1892).

RESEARCH REFERENCES

ALR. Power of legislature to investigate conduct of private person, corporation, or institution. 9 A.L.R. 1341.

Power of legislative body or committee to compel attendance of nonmember as witness. 50 A.L.R. 21, 65 A.L.R. 1518.

Construction and application of constitutional provision against changing purpose of bill during passage. 158 A.L.R. 421.

Power of state legislature to limit the powers of a state constitutional convention. 158 A.L.R. 512.

Effect of modification or repeal of constitutional or statutory provision adopted by reference in another provision. 168 A.L.R. 627.

Am Jur. 73 Am. Jur. 2d, Statutes § 27.

CJS. C.J.S. Statutes §§ 18, 29, 43, 55.

§ 61. Amendment or revival by reference to title prohibited

No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length.

JUDICIAL DECISIONS

1. In general.
2. Validity and effect of amending acts—In general.
3. Revival of laws, validity and effect of amending acts.
4. Incorporation by reference, validity and effect of amending acts.
5. Insertion at length or bringing forward, validity and effect of amending acts.
6. Acts not amendatory in character.

1. In general.

Municipalities' claim that 2000 Miss. Laws 304 "amended by reference" Miss. Code Ann. § 27-65-75 in violation of Miss. Const. Art. 4, § 61 failed, as Miss. Const. Art. 4, § 61 had no reference to amendment by implication when the amending statute was complete within itself, as was 2000 Miss. Laws 304. City of Belmont v. Miss. State Tax Comm'n, 860 So. 2d 289 (Miss. 2003).

This section has no reference to amendment by implication when the amending statute is complete within itself. Lamar County Sch. Bd. v. Saul, 359 So. 2d 350 (Miss. 1978).

This provision is inapplicable to adoption of code of previous laws. State ex rel. Colmer v. Benvenutti, 162 Miss. 313, 137 So. 537 (1931).

This section has no application to an amendment or repeal pro tanto by implication. Ellis v. Ellis, 125 So. 563 (Miss. 1930).

This section held not to have reference to a repeal or modification of a statute because in conflict with the provisions of a later statute. Stingily v. City of Jackson, 140 Miss. 19, 104 So. 465 (1925).

The courts do not favor repeals by mere implication. State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1 (1919).

The purpose of this section is to prevent ambiguity and uncertainty with reference to the amendment of previous acts. Heidelberg v. Batson, 119 Miss. 510, 81 So. 225 (1919); Jackson v. Deposit Guar. Bank & Trust. Co., 160 Miss. 752, 133 So. 195 (1931).

This section has no application to an act adopting and putting in force a code of laws. Hunt v. Wright, 70 Miss. 298, 11 So. 608 (1892).

2. Validity and effect of amending acts—In general.

While Laws of 2004, ch. 595, § 13 (Section 13) had an indirect effect on Miss. Code Ann. § 25-9-127(1) by suspending it for a specified period of time, it required no reference to § 25-9-127(1) for an understanding of its meaning and scope; thus, it qualified as an amendment by implication, which was complete in itself and was not violative of Miss. Const. Art. 4, § 61, and the employee's argument that Section 13 was unconstitutional was not persuasive. Hemba v. Miss. Dep't of Corr., 998 So. 2d 1003 (Miss. 2009).

Section 11-46-6 [repealed] is unconstitutional as violative of Article 4, § 61 of the Mississippi Constitution since the clause in § 11-46-6 providing that causes of action arising from acts or omissions of the State or political subdivisions shall be governed "by the case law governing sovereign immunity as it existed immediately prior to the decision in the case of Pruett v. City of Rosedale..." does not adopt a mere statute by reference but revives an entire body of common law on a particular subject by reference, and it is readily apparent that the terms employed are blind, that one must examine a plethora of cases to determine what the law is, and that it cannot be said that the average legislator, lawyer and lay person alike had a reasonable chance of understanding all that was enacted. Presley v. Mississippi State Hwy. Comm'n, 608 So. 2d 1288 (Miss. 1992).

Statute exempting domestic insurance corporations from ad valorem taxes held not unconstitutional as amending law by reference to title only. Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

Chapter 209 Acts of 1918 relating to contracting of interest-bearing debts by county, municipality or other taxing district, is not violative of this section. Heidelberg v. Batson, 119 Miss. 510, 81 So. 225 (1919).

To amend a statute there must be specific mention in the amendatory act of the statute to be amended. State ex rel. Booze v. Cresswell, 117 Miss. 795, 78 So. 770 (1918).

3. Revival of laws, validity and effect of amending acts.

The portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) requiring that all claims against the State be governed by case law governing sovereign immunity as it existed immediately prior to the decision in Pruett v. City of Rosedale (Miss. 1982) 421 So. 2d 1046 is unconstitutional as it violates the doctrine of separation of powers and the prohibition against reviving or amending a law by reference to its title only. Presley v. Mississippi State Hwy. Comm'n, 608 So. 2d 1288 (Miss. 1992).

Chapter 160 Laws of 1922 attempting to revive and restore the scheme as to certain county officers' fees held unconstitutional. Moore v. Tunica County, 143 Miss. 821, 107 So. 659 (1926), motion overruled, 143 Miss. 839, 108 So. 900 (1926).

4. Incorporation by reference, validity and effect of amending acts.

This section is not violated by a statute (Laws 1946, chap. 269), authorizing counties and municipalities to levy privilege taxes on automatic weighing and vending machines, because it adopts merely by reference the provisions of the Local Privilege Tax Act (Laws 1944, chap. 137) as to means of enforcement, since such adoption by reference does not constitute an amendment within the purview of this section. Corso v. City of Biloxi, 201 Miss. 532, 29 So. 2d 638 (1947), error overruled, 201 Miss. 539, 30 So. 2d 237 (1947).

Section 2 ch 210 Laws of 1922, imposing a jail sentence in addition to a fine as punishment on conviction of selling intoxicating liquors, was unconstitutional in that it referred to prior statutes for the imposition of the fine. Buford v. State, 146 Miss. 66, 111 So. 850 (1927); Holmes v. State, 146 Miss. 351, 111 So. 860 (1927).

5. Insertion at length or bringing forward, validity and effect of amending acts.

It is not necessary hereunder that the whole chapter of a statute instead of only the section thereof intended to be amended should be brought forward into the amending statute. Fugler v. State, 192 Miss. 775, 7 So. 2d 873 (1942).

Amendatory statute supersedes amended statute, and provisions of latter statute, not brought forward in amending statute, need not thereafter be observed. Gully v. Holaday, 164 Miss. 718, 145 So. 742 (1933).

Act requiring clerk to give lienors notice of lands sold for taxes held to comply with constitutional provision requiring inserting at length the statutory section enlarged, amended, or revived. Breland v. State, 164 Miss. 32, 143 So. 690 (1932).

Statute exempting surplus of banks from taxation until outstanding guaranty certificates are liquidated does not violate this constitutional provision, as against the contention that the section sought to be amended must be inserted in full as amended. City of Jackson v. Deposit Guar. Bank & Trust Co., 160 Miss. 752, 133 So. 195 (1931).

An instance of repealing a statute by failure to bring it forward. Bell v. State, 118 Miss. 140, 79 So. 85 (1918); Lang v. Harrison County, 114 Miss. 341, 75 So. 126 (1917).

Chapter 260 Laws of 1912 is not violative of this section of the Constitution, since the legislature in providing that statutes therein dealt with should "be amended as follows," manifestly intended that they should "be amended so as to read as follows." Bryan v. City of Greenwood, 112 Miss. 718, 73 So. 728 (1917).

Laws 1912 ch 232 is unconstitutional because it fails to insert at length therein § 2434 (Code 1906 § 3074) as amended. Horton v. King, 110 Miss. 859, 71 So. 9 (1916).

This section has no application where the form which the legislature intended the statute to take as amended is fully set forth in the body of the act, therefore Laws 1910 ch 192 amending Code 1906 § 2193 (Code 1942, §§ 1873-1876), is not invalid. Magee v. Lincoln County, 109 Miss. 181, 68 So. 76 (1915).

Part of a statute amended, left out of the amending statute, is no longer law. Nations v. Lovejoy, 80 Miss. 401, 31 So. 811 (1902).

6. Acts not amendatory in character.

Code 1942, § 2223, as amended by Ch 260, Laws of 1952, making the death of the mother resulting from an illegal abortion a murder is not violative of § 61 of the Mississippi Constitution for omitting to insert the provisions of Code 1942 §§ 2221, 2220, 2215 at length in the amendatory act, for the statute enacted by Ch 260, Laws of 1952, is complete within itself, required no mention of the manslaughter statutes under which previous prosecution was maintained for the death of a mother as a result of an abortion, and such sections were amended by implication. McCaskill v. State, 227 So. 2d 847 (Miss. 1969).

An act merely adopting by reference the provisions of another act as to means of enforcement does not amend the adopted act. Corso v. City of Biloxi, 201 Miss. 532, 29 So. 2d 638 (1947), error overruled, 201 Miss. 539, 30 So. 2d 237 (1947).

Statute making robbery or attempt at robbery with deadly weapon a capital offense under certain conditions was not invalid under this section, since such statute was intended to, and did, compose a new and independent enactment, complete in itself, requiring no reference or resort to any other statute to render it intelligible and to determine its meaning and the scope of its operation. Hall v. State, 166 Miss. 331, 148 So. 793 (1933).

A statute not under consideration will not be held to have been changed by the legislature in enacting another statute. State ex rel. Booze v. Cresswell, 117 Miss. 795, 78 So. 770 (1918).

Laws 1910 ch 204 amending Code 1906 § 3435 so as to extend terms of municipal officers to four years in cities of over 15,000 inhabitants, does not repeal the section as it applies to cities of less than 15,000 and does not violate Const 1890 § 61. Mayor of Water Valley v. State, 103 Miss. 645, 60 So. 576 (1913).

Laws 1912 ch 120 providing for commission government for municipalities not being amendatory of the present municipal laws, but providing for a different and additional form of government, was not violative of Const § 61. Mayor of City of

Jackson v. State, 102 Miss. 663, 59 So. 873, Am. Ann. Cas. 1915A,1213 (1912).

RESEARCH REFERENCES

ALR. Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication. 5 A.L.R.2d 1270.

Constitutionality of fencing and stock laws. 6 A.L.R. 212; 18 A.L.R. 67.

Effect of modification or repeal or constitutional or statutory provision adopted by reference in another provision. 168 A.L.R. 627.

CJS. C.J.S. Statutes § 248.

§ 62. Voting on amendments; adoption of committee reports

No amendment to bills by one House shall be concurred in by the other except by a vote of the majority thereof, taken by yeas and nays and the names of those voting for and against recorded upon the journals; and reports of committees of conference shall in like manner be adopted in each house.

RESEARCH REFERENCES

CJS. C.J.S. Statutes §§ 23, 38, 39.

§ 63. Maximum sum fixed in appropriation bill

No appropriation bill shall be passed by the Legislature which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury.

JUDICIAL DECISIONS

1. In general.
2. Specific appropriations.

1. In general.

The Governor's partial veto of a legislative bill authorizing the borrowing of $8,000,000 through the issuance of general obligation bonds to finance the acquisition and development of historic properties in the state was unconstitutional, since the bill was a creation of a debt rather than an "appropriation bill" within the meaning of the Mississippi Constitution, and thus was not properly subject to the Governor's Article 4, § 73 partial veto power. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

In order for bills to be susceptible to the Governor's partial veto power under Article 4, § 73 of the Mississippi Constitution, they must fix a definite maximum amount, as required by Article 4, § 63, and not continue to be in force withdrawing money from the state treasury longer than 2 months after the expiration of the fiscal year ending after the meeting of the legislature at its next regular session, as required by Article 4, § 64. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

No bill authorizing the issuance of bonds can contain a definite maximum sum to be paid by the treasury, as required for appropriation bills under Article 4, § 63 of the Mississippi Constitution, since at the time of passage of bills authorizing the issuance of bonds, no one knows when the bonds will be sold, what the interest rate on the bonds will be, or when the bonds will mature, and therefore such bills are not "appropriation" bills susceptible to the Governor's partial veto power under Article 4, § 73. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

This section and §§ 64, 68, 69, 73, 116 and 123 referred to, commented upon and applied with respect to a statute authorizing the issuance of state bonds and providing for their retirement at the option of the state. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

The Constitution regards the legislature as the sole repository of power to make appropriations of moneys to be paid out of the state treasury; and, consequently, the governor was without power to exercise an option to retire bonds which was reserved to the state in a statute providing for the issuance of such bonds. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

2. Specific appropriations.

The Governor's partial veto of a legislative bill authorizing the borrowing of $65,882,979 through the issuance of general obligation bonds of the state to finance capital improvements at the state institutions of higher learning and community and junior colleges was unconstitutional, since the bill was a creation of a debt rather than an "appropriation bill" within the meaning of the Mississippi Constitution, and thus was not properly subject to the Governor's Article 4, § 73 partial veto power. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

The Unemployment Compensation Law does not violate the State Constitution prohibiting appropriation bills which do not fix the maximum sum to be drawn from the treasury; the fund provided for being a trust fund, and not a fund to be placed in the State treasury, nor a fund for operating the State Government. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

Laws 1924 ch 325 providing for the supervision and auditing of public offices is not an appropriation bill within this section. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

Code 1906 § 4348 providing for refund of money paid into state treasury by mistake does not violate this section, since the statute made no appropriation within the meaning of this section. Pearman v. Robertson, 119 Miss. 384, 80 So. 786 (1919).

Statute providing for the issuance of state bonds, reserving option in the state to retire them before their due date did not of itself constitute an appropriation of money for the payment of the bonds. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 390-392, 403-405, 416, 417.

§ 64. Time limit and voting requirements for appropriations

No bill passed after the adoption of this Constitution to make appropriations of money out of the State Treasury shall continue in force more than two months after the expiration of the fiscal year ending after the meeting of the Legislature at its next regular session; nor shall such bill be passed except by the votes of a majority of all members elected to each House of the Legislature.

SOURCES: Laws, 1935, ch 116.

JUDICIAL DECISIONS

1. In general.
2. Appropriation bills within section.

1. In general.

The Governor's partial veto of a legislative bill authorizing the borrowing of $65,882,979 through the issuance of general obligation bonds of the state to finance capital improvements at the state institutions of higher learning and community and junior colleges was unconstitutional, since the bill was a creation of a debt rather than an "appropriation bill" within the meaning of the Mississippi Constitution, and thus was not properly subject to the Governor's Article 4, § 73 partial veto power. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

The Governor's partial veto of a legislative bill authorizing the borrowing of $8,000,000 through the issuance of general obligation bonds to finance the acquisition and development of historic properties in the state was unconstitutional, since the bill was a creation of a debt rather than an "appropriation bill" within the meaning of the Mississippi Constitution, and thus was not properly subject to the Governor's Article 4, § 73 partial veto power. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

In order for bills to be susceptible to the Governor's partial veto power under Article 4, § 73 of the Mississippi Constitution, they must fix a definite maximum amount, as required by Article 4, § 63, and not continue to be in force withdrawing money from the state treasury longer than 2 months after the expiration of the fiscal year ending after the meeting of the legislature at its next regular session, as required by Article 4, § 64. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

See Pearman v. Robertson, 119 Miss. 384, 80 So. 786 (1919).

The Constitution regards the legislature as the sole repository of power to make appropriations of moneys to be paid out of the state treasury. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

2. Appropriation bills within section.

The short expiration period imposed on appropriation bills by Article 4, § 64 of the Mississippi Constitution is a characteristic not shared by bills authorizing the issuance of bonds, since most bond bills involve a financing transaction that is not complete until 20 or 30 years after issuance when the bonds are redeemed, and therefore such bills are not "appropriation" bills susceptible to the Governor's partial veto power under Article 4, § 73. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

The Unemployment Compensation Law provides for a trust fund, to be withheld from the State treasury, and hence does not violate or come within the State Constitution governing the passage and duration of appropriation laws. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

Statute providing for the issuance of state bonds, reserving option in the state to retire them before their due date did not of itself constitute an appropriation of money for the payment of the bonds. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 390-392, 403-405, 416, 417.

§ 65. Reconsideration of votes

All votes on the final passage of any measure shall be subject to reconsideration for at least one whole legislative day, and no motion to reconsider such vote shall be disposed of adversely on the day on which the original vote was taken, except on the last day of the session.

JUDICIAL DECISIONS

1. Judicial authority.
Compliance with this requirement is not subject to supervision and revision by the courts. Barnes v. Ladner, 241 Miss. 606, 131 So. 2d 458 (1961).

RESEARCH REFERENCES

CJS. C.J.S. Statutes § 38.

§ 66. Law granting donation or gratuity

No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the Legislature, nor by any vote for a sectarian purpose or use.

SOURCES: Laws, 1908, ch 149.

Cross References — Prohibition as to enactment of local, private, or special laws granting state lands, see Miss. Const. Art. 4, § 90(u).

JUDICIAL DECISIONS

1. In general.
2. Colleges and universities.
3. Non-profit hospitals.

1. In general.
Constitutional limitation, express or implied, on gifts of public money does not generally apply to disbursement, appropriation, or other fiscal statute for public purpose to carry out function of government or to discharge obligation of state, although only moral or equitable obligation. Craig v. Mercy Hospital-Street Mem., 209 Miss. 427, 45 So. 2d 809 (1950), error overruled, 209 Miss. 490, 47 So. 2d 867 (1950).

Term "donation or gratuity" implies absence of consideration, the transfer of money or other things of value from owner to another without any consideration. Craig v. Mercy Hospital-Street Mem., 209 Miss. 427, 45 So. 2d 809 (1950), error overruled, 209 Miss. 490, 47 So. 2d 867 (1950).

This section of constitution does not prohibit state from using sectarian institution as medium for performance of governmental duty. Craig v. Mercy Hospital-Street Mem., 209 Miss. 427, 45 So. 2d 809 (1950), error overruled, 209 Miss. 490, 47 So. 2d 867 (1950).

"Grant" as used in Laws 1946, ch 363, as amended by Laws 1948, ch 430 (Code 1942, §§ 7146-05 and 7146-06), providing for grants of state funds to certain non-profit institutions, is not synonymous with "donation" as used in this section of the constitution. Craig v. Mercy Hospital-Street Mem., 209 Miss. 427, 45 So. 2d 809 (1950), error overruled, 209 Miss. 490, 47 So. 2d 867 (1950).

2. Colleges and universities.
Chapter 120, Laws of 1910, authorizing municipalities to aid in establishing a state college is not violative of this section. Turner v. City of Hattiesburg, 98 Miss. 337, 53 So. 681 (1910).

3. Non-profit hospitals.
A local law authorizing a city to issue revenue bonds for the purpose of acquiring hospital facilities to be leased to a Methodist hospital did not violate the First Amendment where there was nothing in the Act or the resolution of the city's governing body that could be construed as being in aid of, or directed toward, the establishment of religion; nor was there a

violation of Mississippi Constitution, where the entire cost of the project was to be paid by the lessee and where the hospital facilities, which would be available to the public, did not involve a sectarian purpose or use. Kerley v. City of Hattiesburg, 361 So. 2d 44 (Miss. 1978).

Christmas bonuses to county hospital employees as a reward for faithful service, is not within the powers of its trustees. Golding v. Salter, 234 Miss. 567, 107 So. 2d 348 (1958).

Grant of funds to non-profit hospital under Laws 1946, ch 363, as amended by Laws 1948, ch 430 (Code 1942, §§ 7146-05 and 7146-06), is not donation or gratuity for sectarian purpose or use when grant is in consideration of hospital's agreement to maintain at least 10% of its bed capacity for charity patients, to make its facilities available at all times as part of hospital program of state and to insure certain controls over institution and its property. Craig v. Mercy Hospital-Street Mem., 209 Miss. 427, 45 So. 2d 809 (1950), error overruled, 209 Miss. 490, 47 So. 2d 867 (1950).

Laws 1948, ch 430, § 1, amending Laws 1946, ch 363, § 6 (Code 1942, § 7146-06), providing for the granting of state aid under the supervision of a state agency to nonprofit hospitals in connection with a state-wide hospital plan does not violate § 258 of the Constitution, prohibiting pledges or loans by the state to any person, association or corporation, since the legislature has the authority to appropriate public funds out of the state treasury for the care of the indigent sick in the nonprofit, nonsectarian hospitals of the state in accordance with § 86 of the Constitution, particularly where the expenditure of such funds for such purpose is under the supervision and control of a state agency. Craig v. North Miss. Community Hosp., 206 Miss. 11, 39 So. 2d 523 (1949).

ATTORNEY GENERAL OPINIONS

Statute allows school district to employ counsel as it deems necessary to represent it in any action at law; however, it does not authorize payment of fees for attorney employed by and representing private group in action to which district is not party; such would be violation of Article 4, Section 66 of Mississippi Constitution of 1890. Andrews Oct. 29, 1993, A.G. Op. #93-0777.

A municipality may not lease a building and surrounding land in an industrial park for nominal consideration. Wise, September 4, 1998, A.G. Op. #98-0481.

The Mississippi Regional Housing Authority No. VI may contract with a nonprofit corporation established by the Authority pursuant to Section 43-33-11(i) to perform such work as collecting rents, cutting grass, repairing housing units, etc., for the corporation; however, any contract for the performance of such duties by employees of the authority and at the authority's expense may not include action that would result in a donation or gratuity being made to a third party in contravention of the express provisions of Section 66 of the Mississippi Constitution of 1890. McArty, April 9, 1999, A.G. Op. #99-0150.

The sale of University of Mississippi land authorized by H.B. 1041 (Chapter 304, Miss. Laws, 1998) is exempt from the requirements relating to all sales of state-held lands supplied by § 29-1-1(3); however, fair market value must be obtained for these lands in the absence of a legislatively authorized donation pursuant to Section 66 of the Constitution of 1890; further, although the University of Mississippi is not required to utilize appraisers, it may do so in order to determine fair market value. Khayat, April 16, 1999, A.G. Op. #99-0163.

Once a county board of supervisors has established deadlines for applications for exemption, even though such deadlines are not required by law, a grant of exemption from solid waste fees that are liquidated and accrued, retroactive to January 1, 1999, would constitute a donation of sums due the county, which is prohibited by Section 66, Mississippi Constitution of 1890; however, a new application date or dates could be established for exemptions which are prospective in nature. Barry, July 2, 1999, A.G. Op. #99-0330.

There is no authority for a school district to pay tuition costs out of district funds for teachers on emergency licenses to obtain certification in the educational field for which an emergency license was granted. Harlow, Sr., Nov. 12, 1999, A.G. Op. #1999-0606.

The Department of Archives and History could not purchase insurance coverage for property owned by an estate that remained in a house that was deeded to the state subject to a life interest after the death of the grantor, as such action would have constituted an unauthorized donation. Hilliard, Aug. 31, 2001, A.G. Op. #01-0548.

A mayor does not have authority to pay employees before services are rendered or the work is performed. Willis, Mar. 8, 2002, A.G. Op. #02-0055.

A proposed payment by a school district of the cost of attending classes for the purpose of preparing an unlicensed employee for the licensure examination would constitute an unauthorized donation of public funds. Adams, Mar. 15, 2002, A.G. Op. #02-0090.

Pursuant to House Bill 1341, the Mississippi Land Water and Timber Resources Board had the authority to grant $5,000,000.00 directly to a private entity for construction of a proposed cow slaughter facility as the bill was passed by a two-thirds vote of the members of the House and the Senate. Rohrlack, Jr., Apr. 25, 2002, A.G. Op. #02-0235.

In the absence of a court order or consideration such as a release, payments in the form of liquidated damages by a school board to employees constitute impermissible donations and unallowable additional compensation and may not be made. Mayfield, Feb. 2, 2004, A.G. Op. 04-0036.

A school board does not have the authority to pay an employee unless services have been rendered or work has been performed. However, a school board may authorize payment to an employee utilizing accrued leave pursuant to the school district leave policy. Chaney, Feb. 20, 2004, A.G. Op. 04-0038.

The expenditure of public funds by regional mental health institutions for the purpose of providing their officers, employees or their family members with flowers or other items of value would constitute a gift or donation prohibited by the Mississippi Constitution. Hendrix, Feb. 6, 2004, A.G. Op. 04-0029.

An incentive compensation program implemented by a county development commission would be in violation of Miss. Const. art. IV, §§ 66 and 96. Allen, June 11, 2004, A.G. Op. 04-0185.

Statutes applicable to economic development authorities do not authorize severance pay or severance packages. Robinson, Oct. 8, 2004, A.G. Op. 04-0483.

Disbursing county funds to an election commissioner for the purpose of paying for the commissioner's supplemental health insurance would constitute an unlawful donation. Phillips, Aug. 8, 2005, A.G. Op. 05-0391.

Article 4, § 66 of the Mississippi Constitution prohibits a municipality from donating water to a church for any "sectarian purpose." Creekmore, Nov. 22, 2005, A.G. Op. 05-0408.

RIDES program grants may be offered to private schools without violating state law. The program, developed by the University of Mississippi, uses 80% federal and 20% state funds. Brown, Oct. 6, 2006, A.G. Op. 06-0410.

Where transfer of title to a building by a company to a county is followed by temporary retention of possession by the donating company, and the eighteen month possession of the building by the company is presumably far less than the building's appraisal value, therefore, the possession of the building after transfer would not be an impermissible donation. Crow, Dec. 8, 2006, A.G. Op. 06-0583.

Proposal whereby employee and employer agree in advance to certain conditions that, once satisfied by the employee's future performance, will obligate the employer to temporarily increase the employee's salary would not violate the constitution. Meredith, Dec. 22, 2006, A.G. Op. 06-0656.

State agencies have only such powers expressly granted to them by statute and such powers as are necessarily implied. There is no authority for Tombigbee River Valley Water Management District to financially assist a member county to obtain and pay for engineering studies on a proposed industrial site or to purchase proposed industrial property. Nichols, February 23, 2007, A.G. Op. #07-00044, 2007 Miss. AG LEXIS 29.

For the Tunica County Utility District, which is county-owned, to fund the construction of connecting water lines to a privately owned utility company would constitute an unlawful donation under Miss. Code Ann. § 19-3-40 and Miss. Const. of 1890, Art. 4 § 66, unless the private utility gives adequate consideration, which may take into account the value of and cost to replicate the backup service that would be provided to the private utility. Dulaney, March 15, 2007, A.G. Op. #07-00123, 2007 Miss. AG LEXIS 62.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 324 et seq. Statutes §§ 34, 41.

Law Reviews. 1978 Mississippi Supreme Court Review: Administrative Law. 50 Miss. L. J. 11, March 1979.

§ 67. Time limit for introducing new bill

No new bill shall be introduced into either House of the Legislature during the last three days of the session.

RESEARCH REFERENCES

CJS. C.J.S. Statutes § 22.

§ 68. Precedence and time limits for appropriation and revenue bills

Appropriation and revenue bills shall, at regular sessions of the Legislature, have precedence in both houses over all other business, and no such bills shall be passed during the last five days of the session.

JUDICIAL DECISIONS

1. In general.
2. Judicial authority.

1. In general.

The Constitution regards the legislature as the sole repository of power to make appropriations of moneys to be paid out of the state treasury. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

2. Judicial authority.

The section is binding as a matter of the procedure on the legislature, but its disregard is beyond the control of the courts. Hunt v. Wright, 70 Miss. 298, 11 So. 608 (1892).

RESEARCH REFERENCES

CJS. C.J.S. Statutes § 34.

§ 69. Contents of appropriation bills

General appropriation bills shall contain only the appropriations to defray the ordinary expenses of the executive, legislative, and judicial departments of the government; to pay interest on state bonds, and to support the common schools. All other appropriations shall be made by separate bills, each embracing but one subject. Legislation shall not be engrafted on the appropriation bills, but the same may prescribe the conditions on which the money may be drawn, and for what purposes paid.

JUDICIAL DECISIONS

1. Veto power.
2. Appropriation bills within section.

1. Veto power.

The governor cannot, under § 73, veto that part of a special appropriation bill in which is expressed, under the section, the conditions on which the money may be drawn. State ex rel. Teachers & Officers of Indus. Inst. & College v. Holder, 76 Miss. 158, 23 So. 643 (1898).

2. Appropriation bills within section.

Chapter 57, Laws of 1904, authorizing reimbursement of a tax collector for money erroneously paid into the state treasury does not violate the provision that all appropriation bills, other than general ones, shall embrace but one subject. Henry v. Carter, 88 Miss. 21, 40 So. 995 (1906).

Statute providing for the issuance of state bonds, reserving option in the state to retire them before their due date, did not of itself constitute an appropriation of money for the payment of the bonds. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

RESEARCH REFERENCES

ALR. Constitutionality of statute appropriating money to reimburse public officer or employee for money paid or liability incurred by him in consequence of breach of duty. 155 A.L.R. 1438.

CJS. C.J.S. States §§ 390-392, 403-405, 416, 417.

§ 70. Votes required for passage of revenue or property assessment bills

No revenue bill, or any bill providing for assessments of property for taxation, shall become a law except by a vote of at least three-fifths of the members of each house present and voting.

JUDICIAL DECISIONS

1. In general.
2. Veto or return of bills by Governor.

1. In general.

This section is binding as a matter of procedure on the legislature, but its disregard is beyond the control of the courts. Hunt v. Wright, 70 Miss. 298, 11 So. 608 (1892).

2. Veto or return of bills by Governor.

Two legislative bills authorizing the borrowing of money through the issuance of general obligation bonds were intended by the legislature to be revenue bills or bond bills, rather than appropriation bills, where the House Journal reflected that 69 out of 115 votes was needed for passage of the bills (exactly three-fifths), since Article 4, § 70 of the Mississippi Constitution provides that a revenue bill must be passed by "at least three-fifths vote of the members of each house present and voting," and therefore the Governor's veto of these bills in a partial rather than a complete manner was inconsistent with Article 4, §§ 72 and 73 of the Mississippi Constitution. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

RESEARCH REFERENCES

CJS. C.J.S. Statutes § 34.

§ 71. Title of bill; committee recommendations

Every bill introduced into the Legislature shall have a title, and the title ought to indicate clearly the subject matter or matters of the proposed legislation. Each committee to which a bill may be referred shall express, in writing, its judgment of the sufficiency of the title of the bill, and this, too, whether the recommendation be that the bill do pass or do not pass.

JUDICIAL DECISIONS

1. In general.
2. Determination of sufficiency of title.
3. Applications—In general.
4. Political subdivisions, applications.
5. Taxes, applications.

1. In general.

The requirement that every bill have a title is directory and not mandatory. Matthews v. State, 240 Miss. 189, 126 So. 2d 245 (1961).

Constitutional requirement that title "ought" clearly to indicate subject-matter of proposed legislation is directory or advisory, not mandatory. Lang v. Harrison County, 114 Miss. 341, 75 So. 126 (1917); Roseberry v. Norsworthy, 135 Miss. 845, 100 So. 514 (1924); Gully v. Jackson Int'l Co., 165 Miss. 103, 145 So. 905 (1933); Lewis v. Simpson, 176 Miss. 123, 167 So. 780 (1936).

It is mandatory that every bill shall have a title; and the title ought to indicate clearly the subject-matter therein. Mayor of City of Jackson v. State, 102 Miss. 663, 59 So. 873, Am. Ann. Cas. 1915A,1213 (1912).

2. Determination of sufficiency of title.

In construing statute, Supreme Court will presume that legislature attempted to comply with constitutional requirement that title of bill should indicate clearly subject-matter of proposed legislation. Lewis v. Simpson, 176 Miss. 123, 167 So. 780 (1936).

Although constitutional requirement that title of bill should indicate clearly subject-matter of proposed legislation is only directory, title of Act may be resorted to ascertain legislative intent and to relieve any ambiguity in body of Act. Lewis v. Simpson, 176 Miss. 123, 167 So. 780 (1936).

If there be title dealing substantially with subject-matter, it is sufficient in so far as judicial department is concerned. Hall v. State, 166 Miss. 331, 148 So. 793 (1933).

The sufficiency of the title of the bill is solely to be determined by the legislature. State v. Philips, 109 Miss. 22, 67 So. 651 (1915); Rosenstock v. Washington County, 112 Miss. 124, 72 So. 876 (1916); Bryan v. Greenwood, 112 Miss. 718, 73 So. 728 (1917); Lang v. Harrison County, 114 Miss. 341, 75 So. 126 (1917); Heidelberg v. Batson, 119 Miss. 510, 81 So. 225 (1919); Everett v. Williamson, 163 Miss. 848, 143 So. 690 (1932).

The purpose of the requirement that the title to an act should indicate fully what subjects of the Code are to be dealt with in the body of the act, is to prevent conceal-ment of any matter in the body of the act by a misleading title, so that any legislator reading the title may, from that, have full knowledge of the scope of the proposed amendments. Ex parte Weems, 96 Miss. 635, 51 So. 2 (1910).

3. Applications—In general.

Constitutional provision prohibiting amendment by reference to title only held inapplicable to adoption of Code of previous laws. State ex rel. Colmer v. Benvenutti, 162 Miss. 313, 137 So. 537 (1931).

Fact that title to an act pertaining to fees and privilege taxes on motor vehicles provided for payment of fees and taxes into the state highway fund and the county road fund while the act itself provided for the payment of all taxes into the county road fund did not constitute a violation of this section, in view of the advisory or directory nature of the constitutional provision as regards sufficiency of subject-matter. Roseberry v. Norsworthy, 135 Miss. 845, 100 So. 514 (1924).

4. Political subdivisions, applications.

This section does not apply to municipal ordinances. City of Corinth v. Sharp, 107 Miss. 696, 65 So. 888 (1914).

Section 7 ch 73 Laws of 1908, pertaining to the Yazoo-Mississippi Delta Levee Board, in attempting to amend a prior statute without mentioning it in the title, violates this section of the Constitution. Ex parte Weems, 96 Miss. 635, 51 So. 2 (1910).

Statute (Laws 1908, ch 97) regulating procedure of the Yazoo-Mississippi Delta Levee Board was not objectionable on the ground that the title thereof did not properly identify the corporation. Bobo v. Board of Levee Comm'rs, 92 Miss. 792, 46 So. 819 (1908).

5. Taxes, applications.

The title of chapter 269, Laws of 1946, imposing privilege taxes on automatic weighing and vending machines, is sufficient, where title substantially deals with the subject-matter embraced in that chapter. Corso v. City of Biloxi, 201 Miss. 532, 29 So. 2d 638 (1947), error overruled, 201 Miss. 539, 30 So. 2d 237 (1947).

Headings to various sections of privilege tax statute are not strictly titles or subtitles, but lead lines which are part of statute itself. Gully v. Jackson Int'l Co., 165 Miss. 103, 145 So. 905 (1933).

RESEARCH REFERENCES

ALR. Constitutionality of statute exempting proceeds of life or benefit insurance. 1 A.L.R. 757.

Tax on automobile or on its use for cost of road and street construction, improvement, or maintenance. 24 A.L.R. 937; 68 A.L.R. 200.

Constitutionality of city manager or commission form of municipal government. 67 A.L.R. 737.

Constitutionality of statute regulating or imposing tax or license fee upon newspapers and magazines. 35 A.L.R. 7; 110 A.L.R. 327.

Title of statutes as an element bearing upon their construction. 37 A.L.R. 927.

Constitutionality of levee and flood control acts. 70 A.L.R. 1274.

Constitutionality and construction of pandering acts. 74 A.L.R. 311.

Constitutionality of statutes in relation to registration before voting at election or primary. 91 A.L.R. 349.

Proposition submitted to people as covering one or more than one proposed constitutional amendment within contemplation of constitutional provision in that regard. 94 A.L.R. 1510.

Constitutionality of statutes providing for refund of taxes illegally or erroneously exacted. 98 A.L.R. 284.

Extension or renewal of period of corporate existence. 108 A.L.R. 59.

Power to detach land from municipal corporations, towns, or villages. 117 A.L.R. 267.

Validity, construction, and application of statutes, ordinances, and other regulations relating to transportation or disposal of carcasses of dead animals not slaughtered for food. 121 A.L.R. 732.

CJS. C.J.S. Statutes §§ 202-240.

§ 72. Approval or disapproval of bill by Governor; veto override process

Every Bill which shall pass both Houses shall be presented to the Governor of the state. If he approve, he shall sign it; but if he does not approve, he shall return it, with his objections, to the House in which it originated, which shall enter the objections at large upon its Journal, and proceed to reconsider it. If after such reconsideration two-thirds (⅔) of that House shall agree to pass the Bill, it shall be sent, with the objections, to the other House, by which, likewise, it shall be reconsidered; and if approved by two-thirds (⅔) of that House, it shall become a law; but in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the Governor within five (5) days (Sundays excepted) after it has been presented to him, it shall become a law in like manner as if he had signed it, unless the Legislature, by adjournment, prevented its return, in which case such Bill shall be a law unless the Governor shall veto it within fifteen (15) days (Sundays excepted) after it is presented to him, and such Bill shall be returned to the Legislature, with his objections, within three (3) days after the beginning of the next session of the Legislature.

SOURCES: 1817 art IV § 15; 1832 art V § 15; 1869 art IV § 24; Laws, 1970, ch. 562, eff June 19, 1970.

Editor's Note — The 1970 amendment to Section 72 of Article 4 of the Constitution of 1890 was proposed by ch. 562 (House Concurrent Resolution No. 14) of the 1970 regular session of the Legislature, and upon ratification by the electorate on June 3, 1970, was inserted by a proclamation of the Secretary of State on June 19, 1970, by virtue of the authority vested in him by Section 273 of the Constitution.

JUDICIAL DECISIONS

1. In general.
2. Return of bill by Governor.

1. In general.

The word "day" means a full or entire day consisting of 24 hours. Carter v. Henry, 87 Miss. 411, 39 So. 690, 6 Am. Ann. Cas. 715 (1906).

The day on which the bill is presented to the governor should be excluded in determining the time he has to veto or approve the bill. Carter v. Henry, 87 Miss. 411, 39 So. 690, 6 Am. Ann. Cas. 715 (1906).

Sunday is non dies. Carter v. Henry, 87 Miss. 411, 39 So. 690, 6 Am. Ann. Cas. 715 (1906).

2. Return of bill by Governor.

The Governor's partial veto of a legislative bill authorizing the borrowing of $65,882,979 through the issuance of general obligation bonds of the state to finance capital improvements at the state institutions of higher learning and community and junior colleges was unconstitutional, since the bill was a creation of a debt rather than an "appropriation bill" within the meaning of the Mississippi Constitution, and thus was not properly subject to the Governor's Article 4, § 73 partial veto power. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

The Governor's partial veto of a legislative bill authorizing the borrowing of $8,000,000 through the issuance of general obligation bonds to finance the acquisition and development of historic properties in the state was unconstitutional, since the bill was a creation of a debt rather than an "appropriation bill" within the meaning of the Mississippi Constitution, and thus was not properly subject to the Governor's Article 4, § 73 partial veto power. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

Two legislative bills authorizing the borrowing of money through the issuance of general obligation bonds were intended by the legislature to be revenue bills or bond bills, rather than appropriation bills, where the House Journal reflected that 69 out of 115 votes was needed for passage of the bills (exactly three-fifths), since Article 4, § 70 of the Mississippi Constitution provides that a revenue bill must be passed by "at least three-fifths vote of the members of each house present and voting," and therefore the Governor's veto of these bills in a partial rather than a complete manner was inconsistent with Article 4, §§ 72 and 73 of the Mississippi Constitution. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

Under this section a statute providing for reimbursement of tax collector for money erroneously paid into state treasury which reached the governor within five days next before adjournment of the legislature but was not returned by him within three days after the beginning of the next session, properly became a law without executive approval. Henry v. Carter, 88 Miss. 21, 40 So. 995 (1906).

The section applies where the governor has wrongfully undertaken to approve a part and veto another part of a bill and the legislature has adjourned within five days after the bill was sent to him for approval. In such case it remains in his hands in legal contemplation. State ex rel. Teachers & Officers of Indus. Inst. & College v. Holder, 76 Miss. 158, 23 So. 643 (1898).

The official publication of an act which was presented to the governor within five days of an adjournment of the legislature raises the presumption that the governor failed to return it within three days after the beginning of the next session. Bowen v. Gilleylen, 58 Miss. 813 (1881).

RESEARCH REFERENCES

ALR. Vote necessary to pass bill over veto. 2 A.L.R. 1593.

Disapproval by governor of a bill in part or approval with modifications. 35 A.L.R. 600, 99 A.L.R. 1277.

Computation of time allowed for approval or disapproval of bill by governor. 54 A.L.R. 339.

Power of executive to sign bill after adjournment, or during recess of legislature. 64 A.L.R. 1468.

Inclusion of Sunday in computation of period within which bill must be presented to governor. 71 A.L.R. 1363.

Effect of failure of officers of Legislature to sign bills as required by constitutional provision. 95 A.L.R. 278.

At what stage does a statute or ordinance pass beyond the power of legislative body to reconsider or recall. 96 A.L.R. 1309.

Devolution, in absence of governor, of veto and approval powers, upon lieutenant governor or other officer. 136 A.L.R. 1053.

Failure of governor to sign bill until after the date at which it is to become effective. 146 A.L.R. 693.

CJS. C.J.S. Statutes § 43.

§ 73. Veto of parts of appropriations bill

The Governor may veto parts of any appropriation bill, and approve parts of the same, and the portions approved shall be law.

JUDICIAL DECISIONS

1. In general.
2. Appropriation bills within section.
3. Parts of bills subject to veto.

1. In general.

In order for bills to be susceptible to the Governor's partial veto power under Article 4, § 73 of the Mississippi Constitution, they must fix a definite maximum amount, as required by Article 4, § 63, and not continue to be in force withdrawing money from the state treasury longer than 2 months after the expiration of the fiscal year ending after the meeting of the legislature at its next regular session, as required by Article 4, § 64. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

Two legislative bills authorizing the borrowing of money through the issuance of general obligation bonds were intended by the legislature to be revenue bills or bond bills, rather than appropriation bills, where the House Journal reflected that 69 out of 115 votes was needed for passage of the bills (exactly three-fifths), since Article 4, § 70 of the Mississippi Constitution provides that a revenue bill must be passed by "at least three-fifths vote of the members of each house present and voting," and therefore the Governor's veto of these bills in a partial rather than a complete manner was inconsistent with Article 4, §§ 72 and 73 of the Mississippi Constitution. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

The Constitution regards the legislature as the sole repository of power to make appropriations of moneys to be paid out of the state treasury; and, consequently, the governor was without power to exercise an option to retire bonds which was reserved to the state in a statute providing for the issuance of such bonds. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

2. Appropriation bills within section.

The Governor's partial veto of a legislative bill authorizing the borrowing of $65,882,979 through the issuance of general obligation bonds of the state to finance capital improvements at the state institutions of higher learning and community and junior colleges was unconstitutional, since the bill was a creation of a debt rather than an "appropriation bill" within the meaning of the Mississippi Constitution, and thus was not properly subject to the Governor's Article 4, § 73 partial veto power. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

The Governor's partial veto of a legislative bill authorizing the borrowing of $8,000,000 through the issuance of general obligation bonds to finance the acquisition and development of historic properties in the state was unconstitutional, since the bill was a creation of a debt rather than an "appropriation bill" within the meaning of the Mississippi Constitution, and thus was not properly subject to the Governor's Article 4, § 73 partial veto power. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

No bill authorizing the issuance of bonds can contain a definite maximum sum to be paid by the treasury, as required for appropriation bills under Article 4, § 63 of the Mississippi Constitution, since at the time of passage of bills authorizing the issuance of bonds, no one knows when the bonds will be sold, what the interest rate on the bonds will be, or when the bonds will mature, and therefore such bills are not "appropriation" bills susceptible to the Governor's partial veto power under Article 4, § 73. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

The short expiration period imposed on appropriation bills by Article 4, § 64 of the Mississippi Constitution is a characteristic not shared by bills authorizing the issuance of bonds, since most bond bills involve a financing transaction that is not complete until 20 or 30 years after issuance when the bonds are redeemed, and therefore such bills are not "appropriation" bills susceptible to the Governor's partial veto power under Article 4, § 73. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

3. Parts of bills subject to veto.

Court properly found that the Mississippi Governor's veto of the third section of a prison-funding bill violated the Mississippi Constitution because the third section of the bill was but a condition of the first two sections, which appropriated the funds by the Mississippi Legislature; language of the bill made the third section reliant on the first two sections. Governor's veto could not inhibit the legislative intent of the bill, nor could the veto create new legislation. Barbour v. Delta Corr. Facility Auth., 871 So. 2d 703 (Miss. 2004).

The Governor's partial veto of 26 bills appropriating funds for particular state government agencies and departments to hire a certain number of employees was unconstitutional where he marked through the number of employees authorized and substituted a smaller figure, since he sought to veto a condition prescribed by the legislature rather than a distinct appropriation. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

The Governor's partial veto of a bill appropriating funds for the state institutions of higher learning for the fiscal year was unconstitutional where he crossed out a section of the bill forbidding the use of any funds appropriated by the bill to raise the salary of the Commissioner of Higher Learning, since he sought to veto a condition prescribed by the legislature rather than a distinct appropriation. Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).

Under this section the governor cannot veto a condition of an appropriation act and approve the remainder of the act. Miller v. Walley, 122 Miss. 521, 84 So. 466 (1920).

The section relates to distinct appropriations contained in general appropriation bills and separable items of special appropriation bills, and does not authorize the veto of that part of a special appropriation bill in which, under § 69, is expressed the conditions on which the money may be drawn. State ex rel. Teachers & Officers of Indus. Inst. & College v. Holder, 76 Miss. 158, 23 So. 643 (1898).

ATTORNEY GENERAL OPINIONS

The governor's action in attempting to veto portions of sections of a senate bill and a house bill constituted an improper exercise of his Section 73 veto powers. Ford, Apr. 11, 2002, A.G. Op. #02-0193.

RESEARCH REFERENCES

ALR. Disapproval by Governor of a bill in part or approval with modifications. 35 A.L.R. 600, 99 A.L.R. 1277.

Devolution, in absence of governor, of veto and approval power, upon lieutenant governor or other officer. 136 A.L.R. 1053.

CJS. C.J.S. Statutes § 50.

§ 74. Referral of bill to committee

No bill shall become a law until it shall have been referred to a committee of each House and returned therefrom with a recommendation in writing.

Cross References — Standing committee on local and private legislation, see MS Const Art. 4, § 89.

RESEARCH REFERENCES

CJS. C.J.S. Statutes § 23.

§ 75. Enforcement of laws of general nature

No law of a general nature, unless therein otherwise provided, shall be enforced until sixty days after its passage.

SOURCES: 1832 art VII § 6; 1869 art XII § 9.

JUDICIAL DECISIONS

1. Construction with other constitutional provisions.
2. Effective and expiration dates.

1. Construction with other constitutional provisions.

So-called "Initiative and Referendum Amendment" to § 33 hereof discussed and held not to have repealed this section of the constitution. State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1 (1919).

2. Effective and expiration dates.

Statute providing for an increase of the tax on natural gas produced for sale, from a rate of 2½ per cent to 10 per cent with the provision that the rate should be 2½ per cent on and after March 1st, 1939, and, in the second section thereof, providing that the act should take effect from and after September 1st, 1939, construed to manifest a legislative intention that the act should take effect September 1, 1938, since it was obvious that a clerical error was made either in the effective date or the expiration date of the statute. Love Petro. Co. v. Stone, 186 Miss. 793, 191 So. 417 (1939).

RESEARCH REFERENCES

ALR. Statutes: conclusiveness of legislative declaration of emergency. 7 A.L.R. 519, 110 A.L.R. 1435.

CJS. C.J.S. Statutes §§ 393-395.

§ 76. Viva voce vote

In all elections by the Legislature the members shall vote viva voce, and the vote shall be entered on the journals.

RESEARCH REFERENCES

CJS. C.J.S. Statutes § 38.

§ 77. Writs of election to fill legislative vacancies

The Governor shall issue writs of election to fill such vacancies as may occur in either house of the legislature, and the persons thereupon chosen shall hold their seats for the unexpired term.

RESEARCH REFERENCES

ALR. Death or disability of one elected to office before qualifying as creating a vacancy. 74 A.L.R. 486.

CJS. C.J.S. States §§ 90-93.

INJUNCTIONS

Sec.	
78.	Salary deductions for neglect of official duty
79.	Sale of delinquent tax lands; right of redemption
80.	Abuse of certain local government unit powers
81.	Obstruction of navigable waters; certain construction projects authorized
82.	Official bonds; fixing penalties
83.	Fire safety in certain public places
84.	Acquisition of land by nonresident aliens and corporations
85.	Working of public roads by contract or by county prisoners
86.	Care of insane and indigent sick

§ 78. Salary deductions for neglect of official duty

It shall be the duty of the Legislature to regulate by law the cases in which deductions shall be made from salaries of public officers for neglect of official duty, and the amount of said deduction.

SOURCES: 1817 art VI § 14; 1832 art VII § 12; 1869 art XII § 10.

JUDICIAL DECISIONS

1. In general.

The section does not deprive the legislature of power to provide for reductions from salaries because of a failure to perform official duties on account of sickness and like causes. Cole v. Humphries, 78 Miss. 163, 28 So. 808 (1900).

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees §§ 130, 270, 271, 274, 286.

§ 79. Sale of delinquent tax lands; right of redemption

The Legislature shall provide by law for the sale of all delinquent tax lands. The courts shall apply the same liberal principles in favor of such titles as in sale by execution. The right of redemption from all sales of real estate, for the nonpayment of taxes or special assessments, of any and every character whatsoever, shall exist, on conditions to be prescribed by law, in favor of owners and persons interested in such real estate, for a period of not less than two years.

SOURCES: 1869 art XII § 8.

JUDICIAL DECISIONS

1. In general.
2. Powers and functions of courts—In general.
3. Review of tax collectors actions, powers and functions of courts.
4. Powers and functions of agencies.
5. Right of redemption—In general.
6. Persons entitled to redeem, right of redemption.

1. In general.

A sale for legal and illegal taxes jointly is not protected by the section. Gamble v. Witty, 55 Miss. 26 (1877); Capital State Bank v. Lewis, 64 Miss. 727, 2 So. 243 (1887); Peterson v. Kittredge, 65 Miss. 33, 5 So. 824 (1887).

The constitution was intended to prevent the mere irregularities which are held not to avoid execution sales, from being held to avoid sales for taxes; it was not intended to cure illegality in the levy of taxes, and it does not dispense with a valid assessment and levy of taxes as the fundamental condition on which a right arises to subject property to sale for nonpayment of taxes. Gamble v. Witty, 55 Miss. 26 (1877).

2. Powers and functions of courts—In general.

The provision for the application by the court of the same liberal principles in favor of tax titles as in sales by execution will not be invoked to uphold a tax title obtained in violation of statute, which, perhaps by legislative blunder, required the filing of the sheriff's deed on the same day on which sale of tax delinquent property was to be made. Howie v. Alford, 100 Miss. 485, 56 So. 797 (1911).

A tax deed not filed on or before the day provided for by law is void. Howie v. Alford, 100 Miss. 485, 56 So. 797 (1911).

The provision that the courts shall apply the same liberal principles in favor of tax titles as in sales by execution applies only to that class of cases in which, the power of sale existing, it has been defectively or irregularly executed, and has no operation as to those matters which are necessary to be done to confer such power. Caston v. Caston, 60 Miss. 475 (1882).

3. Review of tax collectors actions, powers and functions of courts.

The essential things which create authority in the tax collector to collect the taxes by sale are: a legal assessment (that constitutes the owner of the property a debtor to the state); and, second, a delivery of the assessment roll to the collector (that authorizes him to receive the money as therein charged against property or persons); and, third, if default is made in payment on the day appointed by law, he has power to distrain and sell. If these concur, the Constitution is imperative that the courts shall regard the sale with the same indulgences and favor as it does that of a sheriff under execution. Virden v. Bowers, 55 Miss. 1 (1882); Wolfe v. Murphy, 60 Miss. 1 (1882).

4. Powers and functions of agencies.

Where a board of supervisors condemned and ordered land for sale for delinquent taxes on a day less than thirty days after the date of the order as prescribed by statute, such sale was void as being beyond the power of the board to so order. Caston v. Caston, 60 Miss. 475 (1882).

5. Right of redemption—In general.

This section is self-executing, and the failure of the legislature to prescribe conditions for redemption of property after sale for delinquent taxes does not invalidate the tax statute. State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

Income tax statute providing for sale of property of defaulting taxpayer but failing to prescribe conditions for redemption was not void under this section. State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

This section itself confers the right of redemption; and while the legislature may impose reasonable conditions on the right of redemption, the right cannot be defeated by the legislature neglecting or failing to provide a scheme by which it may be done, since, in such case, the right of redemption may be enforced in equity. Union Sav. Bank & Trust Co. v. City of Jackson, 122 Miss. 557, 84 So. 388 (1920).

Chapter 260 Laws of 1912 relating to street and sidewalk improvements and special assessments therefor, but failing to make provision for redemption, is not unconstitutional. Union Sav. Bank & Trust Co. v. City of Jackson, 122 Miss. 557, 84 So. 388 (1920).

The section was prospective only. Under § 274, continuing existing statutes in force until April 1, 1892, the right to redeem land sold for taxes in March, 1891, was limited to one year. Le Blanc v. Illinois Cent. R. Co., 72 Miss. 669, 18 So. 381 (1895).

The section did not extend the time for redemption from sales made in March, 1892; the previous statute on the subject (code 1880 § 531) having been continued in force until April 1, 1892, by § 274 Constitution. Judah v. Brothers, 71 Miss. 414, 14 So. 455 (1893).

6. Persons entitled to redeem, right of redemption.

A judgment creditor does not have an interest in the land of his judgment debtor sufficient to enjoy the right to redeem. Perret v. Loflin, — So. 2d —, 2001 Miss. App. LEXIS 146 (Miss. Ct. App. Apr. 10, 2001), reversed by 814 So. 2d 137, 2002 Miss. LEXIS 44 (Miss. 2002).

Taxpayer was not entitled to enjoin sale of property for delinquent paving assessment because of an unauthorized statement of municipal officer that the sale would be made without right of redemption. Ring v. Watson, 142 Miss. 281, 107 So. 6 (1926).

Under a statute giving the right to redeem land sold for taxes to the owner or any person interested, a person owning an undivided interest in land has a right to redeem it. Darrington v. Rose, 128 Miss. 16, 90 So. 632 (1922).

Under statute providing for sale to state of delinquent tax lands and permitting owner to redeem within two years from such sale, fact that statute did not require tax collector to certify list of lands struck off to the state until the first Monday in April following the sale, did not interfere with owner's right of redemption given by this section. K.C. Lumber Co. v. Moss, 119 Miss. 185, 80 So. 638 (1919).

ATTORNEY GENERAL OPINIONS

Only the owner at the time of the original sale, his agent or assigns, may redeem property from the original tax sale; thus, an individual who purchased a parcel of property at the land sale could obtain a refund of the taxes, penalties, and interest he subsequently, but mistakenly, paid to redeem the property. Coleman, May 10, 2002, A.G. Op. #02-0217.

RESEARCH REFERENCES

CJS. C.J.S. Taxation §§ 1096-1353.

§ 80. Abuse of certain local government unit powers

Provision shall be made by general laws to prevent the abuse by cities, towns, and other municipal corporations of their powers of assessment, taxation, borrowing money, and contracting debts.

JUDICIAL DECISIONS

1. In general.
2. Validity of statutes.
3. Power of Legislature.

1. In general.

History of legislation, constitutional and statutory, relating to the powers of the board of supervisors reviewed. Monroe County v. Strong, 78 Miss. 565, 29 So. 530 (1900).

The section is prospective only and did not repeal existing municipal charters. Lum v. City of Vicksburg, 72 Miss. 590, 18 So. 476 (1895).

2. Validity of statutes.

A city ordinance which would in effect rebate ad valorem property taxes to the elderly and disabled for the tax year of 1982 was repugnant to both statutory law and the Mississippi Constitution, and the ordinance was an ultra vires act beyond the authority of the city to enact. City of Jackson v. Pittman, 484 So. 2d 998 (Miss. 1986).

Where in a statute which permits municipalities, after authorization by voters in special election to issue public utility improvement revenue bonds, there is a provision which states that no bond issue pursuant to acts should constitute an indebtedness within the meaning of any statutory or charter limitation, this was not unconstitutional. Spencer v. Mayor & Bd. of Aldermen, 215 Miss. 160, 60 So. 2d 562 (1952).

Chapter 290 of the Laws of 1918 which authorizes the city to issue bonds for the building and equipment of a hospital on a majority vote, does not violate this section of the Constitution. Feemster v. City of Tupelo, 121 Miss. 733, 83 So. 804 (1920).

This § 80 does not invalidate chs 119 and 120 Laws of 1910 authorizing municipalities to make donations to secure the location of a state educational institution. J. Livelar & Co. v. State, 98 Miss. 330, 53 So. 681 (1910).

3. Power of Legislature.

Where a constitutional provision requires ways to be made by general laws to prevent abuse by municipal corporations of powers of taxation and contracting debts, and it is not self-executing, and it requires legislation to put into effect, it is the duty of the legislature to say what constitutes abuse of such powers of municipality, and to provide checks thereon. Spencer v. Mayor & Bd. of Aldermen, 215 Miss. 160, 60 So. 2d 562 (1952).

Issues arising under law relating to objections to improvement by majority of property owners are appealable. Faison v. City of Indianola, 156 Miss. 872, 127 So. 558 (1930).

Constitutional provision requiring general laws to prevent abuse by cities, towns, and other municipal corporations of powers concerning finances held not to give legislature power to add to qualifications for holding offices. McCool v. State, 149 Miss. 82, 115 So. 121 (1928).

The legislature may authorize municipalities to own and operate an electric railway. Love v. Holmes, 91 Miss. 535, 44 So. 835 (1907).

The taxing power previously delegated to a municipality by a special charter can be controlled by the legislature by subsequent act. Adams v. Kuykendall, 83 Miss. 571, 35 So. 830 (1904).

ATTORNEY GENERAL OPINIONS

A contractual provision granting a tax exemption is unenforceable to the extent that the exemption exceeds the constitutional and statutory limits for such exemptions. Cofer, June 12, 1998, A.G. Op. #98-0327.

RESEARCH REFERENCES

ALR. Constitutionality of statute extending period for redemption from judicial or tax sale, or sale upon mortgage foreclosure. 1 A.L.R. 143; 38 A.L.R. 229; 89 A.L.R. 966.

Right of person under disability to redeem from tax sale. 65 A.L.R. 582; 159 A.L.R. 1467.

Statutory enactment or repeal subsequent to tax sale or issuance of tax certificates as affecting rights of holders of tax certificates or purchasers at tax sale. 111 A.L.R. 237.

CJS. C.J.S. Municipal Corporations §§ 1609, 1725.

§ 81. Obstruction of navigable waters; certain construction projects authorized

The Legislature shall never authorize the permanent obstruction of any of the navigable waters of the State, but may provide for the removal of such obstructions as now exist, whenever the public welfare demands. This section shall not prevent the construction, under proper authority, of drawbridges for railroads, or other roads, nor the construction of booms and chutes for logs, nor the construction, operation and maintenance of facilities incident to the exploration, production or transportation of oil, gas or other minerals, nor the construction, operation and maintenance of bridges and causeways in such manner as not to prevent the safe passage of vessels or logs under regulations to be provided by law.

SOURCES: Laws, 1968, ch. 660, eff June 13, 1968.

Editor's Note — The 1968 amendment to Section 81 of Article 4 of the Constitution of 1890 was proposed by ch. 660 (House Concurrent Resolution No. 71) of the 1968 regular session of the Legislature, and upon ratification by the electorate on June 4, 1968, was inserted by a proclamation of the Secretary of State on June 13, 1968, by virtue of the authority vested in him by Section 273 of the Constitution.

JUDICIAL DECISIONS

1. In general.
2. Public waterways within section.
3. Public use—In general.
4. Improvements, public use.
5. Private use.

1. In general.

Navigable waters of the state within this provision are not necessarily those defined as navigable by Code 1942, §§ 686 and 8414. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

The state is the absolute owner of the title of the soil and of the minerals therein contained, in the beds of all its shores, arms and inlets of the sea, wherever the tide ebbs and flows, as trustee for the people of the state, and subject only to the paramount right of the United States to control commerce and navigation, with the consequent right to use or dispose of any portion thereof, when that can be done without impairment of the interest of the public in the waters, and not inconsistent with this section of the Constitution, and without unreasonable interference with the riparian proprietor's right of access to and from such waters and the reasonable use thereof as well as of the lands subject to tidewater, as a necessary incident to the reasonable enjoyment of his adjacent lands, or with the right of free fishing by the public generally. State ex rel. Rice v. Stewart, 184 Miss. 202, 184 So. 44 (1938), error overruled, 184 Miss. 235, 185 So. 247 (1938).

Constitutional provision relating to obstruction of navigable waters relates to waters of Mississippi Sound. Money v. Wood, 152 Miss. 17, 118 So. 357 (1928).

History of ownership of tidewater lands. Money v. Wood, 152 Miss. 17, 118 So. 357 (1928).

The section does not interfere with the police power of the state to grant ferry licenses. Marshall v. Grimes, 41 Miss. 27 (1866).

2. Public waterways within section.

Section 51-1-4's 100 cubic feet per second standard for determining what constitutes a public waterway suffers no constitutional or other infirmity when scrutinized under §§ 14, 17 or 81 of the Mississippi Constitution or otherwise, or under federal law, including but not limited to the Equal Footings Doctrine and the congressional enactment of 1817 creating the State of Mississippi. Ryals v. Pigott, 580 So. 2d 1140 (Miss. 1990), cert. denied, 502 U.S. 940, 112 S. Ct. 377, 116 L. Ed. 2d 328 (1991).

3. Public use—In general.

Where the state gave the riparian owners bordering on Gulf of Mexico, Mississippi Sound and waters tributary thereto, license or the privilege to plant and gather oysters and to build bath-houses and other structures, the privilege or license was subject to superior right of the state to impose an additional public use upon such property already set aside for public purposes without requiring the payment of compensation for it. Crary v. State Hwy. Comm'n, 219 Miss. 284, 68 So. 2d 468 (1953).

Where state constructed a bridge across the bay of St. Louis, which bridge was partly across area or riparian owners who had been granted the privilege and license of planting and gathering oysters and erecting bath-houses and other structures, the state by building this bridge exercised its power to impose an additional public use upon a property which was already set aside for public purposes and the exercise of this power was not taking of property for which compensation must be made. Crary v. State Hwy. Comm'n, 219 Miss. 284, 68 So. 2d 468 (1953).

The state may authorize the diversion of streams from their old channels for the purpose of improving the navigation, and riparian owners have no cause of complaint. Commissioners of Homochitto River v. Withers, 29 Miss. 21, 64 Am. Dec. 126 (1855), aff'd, 61 U.S. (20 How.) 84, 15 L. Ed. 816 (1858).

4. Improvements, public use.

The sale by the state of Mississippi to a municipal bridge and park commission of 150 acres of submerged lands in Mississippi Sound in the Gulf of Mexico for filling and development did not constitute a violation of this section, where the lands consisted of mud flats covered only by three or four feet of water, were essentially non-navigable, and where dredging operations to secure the necessary land fill would enhance the navigability of surrounding waters. Treuting v. Bridge & Park Comm'n, 199 So. 2d 627 (Miss. 1967).

5. Private use.

Construction of a reservoir by damming the Pearl River above tidewater does not contravene this prohibition. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

A riparian owner, without legislative sanction, cannot rightfully maintain a boom for the stoppage of logs. Pascagoula Boom Co. v. Dickson, 77 Miss. 587, 28 So. 724, 78 Am. St. R. 537 (1900).

RESEARCH REFERENCES

ALR. Laches: waiver or estoppel on part of government respecting obstruction to navigation. 2 A.L.R. 1694.

Power of state to prohibit or regulate floating of logs. 9 A.L.R. 1025.

Title to beds of natural lakes or ponds. 23 A.L.R. 757, 112 A.L.R. 1108.

CJS. C.J.S. Navigable Waters §§ 23, 25-30, 47, 50, 52-55, 59.

§ 82. Official bonds; fixing penalties

The Legislature shall fix the amount of the penalty of all official bonds, and may, as far as practicable, provide that the whole or a part of the security required for the faithful discharge of official duty shall be made by some guarantee company or companies.

JUDICIAL DECISIONS

1. In general.

The section has no application to bonds of officers created alone by statute. Town of Gloster v. Harrell, 77 Miss. 793, 27 So. 609 (1900).

RESEARCH REFERENCES

ALR. Constitutionality of statute relieving officer or public depository or his surety from liability for loss of public funds. 38 A.L.R. 1512, 96 A.L.R. 295.

Constitutional, statutory, or charter provision as to time of taking oath of office and giving official bond as mandatory or directory. 158 A.L.R. 639.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 414 et seq.

43 Am. Jur. (1st ed), Public Officers §§ 394 et seq.

CJS. C.J.S. Officers and Public Employees §§ 61, 62.

§ 83. Fire safety in certain public places

The Legislature shall enact laws to secure the safety of persons from fires in hotels, theaters, and other public places of resort.

RESEARCH REFERENCES

CJS. C.J.S. Health and Environment §§ 51-64, 92.

§ 84. Acquisition of land by nonresident aliens and corporations

The Legislature shall enact laws to limit, restrict, or prevent the acquiring and holding of land in this State by nonresident aliens, and may limit or restrict the acquiring or holding of lands by corporations.

RESEARCH REFERENCES

CJS. C.J.S. Aliens § 139.

C.J.S. Corporations § 647.

§ 85. Working of public roads by contract or by county prisoners

The Legislature shall provide by general law for the working of public roads by contract or by county prisoners, or both. Such law may be put in operation only by a vote of the board of supervisors in those counties where it may be desirable.

JUDICIAL DECISIONS

1. In general.
2. Necessary allegations in indictment.
3. Specific statutes—In general.
4. Construction with other laws, specific

statutes.

1. In general.

While constitutional jurisdiction of board of supervisors over roads, ferries, and bridges must be exercised under regulations prescribed by legislature, legislature cannot entirely destroy such jurisdiction. Panola County v. Sardis, 171 Miss. 490, 157 So. 579 (1934); Greenwood v. Leflore County, 157 So. 585 (Miss. 1934).

The word "contract" in this section is to be used in its broad sense, and is not limited to any particular kind of contract. Lang v. Board of Supvrs., 114 Miss. 341, 75 So. 126 (1917).

2. Necessary allegations in indictment.

An indictment for failure to perform a contract to keep a road in repair must show that the law had been so put in operation in the county in which the road is situated. Wilson v. State, 81 Miss. 404, 33 So. 171 (1903).

3. Specific statutes—In general.

Statute (Ch 172, Laws 1916) providing for additional methods for working public roads and empowering boards of supervisors to raise the necessary funds by the issuance of bonds did not violate this section. Lang v. Board of Supvrs., 114 Miss. 341, 75 So. 126 (1917).

Chapter 150 Laws of 1910 authorizing the board of supervisors through a commission to work public roads is not violative of this section. Weston v. Hancock County, 98 Miss. 800, 54 So. 307 (1911).

4. Construction with other laws, specific statutes.

Chapter 177, Laws of 1916, providing for taxation for road purposes if a county board of supervisors should elect to adopt it, is independent of the last 11 sections of the Code chapter on "Roads, Ferries, and Bridges," and the Code sections did not impose a limitation on the taxing power granted under Ch 177. Martin v. Little, 115 Miss. 195, 76 So. 142 (1917).

RESEARCH REFERENCES

CJS. C.J.S. Convicts § 19.

§ 86. Care of insane and indigent sick

It shall be the duty of the Legislature to provide by law for the treatment and care of the insane; and the Legislature may provide for the care of the indigent sick in the hospitals in the State.

SOURCES: 1869 art XII § 27.

JUDICIAL DECISIONS

1. In general.

By conditioning the admission of a patient for court-ordered mental treatment on the determination by the admitting institution's director that facilities and services are available, § 41-21-77 does not violate Article 4, § 86 of the Mississippi Constitution; however, the statute requires the director of the admitting facility to assume the responsibility of providing treatment, care, and housing for mentally ill minors even if they are not immediately admitted to the facility. Attorney General v. B.C.M., 744 So. 2d 299 (Miss. 1999).

Obligation of legislature under this section, though not a mandatory duty, may be carried out through some agency equipped to render such service, and this constitutional provision contemplates that it may be done in hospitals in (not necessarily of) state. Craig v. Mercy Hospital-Street

Mem., 209 Miss. 427, 45 So. 2d 809 (1950), error overruled, 209 Miss. 490, 47 So. 2d 867 (1950).

Laws 1948, ch 430, § 1, amending Laws 1946, ch. 363, § 6 (Code 1942, § 7146-06), providing for state aid to nonprofit hospitals under supervision by a state agency in connection with a statewide hospital plan does not violate the due process clause of § 14, constitution of 1890, since it bears a reasonable relation to a governmental purpose as expressed in this section. Craig v. North Miss. Community Hosp., 206 Miss. 11, 39 So. 2d 523 (1949).

RESEARCH REFERENCES

ALR. Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum. 20 A.L.R.3d 363.

CJS. C.J.S. Social Security and Public Welfare §§ 231-233.

LOCAL LEGISLATION

Sec.
87. Special or local laws
88. Content of general laws
89. Standing committee for local and private legislation in each house
90. Matters provided for by general laws only

§ 87. Special or local laws

No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this State; nor shall the operation of any general law be suspended by the Legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable, and would be advantageous, no special law shall be enacted.

Cross References — Legislative standing committees on local and private legislation, see MS Const Art. 4, § 89.

Subjects upon which the legislature is prohibited from enacting local, private, or special laws, see MS Const Art. 4, § 90.

JUDICIAL DECISIONS

1. In general.
2. Special or general laws—In general.
3. Bonds, special or general laws.
4. Taxation, special or general laws.
5. Limitations, special or general laws.
6. Business or professions, special or general laws.
7. Laws suspending general laws—In general.
8. Taxation, laws suspending general laws.
9. Individuals or corporations subject to prohibition—In general.
10. Railroads, individuals or corporations subject to prohibition.

1. In general.

Supposed "notice" to a special assistant attorney general is not sufficient under Miss. R. Civ. P. 24(d) or Miss. R. App. P. 44; therefore, a hospital was procedurally barred from bringing constitutional challenges to Miss. Code Ann. § 41-7-191(16) under Miss. Const. Art. 4, § 87, Miss. Const. Art. 3, § 14, and the Fourteenth Amendment where there was no notice to the Mississippi Attorney General. Oktibbeha County Hosp. v. Miss. State Dep't of Health, 956 So. 2d 207 (Miss. 2007).

The three main sections of the Mississippi Constitution dealing with local and private legislation are §§ 87, 89 and 90. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

When local and private legislation does not satisfy the requirements of Mississippi Constitution § 89, or bears no rational relationship to the limited classification, the legislation must be held invalid. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

Legislature has wide discretion in classification of subjects by legislation, and law is general, not local, if classification has reasonable relation to purpose of Act and embraces all of stated class. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

In determining whether law is invalid because of arbitrary or unreasonable classification, object thereof and question whether classification is reasonably expected to attain such object and germane thereto must be considered. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

Law is general when it operates uniformly on all members of class of persons, places or things requiring legislation peculiar to that class. State ex rel. Jordan v. Gilmer Grocery Co., 156 Miss. 99, 125 So. 710 (1930); Jackson v. Deposit Guar. Bank & Trust. Co., 160 Miss. 752, 133 So. 195 (1931).

2. Special or general laws—In general.

The 1989 Public Trust Tidelands Act (§§ 29-15-1 through 29-15-23) was not local or private legislation in violation of §§ 87 and 90(u) of the Mississippi Constitution, but, rather, was a general law because it would be applied to all members of the class of persons whose lands bordered tidelands, and was an effort to manage and protect the public trust lands for the benefit of every citizen of the State. Secretary of State v. Wiesenberg, 633 So. 2d 983 (Miss. 1994).

Subsection (3)(c) of Mississippi Code § 41-13-29 is void in its entirety as in violation of the Mississippi Constitution. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

Chapter 194 Laws of 1926 validating title to real estate owned by any religious society does not violate this section. State ex rel. Knox v. Sisters of Mercy, 150 Miss. 559, 115 So. 323 (1928).

Statute amending prior statute which created the office of county prosecuting attorney so as to make the office optional with the different counties of the state, depending upon local elections called for that purpose as provided for in the amending statutes does not violate this section, since the act is neither a local, private, nor special law. Board of Election Comm'rs v. Davis, 102 Miss. 497, 59 So. 811 (1912).

Chapter 166 Laws of 1906 creating Jefferson Davis County, is not such local legislation forbidden by this section. Conner v. Gray, 88 Miss. 489, 41 So. 186, 9 Am. Ann. Cas. 120 (1906).

3. Bonds, special or general laws.

Section 6 of Chapter 886, Local and Private Laws of Mississippi, Regular Session 1984, which authorizes the City of Hattiesburg to pretermit, or suspend, a bond issue referendum election absent a petition signed by 10 percent of the city's registered voters, does not offend sections 87, 88, 89, or 90 of the Mississippi Constitution. Brandon v. City of Hattiesburg, 493 So. 2d 324 (Miss. 1986).

City of Hattiesburg could lawfully proceed with issuance of general obligation industrial park bonds under Chapter 886, Local and Private Laws of Mississippi, Regular Session 1984, which dispenses with the necessity for a bond issue election, except upon petition of 10 percent of the city's registered voters. Brandon v. City of Hattiesburg, 493 So. 2d 324 (Miss. 1986).

In bond judgment and declaratory judgment actions by objectors against a county utility district that proposed to issue revenue bonds to finance a water and sewage treatment center, Mississippi Constitution, Art IV, §§ 87-90 did not sap the local and private act of its enabling power, where the local and private act furthered the same general purposes and policies as the general act, the differences between the two were primarily procedural or otherwise relatively minor, and the citizens of the political subdivision covered by the local and private act had alternatives in that they could proceed under either that act or the general law. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

A statute authorizing the Board of Supervisors of a certain county to borrow a certain amount of money and to issue bonds or certificates of indebtedness of such county for the payment of such loans is not a private law or a law in favor of private persons, but is a local and public law. Haas v. Hancock County, 183 Miss. 365, 184 So. 812 (1938).

Chapter 290 Laws of 1918 authorizing Tupelo to issue bonds for building and equipment of hospital is not violative of this section. Feemster v. City of Tupelo, 121 Miss. 733, 83 So. 804 (1920).

4. Taxation, special or general laws.

An amendment of § 27-35-309 exempting from county, municipal and district ad valorem taxes any in-state nuclear generating plant owned or operated by a public utility rendering electrical service within the state, was a general law within the meaning of Mississippi Constitution Article 4 § 87, rather than invalid local and private legislation, since it would "bring into its predicament" any privately owned nuclear facilities built in the future. Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

Local and private legislation authorizing a county board of supervisors to impose a two-mill ad valorem tax for garbage collection and disposal in certain unincorporated areas of the county did not violate the constitutional requirement for uniform and equal taxation throughout the state or the constitutional prohibition against the enactment of special or local laws for the benefit of individuals or corporations, where the assessments and tax levy were equal and uniform throughout the respective garbage disposal districts and where it could not be said that the sanitary condition existing in the county at issue was a common characteristic or constituted a classification for every other county in the state. Harris v. Harrison County Bd. of Supvrs., 366 So. 2d 651 (Miss. 1979).

Chapter 231 Acts of 1906 withdrawing from the revenue agent authority to prosecute certain suits or appeals is a general law and not in contravention of this section. Johnston v. Reeves & Co., 112 Miss. 227, 72 So. 925 (1916).

Chapter 57 Laws of 1904 authorizing reimbursement of a tax collector for money erroneously paid into the state treasury is not a violation of this section. Henry v. Carter, 88 Miss. 21, 40 So. 995 (1906).

5. Limitations, special or general laws.

The ten-year limitation contained in § 15-1-41 does not violate either Article 3, § 24 or Article 4, § 87 of the Mississippi Constitution. Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981).

A statute of limitations with reference to one year for bringing suits against an insurance company is a general statute. Taylor v. Farmers' Fire Ins. Co., 101 Miss. 480, 58 So. 353 (1912).

6. Business or professions, special or general laws.

In view of its membership, its functions and the purposes of its creation, the State Bar, created by the Act possesses none of the attributes of a private corporation, and the State Bar Act is in no sense a local or private act. Mississippi State Bar v. Collins, 214 Miss. 782, 59 So. 2d 351 (1952).

Statute regulating practice of barbering in all municipalities of 500 or more inhabitants held not local nor invalid as making arbitrary or unreasonable classification. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

Barber cannot complain of exemption of beauty operators from application of statute regulating practice of barbering as arbitrary and unreasonable. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

Statute permitting a corporation to file report of organization after the time limited by § 930, Code of 1906 (§ 4104, Hemingway's Code), being neither special nor local legislation, did not violate this section. Southern Coal Co. v. Yazoo Ice & Coal Co., 118 Miss. 860, 80 So. 334 (1919).

7. Laws suspending general laws—In general.

H.B. 1671, Reg. Sess. (Miss. 2006), was a private law which enabled the city to obtain municipal parking facilities in exchange for the conveyance of air and development rights; the last sentences of sections 3 and 4 were unconstitutional under Miss. Const. Art. IV, § 87, as exempting the bill from compliance with Miss. Code Ann. §§ 21-17-1 and 31-7-13 and were not merely procedural and minor. Oxford Asset Partners, LLC v. City of Oxford, 970 So. 2d 116 (Miss. 2007).

A local law authorizing a city to issue bonds for the purpose of acquiring hospital facilities to be leased to a non-profit corporation provided an alternative to the method of acquiring hospitals provided by general law and did not suspend the general law, as prohibited by Mississippi Constitution, Article 4, § 87; thus, Mississippi Constitution, Article 4, § 89 was applicable. Kerley v. City of Hattiesburg, 361 So. 2d 44 (Miss. 1978).

That portion of a statute providing for the underground storage of natural gas exempting therefrom "a county having two judicial districts and being intersected by U.S. Highway 84 and Interstate 59" was a private and local exception suspending the operation of the general legislative act, did not amount to a classification germane to the subject matter of the legislation, and was, therefore, unconstitutional and void. Smith v. Transcontinental Gas Pipeline Corp., 310 So. 2d 281 (Miss. 1975).

A special act of the Legislature authorizing the board of supervisors of a designated county to reimburse a former sheriff thereof for expense incurred in purchasing disinfectants for the county jail, which claim had previously been disallowed by the board of supervisors, was void as being within the prohibition of this section in suspending the operation of a general law (§ 6064, Code 1930) relating to the purchase of supplies by the county which expressly requires contracts for the purchase of supplies, etc., to be let upon competitive bids and prohibits any individual members of the board from making such purchases. Beall v. Board of Supvrs., 191 Miss. 470, 3 So. 2d 839 (1941).

General law may be suspended by another general law. City of Jackson v. Deposit Guar. Bank & Trust Co., 160 Miss. 752, 133 So. 195 (1931).

Statute suspending operation of bank guaranty law until guaranty certificates are paid is general, and not prohibited by Constitution. City of Jackson v. Deposit Guar. Bank & Trust Co., 160 Miss. 752, 133 So. 195 (1931).

Statute forbidding unlawful combinations of cotton ginners, dividing gin operators into two classes, those operating gins in one place and those operating gins in two or more places, held not invalid. State ex rel. Jordan v. Gilmer Grocery Co., 156 Miss. 99, 125 So. 710 (1930).

Chapter 704, Laws of 1924, ratifying unlawful disbursement of county funds by a board of supervisors, for which a general law imposed personal liability upon the members of the board, violated this section of the constitution as constituting suspension of a general law for the benefit of individuals. Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925).

8. Taxation, laws suspending general laws.

With respect to a statute providing for suit to confirm title and requiring the court to validate and perfect title to patents issued for tax forfeited land unless the patent was obtained by "actual fraud on the part of the patentee or his representative," construction of the quoted phrase to mean such fraud in the procurement of the patent as the making of false statements to, or intentionally withholding important information from, the state land commissioner as to material facts in regard to which the applicant is required to make a disclosure under oath, and which false representations were either known to be false, or were made in reckless disregard of whether the same were true or false, would not suspend the operation of any general law for the benefit of any individual, private corporation or association, in contravention of this section, since it leaves in full force and effect the general law which prohibits a corporation or nonresident aliens from becoming the owner of any public land, and which declares every patent issued in contravention thereof shall be void; and it also leaves unimpaired the statute which declares that all lands acquired, directly or indirectly, by any person in excess of one quarter section of state forfeited tax land in one year, shall escheat to the state; nor does it affect the statute invalidating all fraudulent purchases of public land except the rights of innocent purchasers without notice. State v. Roell, 192 Miss. 873, 7 So. 2d 867 (1942); State v. Lewis, 192 Miss. 890, 7 So. 2d 871 (1942).

Statutes exempting domestic insurance corporations from ad valorem taxes held not invalid as special law or suspension of general laws for benefit of corporations. Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

Statute postponing tax sales held not to violate constitutional provision against suspending general law. Hart v. Backstrom, 148 Miss. 13, 113 So. 898 (1927).

9. Individuals or corporations subject to prohibition—In general.

Public utility district is public entity to which § 87 is wholly inapplicable. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

Local utility district may, consistent with state constitution, be organized and exist under local and private law in face of general law respecting organization and existence of such district, so long as local and private act furthers same general purposes and policies as general act and so long as differences between 2 are primarily procedural or otherwise relatively minor. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

This section applies only to private corporations and does not prohibit enactment of local law authorizing water and light commission of specified city to establish pension, disability, and annuity retirement system for employees of electric light system and water works. Palmertree v. Garrard, 207 Miss. 796, 43 So. 2d 381 (1949).

This section has no application to municipal corporations, but applies only to individuals and private corporations. City of Greenwood v. Telfair, 207 Miss. 200, 42 So. 2d 120 (1949).

Section 5196, Code of 1930, providing that every person who solicits insurance on behalf of any insurance company, etc., shall be held to be the agent of the company for which the act is done cannot be suspended arbitrarily. Columbian Mut. Life Ins. Co. v. Gipson, 185 Miss. 890, 189 So. 799 (1939).

10. Railroads, individuals or corporations subject to prohibition.

A special act suspending a general law and relating to a certain railroad is void. State v. Mobile, J. & K.C.R.R., 86 Miss. 172, 38 So. 732, 122 Am. St. R. 277 (1905), aff'd, 210 U.S. 187, 28 S. Ct. 650, 52 L. Ed. 1016 (1908).

Statute authorizing the Yazoo & Mississippi Valley Railroad Company to lease or purchase and to maintain and operate a branch of another railroad was unconstitutional under this section as suspending a general law making it unlawful for competing railroads operating parallel lines of road within twenty miles of each other to lease or purchase directly or indirectly the opposing line or any part thereof or any interest therein. Yazoo & Miss. V. Ry. v. Southern Ry., 83 Miss. 746, 36 So. 74 (1904).

A railroad corporation is a private one within the meaning of this section. Yazoo & Miss. V. Ry. v. Southern Ry., 83 Miss. 746, 36 So. 74 (1904).

RESEARCH REFERENCES

ALR. Validity of statute or ordinance regulation barbers. 20 A.L.R. 1111, 98 A.L.R. 1088.

Constitutionality of statutes relieving officer or public depository or his surety, from liability for loss of public funds. 38 A.L.R. 1512, 96 A.L.R. 295.

Power to extend boundaries of municipal corporations. 64 A.L.R. 1335.

Constitutionality of city manager or

commission form of municipal government. 67 A.L.R. 737.

Constitutionality of statutes regulating business of making small loans. 69 A.L.R. 581; 125 A.L.R. 743; 149 A.L.R. 1424.

Constitutionality of levee and flood control acts. 70 A.L.R. 1274.

Constitutionality of statutes in relation to registration before voting at election or primary. 91 A.L.R. 349.

Power of municipal or school authorities to prescribe vaccination or other health measure as a condition of school attendance. 93 A.L.R. 1413.

Power to detach land from municipal corporations, towns, or villages, 117 A.L.R. 267.

Constitutional provision prohibiting local or special legislation as applied to statutes relating to juries. 155 A.L.R. 789.

Constitutionality of statute appropriating money to reimburse public officer or employee for money paid or liability incurred by him in consequence of breach of duty. 155 A.L.R. 1438.

Comment Note: What constitutes moral obligation justifying appropriation of public moneys for benefit of an individual. 172 A.L.R. 1407.

Construction and effect of absentee voters' laws. 97 A.L.R.2d 257.

Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum. 20 A.L.R.3d 363.

Validity of statutory classifications based on population — zoning, building, and land use statutes. 98 A.L.R.3d 679.

Validity of statutory classifications based on population-tax statutes. 98 A.L.R.3d 1083.

Validity of statutory classifications based on population — intoxicating liquor statutes. 100 A.L.R.3d 850.

CJS. C.J.S. Statutes §§ 145 to 200, 244.

Law Reviews. 1978 Mississippi Supreme Court Review: Administrative Law. 50 Miss. L. J. 11, March 1979.

General, Special, Local and Private Legislation: A Mississippi Overview. 56 Miss L. J. 327, August, 1986.

§ 88. Content of general laws

The Legislature shall pass general laws, under which local and private interest shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment.

JUDICIAL DECISIONS

1. In general.
2. Laws applicable to municipalities — In general.
3. — — Annexation.
4. Incorporation of municipalities, laws applicable to municipalities.
5. Amendment of municipal charters, laws applicable to municipalities.
6. Laws applicable to corporations.

1. In general.

This section is mandatory. Monette v. State, 91 Miss. 662, 44 So. 989, 124 Am. St. R. 715 (1907), overruled on other grounds, Glover v. Columbus, 197 Miss. 467, 19 So. 2d 756 (1944).

This section does not deprive the legislature of the right to control the taxing power previously delegated to a municipality by a special charter. Adams v. Kuykendall, 83 Miss. 571, 35 So. 830 (1904).

Neither this section nor § 91 affected § 8 c 250 of the Laws of 1890 authorizing a salary to members of the board of supervisors of Madison County, such sections being prospective. Adams v. Dendy, 82 Miss. 135, 33 So. 843 (1903).

The section is prospective only and did not repeal existing municipal charters. Lum v. City of Vicksburg, 72 Miss. 590, 18 So. 476 (1895).

2. Laws applicable to municipalities — In general.

Chancellor's finding comported with the law in holding that under the constitutional scheme, there is no prohibition upon the Legislature's enacting upon a given subject matter both a general law and a local and private law. It was within the Legislature's power to protect the vitality of a local utility district by including the language in H.B. 1730 (laws of 1996, ch. 970), § 12, that states that the district may not be annexed unless it is annexed in its entirety; § 12 did not offend the mandate of Miss. Const. Art, 4, § 88, and neither was it at odds with the general laws regarding annexation. City of Laurel v. Sharon Waterworks Ass'n (In re Extension of the Boundaries of the City of Laurel), 17 So. 3d 529 (Miss. 2009).

Under the Mississippi Constitution, the state legislature was required to pass general laws, under which local and private interests were provided for, and under which cities and towns could be chartered; since the city's charter did not allow the mayor to cast a vote on the appointment of a city attorney and was not otherwise authorized to cast a vote unless a tie vote occurred, the city council's vote pursuant to its charter of three votes for a particular person to be appointed as city attorney and two votes against, without the mayor's participation in the vote, had to stand. Tisdale v. City Council of Aberdeen, 856 So. 2d 323 (Miss. 2003).

Municipality operating under Private Charter could employ city administrator whose duties violated neither charter nor state statutes governing employment of municipal officials or operation of municipal departments; absent some indication that rights may have been violated, question of consent to and approval of administrator's conduct in hiring and firing city employees is political in nature and left to city's electorate. Peterson v. McComb City, 504 So. 2d 208 (Miss. 1987).

City of Hattiesburg could lawfully proceed with issuance of general obligation industrial park bonds under Chapter 886, Local and Private Laws of Mississippi, Regular Session 1984, which dispenses with the necessity for a bond issue election, except upon petition of 10 percent of the city's registered voters. Brandon v. City of Hattiesburg, 493 So. 2d 324 (Miss. 1986).

Section 6 of Chapter 886, Local and Private Laws of Mississippi, Regular Session 1984, which authorizes the City of Hattiesburg to pretermit, or suspend, a bond issue referendum election absent a petition signed by 10 percent of the city's registered voters, does not offend sections 87, 88, 89, or 90 of the Mississippi Constitution. Brandon v. City of Hattiesburg, 493 So. 2d 324 (Miss. 1986).

In bond judgment and declaratory judgment actions by objectors against a county utility district that proposed to issue revenue bonds to finance a water and sewage treatment center, Mississippi Constitution, Art IV, §§ 7-90 did not sap the local and private act of its enabling power, where the local and private act furthered the same general purposes and policies as the general act, the differences between the two were primarily procedural or otherwise relatively minor, and the citizens of the political subdivision covered by the local and private act had alternatives in that they could proceed under either that act or the general law. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

The Housing Authorities Act (Code 1942, §§ 7295 et seq.) does not exclude municipalities operating under special charter. Quinn v. City of McComb, 212 Miss. 730, 55 So. 2d 479 (1951).

This section is not violated by enactment of local law authorizing water and light commission of specified city operating under commission form of government to establish pension, disability, and annuity retirement system for employees for city's light and water works. Palmertree v. Garrard, 207 Miss. 796, 43 So. 2d 381 (1949).

City though having special charter may pave under Laws 1924, c 194. McClure v. City of Natchez, 151 Miss. 718, 118 So. 616 (1928).

Local laws attempting to validate ordinance extending municipal limits to include territory of existing town held invalid. City of Pascagoula v. Krebs, 151 Miss. 676, 118 So. 286 (1928).

The Act of 1894 (p 29) authorizing the intervention of the state revenue agent for the assessment and collection of municipal taxes on property that had escaped taxation is not unconstitutional on the alleged ground that it deprives the city of the right of local self-government, although the city is operating under a special charter delegating to it the power of taxation. Adams v. Kuykendall, 83 Miss. 571, 35 So. 830 (1904).

The legislature can constitutionally confer on municipalities the power, by ordinance, to punish as an offense against the municipality an act which constitutes a crime against the state. Town of Ocean Springs v. Green, 77 Miss. 472, 27 So. 743 (1900).

3. — — Annexation.

Language of Miss. Const. Art. 4, § 90 did not support the proposition that general legislation, as contemplated by Miss. Const. Art. 4, § 88, was required on the subject of annexation. Miss. Const. Art. 4, § 90 listed twenty-one instances in which general laws were required; none of these instances included annexation. City of Laurel v. Sharon Waterworks Ass'n (In re Extension of the Boundaries of the City of Laurel), 17 So. 3d 529 (Miss. 2009).

4. Incorporation of municipalities, laws applicable to municipalities.

Statute which provides for incorporation of municipality by proclamation of the governor, does not violate the constitution which provides that the legislature shall pass general laws, under which private interest shall be provided for and protected, and under which cities and towns may be chartered and their charters amended. Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 62 So. 2d 772 (1953).

Section 2921 of the Code of 1892 (Code 1906, § 3312), authorizing the governor to pass upon and approve applications for the incorporation of cities, towns and villages, is constitutional. City of Jackson v. Whiting, 84 Miss. 163, 36 So. 611 (1904).

5. Amendment of municipal charters, laws applicable to municipalities.

The Legislature has granted each municipality power to amend its special charter, but when municipality undertakes to make this amendment whether as to substance or form, it must follow the statute as to manner and method by which such amendment may be made. Bishop v. City of Meridian, 223 Miss. 703, 79 So. 2d 221 (1955), error overruled, 223 Miss. 713, 79 So. 2d 815 (1955).

The legislature may amend the charters of municipalities, operating under special charters, by a general law applying to all municipalities. Quinn v. City of McComb, 212 Miss. 730, 55 So. 2d 479 (1951).

Chapter 134, Acts of 1900, a special act amending the charter of the city of Meridian violates this section. Monette v. State, 91 Miss. 662, 44 So. 989, 124 Am. St. R. 715 (1907), overruled on other grounds, Glover v. Columbus, 197 Miss. 467, 19 So. 2d 756 (1944).

An act of the legislature which provides by a general law a method whereby cities can amend their charters does not violate this section. Ex parte Dickson, 89 Miss. 778, 42 So. 233 (1906).

This section merely requires the passage of uniform general laws prescribing the mode by which municipal charters may be granted and amended, and does not require such laws to contain the entire contents of such amendments. Yazoo City v. Lightcap, 82 Miss. 148, 33 So. 949 (1903).

6. Laws applicable to corporations.

Chapter 194, Laws of 1926, validating title to real estate owned by any religious society does not violate this section. State ex rel. Knox v. Sisters of Mercy, 150 Miss. 559, 115 So. 323 (1928).

Statute permitting a corporation to file report of organization after the time limited by § 930, Code of 1906 (§ 4104, Hemingway's Code), being neither special nor local legislation, did not violate this section. Southern Coal Co. v. Yazoo Ice & Coal Co., 118 Miss. 860, 80 So. 334 (1919).

Under this section, the right is given to the legislature to create corporations and amend or change charters of corporations, and where the charter of the corporation itself provides that it may be amended, as it does by reading into it § 899, Code 1906, which was in force when such charter was granted and which permitted such amendments, and the corporation so provides by its bylaws, an amendment authorized by a resolution passed by a majority of the stockholders of a state bank decreasing the amount of the capital stock was legal and valid. Perry v. Bank of Commerce, 116 Miss. 838, 77 So. 812 (1918).

RESEARCH REFERENCES

ALR. Constitutional provisions against special legislation relating to counties or municipalities as affected by the distinction between their political and nonpolitical character. 50 A.L.R. 1163.

Delegating authority to county or municipal corporation to make violation of ordinance crime or to provide criminal punishment. 174 A.L.R. 1343.

CJS. C.J.S. Municipal Corporations §§ 10, 14, 17, 18.

C.J.S. Statutes § 177.

Law Reviews. General, Special, Local and Private Legislation: A Mississippi Overview. 56 Miss. L. J. 327, August, 1986.

§ 89. Standing committee for local and private legislation in each house

There shall be appointed in each house of the Legislature a standing committee on local and private legislation; the house committee to consist of seven representatives, and the Senate committee of five Senators. No local or private bill shall be passed by either House until it shall have been referred to said committee thereof, and shall have been reported back with a recommendation in writing that it do pass, stating affirmatively the reasons therefor, and why the end to be accomplished should not be reached by a general law, or by a proceeding in court; or if the recommendation of the committee be that the bill do not pass, then it shall not pass the House to which it is so reported unless it be voted for by a majority of all members elected thereto. If a bill is passed in conformity to the requirements hereof, other than such as are prohibited in the next section, the courts shall not, because of its local, special, or private nature, refuse to enforce it.

Cross References — Referral of bill to committee before enactment, see Miss. Const. Art. 4, § 74.

JUDICIAL DECISIONS

1. In general.

City of Hattiesburg could lawfully proceed with issuance of general obligation industrial park bonds under Chapter 886, Local and Private Laws of Mississippi, Regular Session 1984, which dispenses with the necessity for a bond issue election, except upon petition of 10 percent of the city's registered voters. Brandon v. City of Hattiesburg, 493 So. 2d 324 (Miss. 1986).

Section 6 of Chapter 886, Local and Private Laws of Mississippi, Regular Session 1984, which authorizes the City of Hattiesburg to pretermit, or suspend, a bond issue referendum election absent a petition signed by 10 percent of the city's registered voters, does not offend sections 87, 88, 89, or 90 of the Mississippi Constitution. Brandon v. City of Hattiesburg, 493 So. 2d 324 (Miss. 1986).

Since Mississippi Code § 41-13-29(3)(c) contravenes Mississippi Constitution § 90, § 89 of the Constitution is inapplicable. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

When local and private legislation does not satisfy the requirements of Mississippi Constitution § 89, or bears no rational relationship to the limited classification, the legislation must be held invalid. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

In bond judgment and declaratory judgment actions by objectors against a county utility district that proposed to issue revenue bonds to finance a water and sewage treatment center, Mississippi Constitution, Art IV, §§ 87-90 did not sap the local and private act of its enabling power, where the local and private act furthered the same general purposes and policies as the general act, the differences between the two were primarily procedural or otherwise relatively minor, and the citizens of the political subdivision covered by the local and private act had alternatives in that they could proceed under either that act or the general law. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

A local law authorizing a city to issue bonds for the purpose of acquiring hospital facilities to be leased to a non-profit corporation provided an alternative to the method of acquiring hospitals provided by general law and did not suspend the general law, as prohibited by Mississippi Constitution, Article 4, § 87; thus, Mississippi Constitution, Article 4, § 89 was applicable. Kerley v. City of Hattiesburg, 361 So. 2d 44 (Miss. 1978).

In a proceeding for the validation of county funding bonds authorized by a statute for the purpose of paying county warrants and accounts outstanding and unpaid, the county was not bound to show a compliance with the provisions of this section, outlining how local and private legislation should be passed in the legislature, since the court will not look to the journals of the legislature to see whether the legislature has complied with the provisions of this section in the passage of a local, private of special law. Haas v. Hancock County, 183 Miss. 365, 184 So. 812 (1938).

Statute authorizing one railroad company to lease or purchase the branch line of another railroad in violation of § 87 of the Constitution could not be saved by this section, since the local or private bills meant by this section are those other than to suspend the operation of a general law for the benefit of an individual or private corporation or association. Yazoo & Miss. V. Ry. v. Southern Ry., 83 Miss. 746, 36 So. 74 (1904).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 37, 44-46.
C.J.S. Statutes § 23.

Law Reviews. General, Special, Local and Private Legislation: A Mississippi Overview. 56 Miss. L. J. 327, August, 1986.

§ 90. Matters provided for by general laws only

The Legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.:

(a) Granting divorces;

(b) Changing the names of persons, places, or corporations;

(c) Providing for changes of venue in civil and criminal cases;

(d) Regulating the rate of interest on money;

(e) Concerning the settlement or administration of any estate, or the sale or mortgage of any property, of any infant, or of a person of unsound mind, or of any deceased person;

(f) The removal of the disability of infancy;

(g) Granting to any person, corporation, or association the right to have any ferry, bridge, road, or fish-trap;

(h) Exemption of property from taxation or from levy or sale;

(i) Providing for the adoption or legitimation of children;

(j) Changing the law of descent and distribution;

(k) Exempting any person from jury, road, or other civil duty (and no person shall be exempted therefrom by force of any local or private law);

(*l*) Laying out, opening, altering, and working roads and highways;

(m) Vacating any road or highway, town plat, street, alley, or public grounds;

(n) Selecting, drawing, summoning, or empaneling grand or petit juries;

(o) Creating, increasing, or decreasing the fees, salary, or emoluments of any public officer;

(p) Providing for the management or support of any private or common school, incorporating the same, or granting such school any privileges;

(q) Relating to stock laws, water-courses, and fences;

(r) Conferring the power to exercise the right of eminent domain, or granting to any person, corporation, or association the right to lay down railroad tracks or street-car tracks in any other manner than that prescribed by general law;

(s) Regulating the practice in courts of justice;

(t) Providing for the creation of districts for the election of justices of the peace and constables; and

(u) Granting any lands under control of the state to any person or corporation.

SOURCES: 1817 art VI § 7; 1832 art VII § 15; 1869 art IV § 22.

Cross References — Donation or grant of state lands to corporations, see Miss. Const. Art. 4, § 95.

Requirement for enactment of law granting donation or gratuity, see Miss. Const. Art. 4, § 66.

JUDICIAL DECISIONS

1. In general.
2. Specific prohibitions—In general.
3. Bond issues, specific prohibition.
4. Creation of judicial districts, specific prohibitions.
5. Exemptions of political subdivisions, specific prohibitions.
6. Regulation of business or professions, specific prohibitions.
7. Regulating rate of interest, specific prohibitions.
8. Exemption of property from taxation, levy or sale, specific prohibitions.
9. Laying out, opening, altering, and working roads and highways, specific prohibitions.
10. Composition, selection and exemption of juries, specific prohibitions.
11. Creating, increasing, or decreasing the fees, salary, or emoluments of public officers, specific prohibitions.
12. Management and support of schools, etc., specific prohibitions.
13. Stock laws, watercourses, and fences, specific prohibitions.
14. Right of eminent domain, specific

prohibitions.

15. Granting lands under control of state, specific prohibitions.

1. In general.

Language of Miss. Const. Art. 4, § 90 did not support the proposition that general legislation, as contemplated by Miss. Const. Art. 4, § 88, was required on the subject of annexation. Miss. Const. Art. 4, § 90 listed twenty-one instances in which general laws were required; none of these instances included annexation. City of Laurel v. Sharon Waterworks Ass'n (In re Extension of the Boundaries of the City of Laurel), 17 So. 3d 529 (Miss. 2009).

The three main sections of the Mississippi Constitution dealing with local and private legislation are §§ 87, 89 and 90. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

Statutory classification is permissible where basis is not arbitrary. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

The prohibition of local, private, and special laws does not prevent classification having some reasonable basis in fact. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

A law is general under this provision of constitution when it applies to and operates uniformly on all members of any class of persons, places, or things requiring legislation peculiar to particular class dealt with by the law. State v. Southern Pine Co., 205 Miss. 80, 38 So. 2d 442 (1949).

The substances rather than the form will be considered in determining whether it is general or local or special law. Toombs v. Sharkey, 140 Miss. 676, 106 So. 273 (1925).

This section is both prohibitory and mandatory; local, private, or special laws shall not be passed by the Legislature in the enumerated cases, and the Legislature must pass general laws governing the subjects named. Halsell v. Merchants' Union Ins. Co., 105 Miss. 268, 62 So. 235 (1913), on suggestion of error, 105 Miss. 280, 62 So. 645, Am. Ann. Cas. 1916E,229 (1913).

This paragraph repealed previously existing laws the passage of which are inhibited by it. Alabama & V. Ry. Co. v. Gibbs, 12 So. 545 (Miss. 1893).

2. Specific prohibitions—In general.

Creation of public utility district pursuant to private or special law does not violate § 90. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

3. Bond issues, specific prohibition.

Section 6 of Chapter 886, Local and Private Laws of Mississippi, Regular Session 1984, which authorizes the City of Hattiesburg to pretermit, or suspend, a bond issue referendum election absent a petition signed by 10 percent of the city's registered voters, does not offend sections 87, 88, 89, or 90 of the Mississippi Constitution. Brandon v. City of Hattiesburg, 493 So. 2d 324 (Miss. 1986).

City of Hattiesburg could lawfully proceed with issuance of general obligation industrial park bonds under Chapter 886, Local and Private Laws of Mississippi, Regular Session 1984, which dispenses with the necessity for a bond issue election, except upon petition of 10 percent of the city's registered voters. Brandon v. City of Hattiesburg, 493 So. 2d 324 (Miss. 1986).

4. Creation of judicial districts, specific prohibitions.

A statute providing for the creation of a second judicial district in a certain county is a general law, and is not a local and private, or special law prohibited by the Constitution. Carter v. Harrison County Election Comm'n, 183 So. 2d 630 (Miss. 1966).

5. Exemptions of political subdivisions, specific prohibitions.

That portion of a statute providing for the underground storage of natural gas exempting therefrom "a county having two judicial districts and being intersected by U.S. Highway 84 and Interstate 59" was a private and local exception suspending the operation of the general legislative act, did not amount to a classification germane to the subject matter of the legislation, and was, therefore, unconstitutional and void. Smith v. Transcontinental Gas Pipeline Corp., 310 So. 2d 281 (Miss. 1975).

6. Regulation of business or professions, specific prohibitions.

In view of its membership, its functions and the purposes of its creation, the State Bar, created by the Act possesses none of the attributes of a private corporation, and the State Bar Act is in no sense a local or private Act. Mississippi State Bar v. Collins, 214 Miss. 782, 59 So. 2d 351 (1952).

7. Regulating rate of interest, specific prohibitions.

The Small Loan Regulatory Act is not limited to any special person or group but is available to all who can qualify and secure the licenses to operate thereunder, and is therefore not a special but a general act and does not violate the constitution. Giles v. Friendly Fin. Co., 185 So. 2d 659 (Miss. 1966), followed, Hart v. Guar. Loan Corp., 185 So. 2d 664 (Miss. 1966), followed, Hart v. Cornell, 185 So. 2d 664 (Miss. 1966), appeal dismissed, cert. denied, 385 U.S. 21, 87 S. Ct. 228, 17 L. Ed. 2d 20 (1966).

Chapter 167, Laws of 1912 relating to rate of interest to be charged by building and loan associations was not repugnant to this section. Halsell v. Merchants' Union Ins. Co., 105 Miss. 268, 62 So. 235 (1913), on suggestion of error, 105 Miss. 280, 62 So. 645, Am. Ann. Cas. 1916E,229 (1913).

Local laws regulating the rate of interest on money are unconstitutional. Mississippi Bldg. & Loan Ass'n v. McElveen, 100 Miss. 16, 56 So. 187 (1911).

8. Exemption of property from taxation, levy or sale, specific prohibitions.

Section 27-35-35 and § 27-35-37 are not unconstitutionally vague and ambiguous in that they fail to set forth a specific formula for valuation of branch bank intangibles. Any vagueness or ambiguity in § 27-35-35 and § 27-35-37 when read in isolation is cured by reading them in pari materia with other statutes dealing with the same or similar subjects, especially § 27-13-13. Additionally, § 27-35-35 is not unconstitutional on the ground that it fails to allow deduction from taxable capital (i.e., net worth) those amounts invested in tax exempt government securities since government obligations are expressly exempted from ad valorem taxation by § 27-31-1(u). It is clear that § 27-31-1(u) is to be read in pari materia with all taxation statutes and nothing in § 27-35-35 implies that the general exemptions of § 27-31-1 are inapplicable to banks. Calhoun County Bd. of Supvrs. v. Grenada Bank, 543 So. 2d 138 (Miss. 1988).

The legislature may use its power to grant exemptions in a manner which divests its political subdivisions of certain taxing authority they would otherwise hold. Morco Indus., Inc. v. City of Long Beach, 530 So. 2d 141 (Miss. 1988).

An act (Laws 1948, ch 738) authorizing city to pay from its general funds into special street improvement bond fund an amount equal to the principal sum of assessments authorized to be canceled so that sufficient funds will be available for payment of said bond does not violate § 90 of the Constitution, prohibiting passage of an act exempting property from taxation or from levy or sale, since act provided that lien of special street improvement bonds on abutting property was not to be affected and act was not to be offered as evidence of any defense to said bonds or for failure of the city to make sufficient assessment against property. City of Greenwood v. Telfair, 207 Miss. 200, 42 So. 2d 120 (1949).

Contention that religious organization's charter, granted prior to adoption of Constitution in 1890, exempting property from taxation violated Constitution prohibiting passage of local, private, or special laws exempting property from taxation involved question of effect of amendment of organization's charter after adoption of Constitution. City of Biloxi v. Trustees of Miss. Annual Conference Endowment Fund, 179 Miss. 47, 173 So. 797 (1937).

Where charter of religious organization, granted by special Act prior to adoption of Constitution in 1890, exempted organization from taxation, amendment of charter after adoption of Constitution rendered organization subject to provision of Constitution prohibiting passage of local, private, or special laws exempting property from taxation and rendered the exemption originally granted to the organization void, notwithstanding amendment of organization's charter merely provided for extension of terms of office of trustees and officers and for filling of vacancies in such offices. City of Biloxi v. Trustees of Miss. Annual Conference Endowment Fund, 179 Miss. 47, 173 So. 797 (1937).

Statutes construed as not freeing title acquired at city's sale for ad valorem taxes from lien for special improvement assessment do not violate constitutional provision respecting laws exempting property from taxation. Curlee v. Mutual Life Ins. Co., 144 So. 686 (Miss. 1932).

Statute exempting surplus of banks from taxation until outstanding guaranty certificates are liquidated does not violate constitutional provision prohibiting special tax exemption laws. City of Jackson v. Deposit Guar. Bank & Trust Co., 160 Miss. 752, 133 So. 195 (1931).

Statutes exempting domestic insurance corporations from ad valorem taxes held not invalid as special law exempting property from taxation. Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

Statute withdrawing from state revenue agent authority to prosecute suits or appeals to assess for taxation, or to collect taxes on, agricultural products, and abating all such pending suits, does not exempt property from taxation within the purview of this paragraph. Johnston v. Reeves & Co., 112 Miss. 227, 72 So. 925 (1916).

9. Laying out, opening, altering, and working roads and highways, specific prohibitions.

Law validating organization of road district and issuance of bonds did not violate this section, because it did not provide for the laying out, opening, altering, or working of public roads. Memphis & C. Ry. v. Bullen, 154 Miss. 536, 121 So. 826 (1928), aff'd, 282 U.S. 241, 51 S. Ct. 108, 75 L. Ed. 315 (1931).

Statute providing for additional methods in working public roads and for the issuance of bonds therefor, being applicable throughout the state, was not unconstitutional. Lang v. Board of Supvrs., 114 Miss. 341, 75 So. 126 (1917).

Statute providing for issuance of bonds to pay for road improvements merely provided for the means of raising revenue for the working of roads and highways, and, therefore, did not violate the constitutional prohibition of special or local laws with respect to the laying out, opening, altering and working of roads and highways. Robertson v. Board of Supvrs., 112 Miss. 54, 72 So. 852 (1916).

10. Composition, selection and exemption of juries, specific prohibitions.

Existing law exempting members of Scranton Fire Company No. 1, of the town of Scranton, from road tax or duty, being within the prohibition of this paragraph, was repealed thereby. Chidsey v. Scranton, supra. Moore v. Cunningham, 124 Miss. 537, 87 So. 112 (1921).

A law applicable only to a single county, providing that no person shall be liable to jury duty outside the district in which he lives, violates paragraph (n) of this section. Burt v. State, 86 Miss. 280, 38 So. 233 (1905).

11. Creating, increasing, or decreasing the fees, salary, or emoluments of public officers, specific prohibitions.

Subsection (3)(c) of Mississippi Code § 41-13-29 is void in its entirety as in violation of the Mississippi Constitution. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

Since Mississippi Code § 41-13-29(3)(c) contravenes Mississippi Constitution § 90, § 89 of the Constitution is inapplicable. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

Since the office of community hospital trustee is a public office, Mississippi Constitution § 90(o) is applicable to Mississippi Code § 41-13-29(3)(c). State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

Chapter 211, Laws of 1924 with reference to providing greater compensation for prosecuting attorneys in certain counties violates § 90 of the Constitution. Toombs v. Sharkey, 140 Miss. 676, 106 So. 273 (1925).

Statute withdrawing from state revenue agent authority to prosecute suits or appeals to assess for taxation, or to collect taxes on, agricultural products, and abating all such pending suits, was not intended to increase, or decrease the fees, salary, or emoluments of any public officer within the prohibition of this paragraph. Johnston v. Reeves & Co., 112 Miss. 227, 72 So. 925 (1916).

Statute amending prior statute which created the office of county prosecuting attorney so as to make the office optional with the different counties of the state, depending upon local elections called for that purpose as provided for in the amending statute, did not violate this section, since the act is neither a local, private, nor special law. Board of Election Comm'rs v. Davis, 102 Miss. 497, 59 So. 811 (1912).

Statutes authorizing the board of supervisors to provide an abstract of title to lands in the county and cause it to be kept up to date at all times and empowering the chancery clerk to charge abstract fees are not unconstitutional. Shingleur-Johnson & Co. v. Canton Cotton Whse. Co., 78 Miss. 875, 29 So. 770, 84 Am. St. R. 655 (1901).

12. Management and support of schools, etc., specific prohibitions.

That part of the statute providing for the selection and term of trustees of consolidated school districts that reads "in which Highways 14 and 15 intersect" was declared unconstitutional and such offensive language would be stricken from the statute; the remaining portion of the statute was declared constitutional. Lovorn v. Hathorn, 365 So. 2d 947 (Miss. 1978), cert. denied, 441 U.S. 946, 99 S. Ct. 2167, 60 L. Ed. 2d 1049 (1979)'.

This provision is not violated by Code 1942, § 6248-07, relating to transfers of pupils from one county to another. Board of Educ. v. State Educ. Fin. Comm'n, 243 Miss. 782, 138 So. 2d 912 (1962).

There was no violation of paragraph (p) of this section where the legislature enacted a special act empowering the mayor and board of aldermen of a city to lease or sell certain property acquired by the city, and pursuant to this act, the mayor and board of aldermen undertook to execute a lease with an option provision to the college. Whitworth College, Inc. v. City of Brookhaven, 161 F. Supp. 775 (S.D. Miss. 1958), aff'd, 261 F.2d 868 (5th Cir. 1958).

Chapter 150, Laws 1942 (Code 1942 § 6600), authorizing boards of supervisors upon the approval of the county superintendent of education to lease sixteenth section lands, where such land is included in the Choctaw Purchase, is not a local or special law in violation of this section, since the phrase "in the Choctaw Purchase" included all lands in the state outside the Chickasaw Cession. Smith v. McCullen, 195 Miss. 34, 13 So. 2d 319 (1943).

Statute authorizing issuance of bonds for building program by agricultural high schools and providing exception from limitation of maximum indebtedness for benefit of counties bordering Gulf of Mexico held not violative of constitutional prohibition against local laws applicable to common school system, since such schools were established by exercise of constitutional right of legislature to establish schools separate from common school system. Humphreys v. Hinds County Agric. High Sch.-Junior College, 177 Miss. 1, 170 So. 530 (1936); Wyatt v. Harrison-Stone-Jackson Agric. High Sch.-Junior College, 177 Miss. 13, 170 So. 526 (1936).

Special act conferring on school district special privileges violates this section. Williamson v. Howell, 155 Miss. 220, 124 So. 319 (1929).

Statute authorizing the trustees of a certain school district to enter into a contract with the trustees of the State Teachers' College to send the children of such district to the practice school of the college and providing for the transportation of such children was invalid under this paragraph. Williamson v. Howell, 155 Miss. 220, 124 So. 319 (1929).

Act providing for the creation of a fund for the support and maintenance of the public schools of the state to be disbursed in such manner as to equalize public school terms throughout the state did not violate this paragraph, since it was a general law and not a special or local law. Miller v. State, 130 Miss. 564, 94 So. 706 (1923).

Act authorizing the board of supervisors of a particular county to issue bonds for the purpose of building and equipping an agricultural high school in a certain consolidated school district of such county violated this paragraph. Scarbrough v. McAdams Consol. Sch. Dist., 124 Miss. 844, 87 So. 140 (1921).

This paragraph is violated by a statute providing for the establishment of a supplemental common school fund for the aid of such county schools as shall have exhausted the money appropriated by the state for common school purposes and cannot run for the constitutional period of four months, such statutory plan being contrary to that prescribed by §§ 205 and 206 of the Constitution and rendering the school districts within its purview the objects of special regard. State Bd. of Educ. v. Pridgen, 106 Miss. 219, 63 So. 416 (1913).

Statute authorizing competition among municipalities for the location of a state normal college and providing for the issuance of bonds to aid in the establishment thereof did not violate this paragraph. J. Livelar & Co. v. State, 98 Miss. 330, 53 So. 681 (1910).

13. Stock laws, watercourses, and fences, specific prohibitions.

In bond judgment and declaratory judgment actions by objectors against a county utility district that proposed to issue revenue bonds to finance a water and sewage treatment center, Mississippi Constitution, Art IV, §§ 87-90 did not sap the local and private act of its enabling power, where the local and private act furthered the same general purposes and policies as the general act, the differences between the two were primarily procedural or otherwise relatively minor, and the citizens of the political subdivision covered by the local and private act had alternatives in that they could proceed under either that act or the general law. In re $7,800,000 Combined Util. Sys. Revenue Bond, 465 So. 2d 1003 (Miss. 1985).

The statute authorizing the organization of a water district to conserve and utilize the flow of the Pearl River, does not violate this provision. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

Drainage law dealing with natural watercourses which when first enacted was local in character because of the exception therefrom of certain named counties, but which later enactments enlarged into law applicable to all counties and parts of the state, did not violate this paragraph. Witty v. Ellsberry Drainage Dist., 126 Miss. 645, 89 So. 268 (1921).

Existing statute creating a stock law district in Lowndes County, though special or local in character, was not abrogated by this section and paragraph of the Constitution. Moore v. Cunningham, 124 Miss. 537, 87 So. 112 (1921), distinguishing Chidsey v. Scranton, 70 Miss. 449, 12 So. 545 (1892), supra 5, this section.

Chapter 147, Laws of 1908, in providing for the creation of a specific drainage district, and providing for effectual drainage not only by artificial drains, canals, etc., but by shortening and improving the natural channels and waterways in the district, violated this paragraph. Crenshaw v. State, 101 Miss. 457, 58 So. 219 (1912).

Sections 371-391, Code 1906, providing for the creation and maintenance of drainage districts, were not violative of this paragraph because § 371 thereof provided that the statutory provisions should not apply to lands overflowed by the backwaters of the Mississippi. Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911).

Statutes dealing with the construction of artificial channels for the drainage of wet, swamp, and overflow lands, and exempting certain counties from its application did not violate this paragraph which applies only to natural watercourses, and it was, therefore, immaterial whether the statutes in question were local or general. Haley v. Drainage Comm'rs, 99 Miss. 556, 55 So. 353 (1911).

A special and local law creating a drainage district for the purpose of providing adequate drainage not only by artificial drains, canals, and ditches but also by the development of natural drainage units, related to watercourses and was unconstitutional under this paragraph. Belzoni Drainage Comm'n v. Winn, 98 Miss. 359, 53 So. 778 (1910).

14. Right of eminent domain, specific prohibitions.

Section 43-35-201 is not a local, private and special law granting the power to exercise the right of eminent domain contrary to the Mississippi Constitution, art. 4, § 90(r), insofar as its application to municipalities of 100,000 population or more is a general classification based solely on population and is not tied to a particular census; under this statute, a redevelopment agency could properly build a mall in its proposed public parking facility. Jackson Redevelopment Auth. v. King, Inc., 364 So. 2d 1104 (Miss. 1978).

Legislation creating the Mantachie Natural Gas District was not void under Mississippi Constitution Art 4 § 90(r), since the right to eminent domain was granted to all pipeline companies, etc., within the state by general law. Loden v. Mississippi Pub. Serv. Comm'n, 279 So. 2d 636 (Miss. 1973).

This paragraph does not mean that only one method for the exercise of the right of eminent domain can be provided, and that this one method must be provided by one general law, but simply means that no method for the exercise of the right shall be provided except by general law; as many methods for the exercise of the right may be provided as the legislature may desire, provided only that each method is set forth in a general law. Riverside Drainage Dist. v. Buckner, 108 Miss. 427, 66 So. 784 (1914).

Statute conferring the right of eminent domain on drainage districts, applicable to all drainage districts, is a general law and not a special law within the prohibition of this paragraph. Riverside Drainage Dist. v. Buckner, 108 Miss. 427, 66 So. 784 (1914).

Discussion with reference to conferring power to exercise right of eminent domain or granting to any person, corporation or association the right to lay down railroad tracks or street-car tracks in any other manner than that prescribed by general law. See Vinegar Bend Lumber Co. v. Oak Grove & G.R.R., 89 Miss. 84, 43 So. 292 (1906); Vinegar Bend Lumber Co. v. Oak Grove & G.R.R., 89 Miss. 117, 43 So. 299 (1906).

15. Granting lands under control of state, specific prohibitions.

The 1989 Public Trust Tidelands Act (§§ 29-15-1 through 29-15-23) was not local or private legislation in violation of §§ 87 and 90(u) of the Mississippi Constitution, but, rather, was a general law because it would be applied to all members of the class of persons whose lands bordered tidelands, and was an effort to manage and protect the public trust lands for the benefit of every citizen of the State. Secretary of State v. Wiesenberg, 633 So. 2d 983 (Miss. 1994).

The word "granting" in paragraph (u) is applicable to all conveyances whereby an estate in lands under control of the state is vested in the grantee, whether for years or in fee. Giles v. City of Biloxi, 237 Miss. 65, 112 So. 2d 815 (1959), error overruled 237 Miss. 65, 113 So. 2d 544.

Code 1942, Section 4073, providing for cancellation of claim of state to lands sold for delinquent taxes when sales are void, is not void as violative of this section of the constitution since it applies uniformly to all persons similarly situated throughout state as well as all sales of same nature, for delinquent taxes. State v. Southern Pine Co., 205 Miss. 80, 38 So. 2d 442 (1949).

Statute providing for suit against the state to confirm title under patent to tax forfeited land unless it should be found that the state had not acquired title to the land by virtue of the tax sale, or that the purchase price had not been paid, or that actual fraud had been committed by the patentee, or his representative, in the procurement of the patent, did not violate this section. State v. Roell, 192 Miss. 873, 7 So. 2d 867 (1942), followed in State v. Lewis, 192 Miss. 890, 7 So. 2d 871 (1942).

Consideration paid state for land conveyed by patent slightly in excess of 50 cents per lot held not so inadequate as to constitute donation. Slay v. Lowery, 152 Miss. 356, 119 So. 819 (1928).

Statute authorizing land commissioner to resell lands owned by the state which the state had formerly undertaken to sell and convey but which conveyances had been judicially held to be invalid, and in effect suspending the provision for the sale of such lands generally in order to permit those who had previously undertaken to purchase them to purchase them again at such reasonable price as might be fixed by certain designated officers, with credit given for the price formerly paid, did not violate this paragraph. Hart v. Backstrom, 148 Miss. 13, 113 So. 898 (1927).

Statute providing that all lands struck off to the state prior to 1875 for delinquent taxes, and which were not embraced in the list returned that year to the auditor under the abatement act, and which have not previously and validly been disposed of by the state, and which are now in the possession, actual or constructive, of bona fide owners, and legally assessed for taxes as required by law, are relinquished to those persons who, but for the sale or sales, would now be lawfully and equitably the owners thereof, is violative of this section as being a special act granting lands under the control of the state to private individuals. Winton v. Day, 96 Miss. 1, 49 So. 264 (1909).

RESEARCH REFERENCES

ALR. Constitutionality of fence and stock laws. 6 A.L.R. 212, 18 A.L.R. 67.

Constitutional inhibition of increase or decrease in compensation during term as applicable to nonconstitutional officer. 31 A.L.R. 1316, 86 A.L.R. 1263.

Construction and application of constitutional provision against special or local laws regulating practice in courts of justice. 135 A.L.R. 365.

Workmen's Compensation Act as in violation of constitutional provision prohibiting special or local laws regulating practice in courts of justice. 135 A.L.R. 383.

Constitutional provision prohibiting local or special legislation as applied to statutes relating to juries. 155 A.L.R. 789.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation. 159 A.L.R. 606.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion. 4 A.L.R.2d 744.

Validity of statutory classifications based on population — jury selection statutes. 97 A.L.R.3d 434.

Validity of local or state denial of public school courses or activities to private or parochial school students. 43 A.L.R.4th 776.

Power of state trial court in criminal case to change venue on its own motion. 74 A.L.R.4th 1023.

CJS. C.J.S. Statutes §§ 148-200.

Law Reviews. General, Special, Local and Private Legislation: A Mississippi Overview. 56 Miss. L. J. 327, August, 1986.

PROHIBITIONS

Sec.	
91.	Uniform application of charges and fees
92.	Salary of deceased officer
93.	Retirement of officer on pay
94.	Disability on account of coverture abolished
95.	Donation or sale of state lands; railroad easements
96.	Extra compensation and unauthorized payments prohibited
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98.	Repealed.
99.	Election of officers by Legislature
100.	Release of obligation or liability owed to State or political subdivision
101.	Seat of state government

§ 91. Uniform application of charges and fees

The Legislature shall not enact any law for one or more counties, not applicable to all the counties in the state, increasing the uniform charge for the registration of deeds, or regulating costs and charges and fees of officers.

JUDICIAL DECISIONS

1. Office of county prosecuting attorney made optional.
2. Salaries of county officers.

1. Office of county prosecuting attorney made optional.

Statute amending prior statute which created the office of county prosecuting attorney so as to make the office optional with the different counties of the state, depending upon local elections called for that purpose as provided for in the amending statute did not violate this section, since the act did not seek to enact any law for one or more counties, not applicable to all the counties in the state. Board of Election Comm'rs v. Davis, 102 Miss. 497, 59 So. 811 (1912).

2. Salaries of county officers.

Under statute relating to salaries of county officers, circuit clerk's salary decreased, where county dropped from higher to lower class. Smith v. Chickasaw County, 156 Miss. 171, 125 So. 96 (1929), error overruled, 156 Miss. 173, 125 So. 705 (1930).

Chapter 192 Laws of 1910 stipulating that county treasurers in counties having depositories shall receive only a salary of $300.00 per annum is not a violation of this section. Magee v. Lincoln County, 109 Miss. 181, 68 So. 76 (1915); Fidelity & Deposit Co. v. Wilkinson County, 109 Miss. 879, 69 So. 865 (1915).

Neither this section nor § 88 affected § 8 c 250, Laws of 1890, authorizing a salary to members of the board of supervisors of Madison County, such sections being prospective. Adams v. Dendy, 82 Miss. 135, 33 So. 843 (1903).

RESEARCH REFERENCES

CJS. C.J.S. Statutes §§ 166, 170, 179.

§ 92. Salary of deceased officer

The Legislature shall not authorize payment to any person of the salary of a deceased officer beyond the date of his death.

JUDICIAL DECISIONS

1. In general.

Since the 1953 amendment of Code 1942 § 6248-02, the county superintendent is accountable to the school fund for payments made to teachers in excess of amounts provided by statute, even though he did so in good faith and through honest error. Golding v. Latimer, 239 Miss. 163, 121 So. 2d 615 (1960).

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees §§ 130, 270, 271, 274, 286.

C.J.S. Statutes § 170.

§ 93. Retirement of officer on pay

The Legislature shall not retire any officer on pay, or part pay, or make any grant to such retiring officer.

JUDICIAL DECISIONS

1. In general.

Act (Laws 1940, ch 287; Code 1942 §§ 3472-3494), providing for retirement benefits for firemen and policemen but making them available for supernumerary tasks after retirement does not violate this section. Mayor & Aldermen of Vicksburg v. Crichlow, 196 Miss. 259, 16 So. 2d 749 (1944).

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees §§ 311-320.

§ 94. Disability on account of coverture abolished

The Legislature shall never create by law any distinction between the rights of men and women to acquire, own, enjoy, and dispose of property of all kinds, or their power to contract in reference thereto. Married women are hereby fully emancipated from all disability on account of coverture. But this shall not prevent the Legislature from regulating contracts between husband and wife; nor shall the Legislature be prevented from regulating the sale of homesteads.

SOURCES: 1869 art I § 16.

Cross References — Discrimination against person seeking employment in state service, or employed in state service, on basis of race, color, religion, sex, national origin, age or handicap, see § 25-9-149.

JUDICIAL DECISIONS

1. In general.
2. Contracts between spouses.
3. Comparative negligence of spouses.
4. Torts by one spouse against other.
5. Right of married woman to recover for impairment of earning capacity.

1. In general.

Only when both spouses have expressly contracted with a third party creditor may one be liable for the other's debts unless there is some type of an agency relationship; to hold otherwise would violate Art 4, § 94 of the Mississippi Constitution and open the door for either spouse to control or deplete the other's estate. Govan v. Medical Credit Servs., Inc., 621 So. 2d 928 (Miss. 1993).

Statute providing that no act of the husband shall work a discontinuance of the wife's freehold or affect the rights of the wife or her heirs therein, was repealed by statute abolishing coverture. Southworth v. Brownlow, 84 Miss. 405, 36 So. 522 (1904).

2. Contracts between spouses.

Statute prohibiting husband and wife from contracting with each other so as to entitle one to claim or receive compensation from other for work or labor held not violative of constitutional provision relating to emancipation of married women. Martin v. First Nat'l Bank, 176 Miss. 338, 164 So. 896 (1936).

A contract whereby a wife relinquishes, on sufficient consideration, all claims on her husband's estate is authorized by this section. Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317 (1902).

3. Comparative negligence of spouses.

A father's negligence which contributed to the injury sustained by his son, and which the trial court held under the Mississippi comparative negligence statute justified a substantial reduction in the award originally made by the court for the son's injuries, could not be made the basis for a reduction in the non-negligent wife's award for loss of consortium and past and subsequent services to her paraplegic son. Wright v. Standard Oil Co., 470 F.2d 1280 (5th Cir. 1972), reh'g denied, 471 F.2d 650 (5th Cir. 1972), cert. denied, 412 U.S. 938, 93 S. Ct. 2772, 37 L. Ed. 2d 398 (1973).

4. Torts by one spouse against other.

Common law unity concept which prohibited suits between spouses for any claim is no longer viable and doctrine of interspousal tort immunity cannot be maintained. Burns v. Burns, 518 So. 2d 1205 (Miss. 1988).

Abrogation of rule of interspousal tort immunity required reversal of decision of trial judge dismissing complaint by wife against her husband for alleged assault and battery. Burns v. Burns, 518 So. 2d 1205 (Miss. 1988).

This section of the Constitution of 1890, and §§ 1940 and 1941 of the Code of 1930 (Code 1942, §§ 451, 452), emancipating married women from the common-law disabilities of coverture, do not have the effect of removing the common-law disability of husband and wife to sue each other for a personal tort, and therefore the common-law rule stands that neither husband nor wife can maintain such a suit. Burke v. Massachusetts Bonding & Ins. Co., 19 So. 2d 647 (La. App. 1st Cir. 1944), aff'd, 209 La. 495, 24 So. 2d 875 (1946).

Wife, injured as result of alleged negligence of husband in automobile accident, could not maintain action against husband's liability insurer, since tort claimant cannot maintain direct action against insurer but must first sue the insured, obtain judgment, and otherwise exhaust his remedies against the insured, and wife has no cause of action against husband for personal tort. Burke v. Massachusetts Bonding & Ins. Co., 19 So. 2d 647 (La. App. 1st Cir. 1944), aff'd, 209 La. 495, 24 So. 2d 875 (1946).

Although wife can sue her husband, she has no cause of action in tort against him for injuries inflicted upon her by the negligence of her husband. Burke v. Massachusetts Bonding & Ins. Co., 19 So. 2d 647 (La. App. 1st Cir. 1944), aff'd, 209 La. 495, 24 So. 2d 875 (1946).

In absence of statute, right of action against husband arising out of automobile accident, existing in wife before marriage, held extinguished by marriage. Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934).

This section of the Constitution and §§ 2517 and 2518, Code of 1906 (Hemingway's Code, §§ 2051 and 2052), emancipating married women from the common law disabilities of coverture, do not have the effect to remove the common law disability of husband and wife to sue each other for a personal tort. Austin v. Austin, 136 Miss. 61, 100 So. 591, 33 A.L.R. 1388 (1924); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934).

5. Right of married woman to recover for impairment of earning capacity.

Under this section and § 1940, Code 1930, disabilities of coverture are abolished and a married woman is, as to her right to own property and earn money by her own labor, on an equality with her husband; her earning capacity, therefore, is an asset for the wrongful impairment of which she is entitled to damages, notwithstanding that she may be supported by her husband. Mississippi Cent. R.R. v. Smith, 176 Miss. 306, 168 So. 604 (1936), appeal dismissed, cert. denied, 299 U.S. 518, 57 S. Ct. 313, 81 L. Ed. 382 (1936).

In personal injury action, evidence as to plaintiff's earning capacity as trained nurse held admissible, notwithstanding that plaintiff may have been supported by her husband. Mississippi Cent. R.R. v. Smith, 176 Miss. 306, 168 So. 604 (1936), appeal dismissed, cert. denied, 299 U.S. 518, 57 S. Ct. 313, 81 L. Ed. 382 (1936).

RESEARCH REFERENCES

ALR. Right of one spouse to maintain an action against the other for assault and battery, under the Married Women's Acts. 6 A.L.R. 1038.

Liability of married woman for necessaries. 15 A.L.R. 833.

Larceny or embezzlement by one spouse of other's property. 55 A.L.R. 558.

Right of one spouse under Married Women's Acts to maintain an action at law against other, based on tort in respect of property, for damages or recovery of possession. 109 A.L.R. 882.

Applicability of statute of limitations or doctrine of laches as between husband and wife. 121 A.L.R. 1382.

Right of one spouse to maintain action against other for personal injury. 43 A.L.R.2d 632.

Construction and application of state equal rights amendments forbidding determination of rights based on sex. 90 A.L.R.3d 158.

Enforceability of agreement requiring spouse's cooperation in obtaining religious bill of divorce. 29 A.L.R.4th 746.

Exclusion of one sex from admission to or enjoyment of equal privileges in places of accommodation or entertainment as actionable sex discrimination under state law. 38 A.L.R.4th 339.

Modern status of views as to validity of premarital agreements contemplating divorce or separation. 53 A.L.R.4th 22.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by circumstances surrounding execution-modern status. 53 A.L.R.4th 85.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms-modern status. 53 A.L.R.4th 161.

Construction and application of provisions of Equal Pay Act of 1963 (29 USCS § 206(d)) prohibiting wage discrimination on basis of sex. 7 A.L.R. Fed. 707.

Disparate impact test for sex discrimination in employment under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.). 68 A.L.R. Fed. 19.

Job discrimination against unwed mothers or unwed pregnant women as proscribed under Pregnancy Discrimination Act (42 USCS § 2000e(k)). 91 A.L.R. Fed. 178.

Am Jur. 40 Am. Jur. 2d, Homestead §§ 107 et seq.

41 Am. Jur. 2d, Husband and Wife §§ 1 et seq.

CJS. C.J.S. Homesteads §§ 70 to 101.

C.J.S. Husband and Wife §§ 87 to 90, 92 to 110, 113.

§ 95. Donation or sale of state lands; railroad easements

Lands belonging to, or under the control of the State, shall never be donated directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations or associations for a less price than that for which it is subject to sale to individuals. This, however, shall not prevent the Legislature from granting a right of way, not exceeding one hundred feet in width, as a mere easement, to railroads across state land, and the Legislature shall never dispose of the land covered by said right of way so long as such easement exists.

Cross References — Grant of state lands by local, private, or special laws, see Miss. Const. Art. 4, § 90(u).

JUDICIAL DECISIONS

1. Donation of public trust lands—In general.
2. Artificial accretion, donation of public trust lands.
3. Closing of streets or highways, donation of public trust lands.
4. Charitable purposes, donation of public trust lands.
5. Tax sales, donation of public trust lands.
6. Dismissal of petition, donation of public trust lands.

7. Binding effect of agency action, donation of public trust lands.
8. Adequacy of consideration, donation of public trust lands.
9. Damages and other remedies, donation of public trust lands.
10. Persons entitled to challenge validity, donation of public trust lands.

1. Donation of public trust lands—In general.

The state could not invalidate sixteenth section leases that were entered into before the ratification of the 1890 Mississippi Constitution on the ground that the rental and renewal terms were invalid because they perpetuated rents that were now nominal in violation of the prohibition of the donation of public property to private parties as such an invalidation would impair the renewal terms of the lease contracts. Lipscomb v. Columbus Mun. Separate Sch. Dist., 269 F.3d 494 (5th Cir. 2001), writ of certiorari denied by 535 U.S. 988, 122 S. Ct. 1541, 152 L. Ed. 2d 467, 2002 U.S. LEXIS 2388, 70 U.S.L.W. 3639 (2002).

The 1989 Public Trust Tidelands Act (§§ 29-15-1 through 29-15-23) did not constitute a donation of public trust property in violation of § 95 of the Mississippi Constitution, but rather was a unified attempt by the Legislature to resolve the discord existing between the State and area landowners; an unconstitutional donation should not survive the statutory process for determining the line of demarcation between the public trust lands and that of private property owners since the common law of Mississippi pertaining to tidelands, submerged lands, and riparian and littoral rights would be applied. Secretary of State v. Wiesenberg, 633 So. 2d 983 (Miss. 1994).

Where a county gave a quit claim deed to a party transferring any interest the county might have had in the subject property, the county did not "donate" the land belonging to it in violation of Article 4 § 95 since the quit claim deed was to quiet title to property in which the county claimed no interest. Covington County v. Page, 456 So. 2d 739 (Miss. 1984).

Statute authorizing land commissioner to resell lands owned by the state which the state had formerly undertaken to sell and convey but which conveyances had been judicially held to be invalid, and in effect suspending the provision for the sale of such lands generally in order to permit those who had previously undertaken to purchase them to purchase them again at such reasonable price as might be fixed by certain designated officers, with credit given for the price formerly paid, was not unconstitutional as providing for donation of state lands. Hart v. Backstrom, 148 Miss. 13, 113 So. 898 (1927).

In the absence of fraud or mistake the court will not inquire into the validity of sale as against contention that this section was not complied with where patent, granted by state under c 46, Laws of 1898 is regular in form. State ex rel. Moore v. Knapp, Stout & Co., 136 Miss. 709, 101 So. 433 (1924).

2. Artificial accretion, donation of public trust lands.

The provision of § 95 of the Constitution prohibiting the donation of lands belonging to the state to private corporations or individuals (which prohibition applies to the beds of its shores, arms, and inlets) prevented the owners abutting upon a 17-mile artificial beach constructed upon submerged land in Mississippi Sound from acquiring title thereto under the doctrine of "artificial accretion". United States v. Harrison County, 399 F.2d 485 (5th Cir. 1968), reh'g denied, 414 F.2d 784 (5th Cir. 1969), cert. denied, 397 U.S. 918, 90 S. Ct. 925, 25 L. Ed. 2d 99 (1970).

On the basis of Article 4, § 95 of the Mississippi Constitution, Harrison County v. Guice (1962) 244 Miss 95, 140 So2d 838 (ovrld by Mississippi State Highway Com. v. Gilich (Miss. 1992) 609 So2d 367) is overruled insofar as it applies the doctrine of artificial accretion so as to render lands once a part of the public trust the property of private landowners by the action of the government in artificially recovering such lands. Mississippi State Hwy. Comm'n v. Gilich, 609 So. 2d 367 (Miss. 1992).

3. Closing of streets or highways, donation of public trust lands.

An ordinance which closed a street did not in effect constitute a donation of portion of right of way of an old highway to private corporation in violation of the constitution, despite the fact that upon closing the abandoned right of way reverted by operation of law to the abutting property owner. Puyper v. Pure Oil Co., 215 Miss. 121, 60 So. 2d 569 (1952).

4. Charitable purposes, donation of public trust lands.

This section is not violated by that portion of Code 1942, § 671 providing that lands devised to an eleemosynary institution, if held for longer than ten years, shall revert to testator's heirs or devisees. Ringling Bros. Barnum & Bailey Shows, Inc. v. Fitzpatrick, 108 So. 2d 703 (Miss. 1959).

5. Tax sales, donation of public trust lands.

State alone can raise question of fraud of patentee practiced upon state in procuring patent to land sold to state for delinquent taxes. Wilkinson v. Steele, 207 Miss. 701, 43 So. 2d 110 (1949).

Code 1942, § 4073, providing for cancellation of claim of state to lands under tax sales when sales are void, does not violate this section of Constitution since a donation is an act or contract by which one voluntarily transfers title to a thing of which he is owner, from himself to another, without any consideration, as free gift and § 4073 is applicable to lands which state has never owned and over which it has no control. State v. Southern Pine Co., 205 Miss. 80, 38 So. 2d 442 (1949).

Statute providing that all lands struck off to the state prior to 1875 for delinquent taxes, and which were not embraced in the list returned that year to the auditor under the abatement act, and which have not previously and validly been disposed of by the state, and which are now in the possession, actual or constructive, of bona fide owners, and legally assessed for taxes as required by law, are relinquished to those persons who, but for the sale or sales, would now be lawfully and equitably the owners thereof, is violative of this section because it is a donation of lands belonging to the state to particular individuals. Winton v. Day, 96 Miss. 1, 49 So. 264 (1909).

6. Dismissal of petition, donation of public trust lands.

On a petition by property owners for exemption from an injunction which restrained interference with the public use of a beach, which a Mississippi county had dedicated to public use in consideration of the federal government's financing the construction of a sand beach in the waters of the Mississippi Sound, on the ground that the beach fronting their property had never been under the waters of the Mississippi Sound, and the United States countered with documentary evidence that the beach was artificially constructed on the waters of the Mississippi Sound and therefore could not be subject to private ownership under the Mississippi Constitution, the district court should have heard evidence and resolved those issues, rather than dismissed the petition without making findings. United States v. Harrison County, 445 F.2d 276 (5th Cir. 1971).

7. Binding effect of agency action, donation of public trust lands.

A board of supervisors, while acting as agent for the state which holds property as trustee, cannot bind the state by a sale of 16th section timber in violation of the constitution, whether the action of the board is due to its negligence or due to fraud or collusion. State ex rel. Kyle v. Dear, 209 Miss. 268, 46 So. 2d 100 (1950), error overruled 209 Miss. 268, 47 So. 2d 150.

8. Adequacy of consideration, donation of public trust lands.

Miss. Code Ann. ch. II, tit. 37, and Miss. Code Ann. §§ 37-7-471 through 37-7-483, do not apply to sixteenth section lands. School districts do not hold title to sixteenth section lands, title resides in the State; where the record was insufficient as to whether the school district had title to a historical mansion on such land, which had been leased for decades to a foundation, and the record was also unclear as to whether there was adequate consideration for renewal of the lease, a remand was required for development of said issues, and summary judgment for the foundation, and against the State, was reversed. Clark v. Stephen D. Lee Found., 887 So. 2d 798 (Miss. 2004).

A 99-year lease of 3.5 acres of Sixteenth Section school trust land for a one-time fee of $150, amounting to approximately 46 cents per acre per year on a tract of land with a value of $3,575 at the time of the lease, was an unconstitutional donation due to inadequate consideration, and was therefore voidable at the option of the school board; the consideration paid for the leasehold was so unconscionably inadequate that it defeated any challenge by anyone claiming to be a bona fide purchaser. Board of Educ. v. Hudson, 585 So. 2d 683 (Miss. 1991).

A lease of school trust land was voidable for inadequate consideration as violative of the donation clause of Article IV, § 95 of the Mississippi Constitution where the consideration paid for the lease was so grossly inadequate as to shock the conscience and to defeat any challenge even of one otherwise claiming the status of a bona fide purchaser; the inadequate consideration was not a hidden title defect but was a matter of public record, so openly blatant as to put any purchaser on notice of a possible defect in the trustee's title where the tax assessments of the city and the county gave notice of value that should have suggested that a far higher rental was required to meet the constitutional mandate of non-donation, and the appraiser's report stated that only a nominal value was used. As a matter of law, a one-time gross sum payment which amounted to $.07575 per year consideration was grossly inadequate and amounted to a donation of public lands prohibited by the constitution and trust law. Mere compliance with statutory formalities and procedures did not vitiate substantive violation of constitutional prohibitions. The case would be remanded to the school district board of trustees for a new determination of the present rental value by a competent appraiser under the 1978 Reform Act. While the public policy of making all reasonable efforts to keep sixteenth section lands leased so that they might be developed and produce revenue from taxation is not an unworthy goal, and this policy may have influenced past officials in leasing sixteenth section lands for nominal rentals, its emphasis must not overshadow constitutional mandates. Hill v. Thompson, 564 So. 2d 1 (Miss. 1989).

In a taxpayer's action seeking an adjudication that a county board of supervisors had leased 320 acres of sixteenth section land for an inadequate consideration in violation of the constitutional prohibition against the donation of state lands, the trial court erred in sustaining defendants' plea of res judicata as a bar to the action, notwithstanding that the statutory procedure for confirmation of the lease had been followed. The doctrine of res judicata would yield to the constitution where the earlier confirmation proceedings had not given notice to the public and where defendant had not filed an answer, thus leading to the conclusion that the board had given its passive consent to the decree confirming the lease. Bragg v. Carter, 367 So. 2d 165 (Miss. 1978).

There was no forbidden donation in a lease by a city to a college where the lease, viewed in its entirety, showed consideration. Whitworth College, Inc. v. City of Brookhaven, 161 F. Supp. 775 (S.D. Miss. 1958), aff'd, 261 F.2d 868 (5th Cir. 1958).

An uncompensated grant by the state of an easement or right of way across a sixteenth section would be in violation of the constitution. Willmut Gas & Oil Co. v. Covington County, 221 Miss. 613, 71 So. 2d 184 (1954), appeal dismissed, 348 U.S. 891, 75 S. Ct. 215, 99 L. Ed. 700 (1954), overruled on other grounds, State v. Michigan Wis. Pipline Co., 360 So. 2d 684 (Miss. 1978).

Sale of abandoned courthouse site and building by board of supervisors who had the authority to dispose of surplus property not needed for county purposes, would not be enjoined on the ground of a grossly inadequate price since the court will assume that supervisors will not sell property at such a grossly inadequate price but would endeavor in good faith to get the best price obtainable therefor. Jackson County Historical Soc. v. Board of Supvrs., 214 Miss. 156, 58 So. 2d 379 (1952).

Where school land timber, worth $4,000, was sold at price of $500, the sale price was so grossly inadequate as to render this sale a donation within the prohibition of this section. State ex rel. Coleman v. Dear, 212 Miss. 620, 55 So. 2d 370 (1951).

Board of supervisors is prohibited by this section to make a sale of Sixteenth Section timber under authority of § 6599, Code of 1942, for such a grossly inadequate price as to virtually amount to a donation thereof. State ex rel. Kyle v. Dear, 209 Miss. 268, 46 So. 2d 100 (1950), error overruled 209 Miss. 268, 47 So. 2d 150.

A purchaser from one who purchased 16th section timber from a board of supervisors is presumed under the law to have known that the board was selling the timber as agent of the state which held it as trustee for the educable children of the township and was in duty bound not to sell the same for a grossly inadequate consideration virtually amounting to a donation in violation of this section. State ex rel. Kyle v. Dear, 209 Miss. 268, 46 So. 2d 100 (1950), error overruled 209 Miss. 268, 47 So. 2d 150.

Grossly inadequate consideration for the sale of 16th section timber is shown prima facie by the fact that only $500 was received for the timber and that at a subsequent sale, not too remote, and where no substantial change in the conditions or circumstances in the meantime is shown to have intervened, the property brought the sum of $4,000 in a resale to a purchaser of experience in valuing the quantity and quality of timber. State ex rel. Kyle v. Dear, 209 Miss. 268, 46 So. 2d 100 (1950), error overruled 209 Miss. 268, 47 So. 2d 150.

In an action by a sawmill man to reform a deed to timber on school lands because of mutual mistake as to description of the premises, court of equity properly denied reformation to plaintiff where it appeared that the county board of supervisors through ignorance of the value of the timber conveyed and sold several thousand dollars worth of timber for $300, since the sale of such timber at such a grossly inadequate price violated the prohibition of this section against donation of state lands; and the court properly gave judgment in favor of the board as to the difference between the purchase price and the reasonable value of the timber already cut, and properly enjoined further cutting of timber. Koonce v. Board of Supvrs., 202 Miss. 473, 32 So. 2d 264 (1947), error overruled, 202 Miss. 479, 32 So. 2d 456 (1947).

Statute requiring courts to validate and perfect a title based upon a patent to tax forfeited land unless the title to such land was divested out of the state "without payment of purchase price," did not violate this section, where the quoted phrase was to be construed as meaning a purchase price not so grossly inadequate as to amount to a donation of the land from the state to the patentee. State v. Roell, 192 Miss. 873, 7 So. 2d 867 (1942), followed in State v. Lewis, 192 Miss. 890, 7 So. 2d 871 (1942).

The issuance of a patent to state tax forfeited land for a grossly inadequate consideration cannot be allowed and is in contravention of the constitutional provision prohibiting the donation, directly or indirectly, to individuals or to corporations, of any of the lands belonging to, or under the control of the state. State ex rel. McCullen v. Tate, 188 Miss. 865, 196 So. 755 (1940).

The issuance of a patent for tax forfeited lands must be canceled where there is a gross inadequacy in a consideration of less than one-fourth of the lowest estimate made by any qualified witness who made any estimate at all, and when the real facts show that such lowest estimate was itself one in extremity, notwithstanding evidence that the land commissioner himself set an appraisal value approximating that for which the land was sold. State ex rel. McCullen v. Tate, 188 Miss. 865, 196 So. 755 (1940).

Sale of state lands for a consideration slightly in excess of 50 cents per lot was not so inadequate as to constitute a donation. Slay v. Lowery, 152 Miss. 356, 119 So. 819 (1928).

9. Damages and other remedies, donation of public trust lands.

A 25 year lease of 150 acres of 16th section land for an annual rent of $37.50 from county superintendent of education to himself was void on its face, and a subsequent three year lease of the same land from the county superintendent to another for an annual rent of $900 showed on its face that the lease to the county superintendent was for a grossly inadequate consideration amounting to a donation of public property to a private individual; County board of supervisors, the surety on their bonds, and the county superintendent were liable for the difference between the $900 annual rental and the $37.50 annual rental for each of the three years of the second lease, plus legal interest. Holmes v. Jones, 318 So. 2d 865 (Miss. 1975).

Facts alleged in the bill, if supported by proof, would be capable to supporting a finding that the lease of a 320 acre tract of 16th section land for an annual rental of $170, although the fair value of the lease was $4,000 per year, amounted to an unconstitutional donation as well as an appropriation of the property to an object not authorized by law; The remedy would be the voiding of the lease rather than its continuation for the remainder of the 25 year lease period with damages prospectively figured for each year of its future existence. Keys v. Carter, 318 So. 2d 862 (Miss. 1975).

10. Persons entitled to challenge validity, donation of public trust lands.

Where taxpayer filed written protests with county board of supervisors, alleging gross inadequacy of consideration in board's proposed leases of public land so as to amount to unconstitutional donation of public property in violation of this section, taxpayer's remedy, following board's refusal to record protests or grant hearing and subsequent to actual execution of leases, was by direct attack in appropriate proceedings in county's chancery court, with board and lessees to be named as defendants. Tally v. Board of Supvrs., 353 So. 2d 774 (Miss. 1978).

A petition filed by taxpayers in a cause brought to extend a lease on 16th section land, in which the taxpayers alleged that the rental provided for in the lease was so grossly inadequate as to render the lease a donation, was sufficient to withstand a general demurrer. Edwards v. Harper, 321 So. 2d 301 (Miss. 1975).

Taxpayers should have been admitted as parties in a suit brought to confirm title to a 16th section lease where they were not dilatory in filing their petition to set aside the lease, the interest of the taxpayers could not be protected by a final decree confirming title to the leasehold interest in the lands involved, and the taxpayers were not injecting new issues into the case, but were contending that the consideration paid for the lease was so inadequate as to amount to a donation. Edwards v. Harper, 321 So. 2d 301 (Miss. 1975).

If an abandoned courthouse site and building has been sold by the board of supervisors for a grossly inadequate price, then a suit by one or more taxpayers may challenge the validity of the sale on the ground of violation of the Constitution. Jackson County Historical Soc. v. Board of Supvrs., 214 Miss. 156, 58 So. 2d 379 (1952).

Defendant in an action to quiet title to tax forfeited land which plaintiff had obtained by patent from the state, the validity of which had been confirmed by an action against the state, could not assert that such patent was void for inadequate consideration in violation of this section, since the fraud alleged could be challenged only in a proceeding instituted for that purpose by the state land commissioner on behalf of the state. Comfort v. Landrum, 52 So. 2d 658 (Miss. 1951).

Only state can raise question of invalidity of patent from state on ground that person obtaining patent had obtained in excess of 160 acres of land from state in one year or that he has paid to state inadequate consideration for land obtained, and these questions cannot be raised by original owners of land in question. Perkins v. White, 208 Miss. 157, 43 So. 2d 897 (1950).

ATTORNEY GENERAL OPINIONS

School District may not delete from the payment of annual rentals under a developmental lease property that has been platted once roads and utilities have been constructed for that portion of the property. Chaney, Nov. 25, 2002, A.G. Op. #02-0629.

RESEARCH REFERENCES

Am Jur. 21 Am. Jur. Pl & Pr Forms (Rev), Railroads, Form 115.1 (Complaint, petition, or declaration-To quiet title-By private landowners against railroad company-Unused and unnecessary right of way).

CJS. C.J.S. States §§ 263, 264.

Law Reviews. Jarman and McLaughlin, A higher purpose? The constitutionality of Mississippi's public trust tidelands legislation. 11 Miss. C. L. Rev. 5, Fall 1990.

Rychlak, Thermal expansion, melting glaciers, and rising tides: the public trust in Mississippi. 11 Miss. C. L. Rev. 95, Fall 1990.

§ 96. Extra compensation and unauthorized payments prohibited

The Legislature shall never grant extra compensation, fee, or allowance, to any public officer, agent, servant, or contractor, after service rendered or contract made, nor authorize payment, or part payment, of any claim under any contract not authorized by law; but appropriations may be made for expenditures in repelling invasion, preventing or suppressing insurrections.

JUDICIAL DECISIONS

1. In general.
2. Governmental agencies and officers subject to constitutional prohibition—In general.
3. Boards and commissions, governmental agencies and officers subject to constitutional prohibition.
4. Commissioners, governmental agencies and officers subject to constitutional prohibition.
5. Municipal officers and employees, governmental agencies and officers subject to constitutional prohibition.
6. Tax collectors, governmental agencies and officers subject to constitutional prohibition.

1. In general.

Awards of back pay to state employees for their employer's failure to follow Mississippi State Personnel Board rules did not violate Miss. Const. Art. 4, § 96, as the pay was not for services rendered but was to be the equivalent pay for the promotions given to the employees, which were also retroactively awarded. Miss. Empl. Sec. Comm'n v. Culbertson, 832 So. 2d 519 (Miss. 2002).

Mississippi constitutional provision, Miss. Const. Art. IV, § 96, did not apply to block employees' claim for back pay as the back pay was not an award for the required services rendered, but was permissible payment for the State personnel agency's administrative error in not following its own policies, procedures, and rules in promoting its own employees. Miss. Empl. Sec. Comm'n v. Culbertson, — So. 2d —, 2002 Miss. LEXIS 48 (Miss. Feb. 21, 2002), opinion withdrawn by, substituted opinion at, remanded by 2002 Miss. LEXIS 428 (Miss. Dec. 12, 2002).

Christmas bonuses to county hospital employees as a reward for faithful service, is not within powers of its trustees. Golding v. Salter, 234 Miss. 567, 107 So. 2d 348 (1958).

Senate resolution allowing extra compensation to employee of Governor's office held violative of constitutional inhibition against granting of extra compensation to public officers after services rendered.

State, ex rel. Wimberly v. White, 171 Miss. 663, 157 So. 472 (1934).

Contingent fund appropriated for use of a separate branch of legislature is a "public fund" to be used for lawful purposes only and neither branch of legislature can use such fund for accomplishment of purpose prohibited by Constitution. State, ex rel. Wimberly v. White, 171 Miss. 663, 157 So. 472 (1934).

2. Governmental agencies and officers subject to constitutional prohibition—In general.

Article 4, § 96 is controlling on any state agency created by the Legislature. Farrish Gravel Co. v. Mississippi State Hwy. Comm'n, 458 So. 2d 1066 (Miss. 1984).

Mistake of levee board in supposing prohibition against increased compensation applied only to legislature did not deprive board as matter of law of defense of good faith. National Sur. Co. v. Miller, 155 Miss. 115, 124 So. 251 (1929).

This section binds not only the legislature but all subordinate state agencies created or controlled by it from granting extra compensation to a public contractor after contract made. Clark v. Miller, 142 Miss. 123, 105 So. 502 (1925).

3. Boards and commissions, governmental agencies and officers subject to constitutional prohibition.

Where a board of supervisors in issuing refunding bonds as provided by law, engaged in connection therewith the services of an attorney, who on declining to proceed further without increased compensation received a settlement for his work done and expenses incurred, and new attorneys were engaged to complete the work, and the board of supervisors made appropriations for the payment of such attorney's fees under their authority to appropriate money for the payment of the expenses incurred in issuing the bonds, no liability accrued against the board of supervisors in the absence of a charge of corruption or that the appropriations were made to an object not authorized by law, notwithstanding that such appropriations for attorney's fees may have exceeded the amount authorized or that they were in violation of the constitutional provision prohibiting extra compensation to public officers, agents, servants or contractors after service rendered or contract made or part payment of any claim under a contract not authorized by law. New York Life Ins. Co. v. Backstrom, 10 So. 2d 451 (Miss. 1942).

Members of levee board held not individually liable for increased compensation unlawfully paid contractors under amended contract respecting subject-matter within board's general jurisdiction. National Sur. Co. v. Miller, 155 Miss. 115, 124 So. 251 (1929).

Levee construction contractors held liable to levee board for excess paid contractors above contract price because of war conditions. R.T. Clark & Co. v. Miller, 154 Miss. 233, 122 So. 475 (1929).

Chapter 704, Laws of 1924, ratifying the act of a board of supervisors in paying out of county funds claims unauthorized by law, is unconstitutional and void. Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925).

4. Commissioners, governmental agencies and officers subject to constitutional prohibition.

Injunction will not be granted against commissioners of city water and electric plants to forbid setting up of any disability and pension system for their employees as authorized by special legislative enactment as violating this section of constitution when record does not reveal conditions applicable to system to be established by commissioners. Palmertree v. Garrard, 207 Miss. 796, 43 So. 2d 381 (1949).

Act to reimburse state land commissioner for amount paid for additional labor beyond the one deputy provided by law violates this section. Moore v. Walley, 152 Miss. 539, 120 So. 197 (1929).

5. Municipal officers and employees, governmental agencies and officers subject to constitutional prohibition.

Act (Laws 1940, ch 287; Code 1942 §§ 3472-3494), providing for retirement benefits for firemen and policemen but making them available for supernumerary tasks after retirement does not violate this section. Mayor & Aldermen of Vicksburg v. Crichlow, 196 Miss. 259, 16 So. 2d 749 (1944).

6. Tax collectors, governmental agencies and officers subject to constitutional prohibition.

Laws of 1944, ch 179 (amending § 3936, Code 1942), increasing compensation to tax collectors must be construed prospectively, since to increase compensation for services therefore performed would violate this section. Brame v. Wyatt, 197 Miss. 679, 20 So. 2d 667 (1945).

A statute (Laws 1928, c 87) changing the period for collection of ad valorem taxes from the fiscal year to the calendar year, providing for the payment of commissions to the sheriff as tax collector on a graduated basis, being 5 per cent on the first $10,000, 2 per cent on the next $40,000 and 1 per cent on the excess collected over $50,000, and permitting a sheriff to collect the higher percentage of commissions notwithstanding that his predecessor had already collected such higher percentage for the same year's taxes, provided for extra compensation paid to the sheriff for the particular service rendered in the collection of the first taxes collected by him in contravention of the express mandate of the constitution insofar as it operated retroactively. Harrell v. State, 189 So. 177 (Miss. 1939).

Chapter 57, Laws of 1904 reimbursing a tax collector for money erroneously paid into treasury does not violate this section. Henry v. Carter, 88 Miss. 21, 40 So. 995 (1906).

ATTORNEY GENERAL OPINIONS

Article 4, Section 96 of Mississippi Constitution prohibits municipalities from paying extra compensation to employees after employment contract has been made. Hicks, Jan. 20, 1993, A.G. Op. #92-1006.

Section 96 of Article 4 of Mississippi Constitution is controlling on legislature and any state agency created by legislature. Thames, May 19, 1993, A.G. Op. #93-0338.

The board of the Harrison County Wastewater and Solid Waste Management District may not include a termination clause in its employment agreement with its executive director which provides for "a severance allowance equal to three months pay and any unused accrued vacation time . . . provided employee is not terminated for conditions listed . . ." Lanford, November 25, 1998, A.G. Op. #98-0710.

If a salaried employee complies with a request from his supervisor to work all day on a Saturday, a school board may grant him paid time off only if a currently existing policy, which has been validly adopted by the board of trustees and appears in the minutes of that body, provided for such payments. Mayfield, Dec. 3, 1999, A.G. Op. #99-0644.

A school board does not have authority to give cash bonuses to staff members with perfect attendance because such awards would constitute donations beyond the contract made. Jones, June 30, 2000, A.G. Op. #2000-0306.

Where a town hired a police officer after a two year hiatus from prior employment as the police chief, the town made a new employment contract with him with new terms and conditions, and the police officer began to accrue personal leave and sick leave from the date of his reemployment at the rate set forth in his new employment contract with the town or set forth in the town personnel policy; thus, the town could not retroactively award the police officer with accrued sick leave or personal leave benefits from his period of prior employment. Davies, June 23, 2000, A.G. Op. #2000-0352.

A county has no authority to enter into an agreement with law enforcement personnel who are compensated according to an hourly rate in which the county guarantees a minimum of 40 hours of compensation per week, without reduction for missed time. Clearman, Oct. 20, 2000, A.G. Op. #2000-0619.

A county school district may enact a policy which allows an employee two days leave in the following year if the employee has perfect attendance in the previous year. Ball, Nov. 19, 2000, A.G. Op. #2000-0650.

In municipalities providing for accrual of vacation or sick leave, city employees choosing to utilize accrued vacation or sick leave should be charged with the actual number of hours taken; thus, an employee working a 12-hour shift, who chooses to take a full day of leave, should be charged the entire 12 hours of leave as charging an employee with eight hours of accrued leave when, in fact, the employee used 12 hours, would constitute an illegal donation in violation of the Mississippi Constitution. Twiford, III, Jan. 18, 2002, A.G. Op. #01-0776.

A mayor does not have authority to pay employees before services are rendered or the work is performed. Willis, Mar. 8, 2002, A.G. Op. #02-0055.

A board of supervisors may enact prospectively benefits that become part of their employees' benefits package, provided that such programs or activities are included on the board minutes. Dulaney, June 28, 2002, A.G. Op. #02-0370.

No additional compensation in the form of grant fees may be paid to municipal employees unless there was an order authorizing such payment spread upon the municipal minutes and in effect when the extra grant work was done. Brown-Toussaint, July 10, 2002, A.G. Op. #02-0363.

In the absence of a written policy, a board of supervisors does not have authority to compensate an employee for accumulated, unused personal leave and/or accumulated, unused sick leave upon retirement or termination. Trapp, Sept. 6, 2002, A.G. Op. #02-0482.

Where city employees claimed that they were never informed of the city's three-week vacation policy and took only two weeks of vacation over a period of ten years when they could have taken three, because the city is prohibited from making payments to employees in excess of the agreed salary (including benefits), it does not have the authority to grant these employees monetary compensation for the one week per year during which they worked that could have been taken as paid vacation. Bryant, Nov. 1, 2002, A.G. Op. #02-0600.

Even if there was an error in crediting experience at the time a school district hired an employee, the district and the employee agreed upon an amount as salary and the employee was paid that salary and is not due any back pay. Logan, Nov. 8, 2002, A.G. Op. #02-0617.

A local school board would have no authority to award gifts to employees upon retirement. Necaise, Dec. 20, 2002, A.G. Op. #02-0672.

So long as a school district's employees are not already contracted and paid to participate in training sessions and have not performed the service of attending the sessions, Article 4, Section 96 of the Mississippi Constitution does not prohibit the district from contracting with these employees to attend the sessions. Adams, Jan. 10, 2003, A.G. Op. #02-0717.

A municipality, pursuant to its authority to establish salaries and benefits, may enlarge upon the amount of family and medical leave available to municipal employees. Bowman, Feb. 7, 2003, A.G. Op. #03-0771.

A proposed modification of a Department of Human Services contract increasing the rate per mile in their transportation contract was a grant of "extra compensation" within the plain meaning of Miss. Const. art. 4, § 96, and was clearly prohibited. Stringer, Mar. 10, 2003, A.G. Op. #03-0081.

Absent a finding that a county board of supervisors previously and lawfully employed one or more election commission members on a part-time basis to perform certain redistricting tasks that were over and above their regular duties in revising and maintaining the county voter rolls, a nunc pro tunc order would not be authorized. Young, Mar. 7, 2003, A.G. Op. #03-0096.

If a school board determines that the partial time taught by a teacher in separate school years would total at least nine months of actual teaching then the requirements for a year of teaching experience are met; however, if it is clear that the employee was hired by the school district at a specific salary level and was paid accordingly for the work performed, the district may adjust the employee's level of experience prospectively, but there is no authority that would allow the district to award retroactive pay for work that has already been performed and for which an agreed upon compensation had already been provided. Chaney, Apr. 18, 2003, A.G. Op. #03-0150.

No authority can be found that would allow a school district to award retroactive pay for work that has already been performed by a teacher and for which an agreed upon compensation has already been provided. Wright, Aug. 15, 2003, A.G. Op. 03-0344.

An arrangement whereby a municipality would agree to pay a retail business a certain amount of money proportional to the sales taxes generated by that business would result in violations of the Mississippi Constitution prohibiting the forgiveness of obligations owed to municipalities, and prohibiting donations. Kerby, Dec. 5, 2003, A.G. Op. 03-0647.

In the absence of a court order or consideration such as a release, payments in the form of liquidated damages by a school board to employees constitute impermissible donations and unallowable additional compensation and may not be made. Mayfield, Feb. 2, 2004, A.G. Op. 04-0036.

The expenditure of public funds by regional mental health institutions for the purpose of providing their officers, employees or their family members with flowers or other items of value would constitute a gift or donation prohibited by the Mississippi Constitution. Hendrix, Feb. 6, 2004, A.G. Op. 04-0029.

A school board does not have the authority to pay an employee unless services have been rendered or work has been performed. However, a school board may authorize payment to an employee utilizing accrued leave pursuant to the school district leave policy. Chaney, Feb. 20, 2004, A.G. Op. 04-0038.

An incentive compensation program implemented by a county development commission would be in violation of Miss. Const. Art. IV, §§ 66 and 96. Allen, June 11, 2004, A.G. Op. 04-0185.

School board members may not receive free admission to school social and sporting events, nor may they ride school buses free of charge in order to attend events that are out of town. Adams, Mar. 11, 2005, A.G. Op. 05-0039.

Where, as result of a disaster, counties enter into contractual agreements with FEMA wherein FEMA agrees to pay overtime or additional compensations to certain personnel, if such agreements are spread upon the minutes of the board of supervisors, and if the board makes findings that such agreements constitute an employment contract applicable to exempt employees, then such payments would be permissible under Section 33-15-17. Hudson, Sept. 27, 2005, A.G. Op. 05-0477.

A school board policy that grants a “bonus” day of personal leave for perfect attendance for both licensed and non-licensed employees is permissible under Section 37-7-307 and would not violate Miss. Const. Art. 4, § 96, as long as the extra leave does not cause the total amount of leave granted to the employees to exceed the limitations of Section 37-7-307(9). Jacks, Dec. 27, 2005, A.G. Op. 05-0600.

The award of compensatory time or “holiday pay” to employees not actually working on a holiday would constitute an unlawful donation. Kohnke, Apr. 7, 2006, A.G. Op. 06-0123.

Proposal whereby employee and employer agree in advance to certain conditions that, once satisfied by the employee’s future performance, will obligate the employer to temporarily increase the employee’s salary would not violate the constitution. Meredith, Dec. 22, 2006, A.G. Op. 06-0656.

RESEARCH REFERENCES

ALR. Constitutionality of statutes providing for bounty or pension for soldiers. 7 A.L.R. 1636; 13 A.L.R. 587; 15 A.L.R. 1359; 147 A.L.R. 1432; 156 A.L.R. 1458.

Constitutional provision against increasing compensation during term of office as applicable where new duties are imposed on officer after taking office. 21

A.L.R. 256; 51 A.L.R. 1522; 170 A.L.R. 1438.

Constitutionality of retroactive statute providing compensation for one injured in service of state. 22 A.L.R. 1445.

Constitutional power of legislature to grant extra compensation for past services of individual public officer or employee. 23 A.L.R. 612.

Operation of statute fixing public officer's salary on basis of population or of the valuation of the taxable property, as contravening a constitutional provision that the salary of a public officer shall not be increased or diminished during his term. 139 A.L.R. 737.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation. 159 A.L.R. 606.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 382, 383.

43 Am. Jur. (1st ed), Public Officers §§ 363, 364.

CJS. C.J.S. Officers and Public Employees §§ 130, 270, 271, 274, 286.

C.J.S. States §§ 291-294, 377-380.

§ 97. Revival of action barred by limitations prohibited

The Legislature shall have no power to revive any remedy which may have become barred by lapse of time, or by any statute of limitation of this state.

Cross References — Limitations of actions generally, see § 15-1-1 et seq.

Running of civil statute of limitation against state, or any subdivision or municipal corporation, see Miss. Const. Art. 4, § 104.

JUDICIAL DECISIONS

1. Limitations—In general.
2. Private agreement or contract, limitations.

1. Limitations—In general.

The court of appeals refused to apply recent amendments to Miss. Code Ann. § 11-46-11(3) (Supp. 2000) to revive a negligence claim against a school district because to do so would violate this provision of the state constitution. Burge v. Richton Mun. Separate Sch. Dist., 797 So. 2d 1062 (Miss. Ct. App. 2001).

This section relates alone either to an express statute of limitations or to a lapse of time dealt with under the statute or the general law as a limitation of time. North British & Mercantile Ins. Co. v. Edwards, 85 Miss. 322, 37 So. 748 (1905).

2. Private agreement or contract, limitations.

This section has no application to a contract by which the parties agree that an action shall not be brought thereon after a specified time. It relates wholly to limitations prescribed by statute. North British & Mercantile Ins. Co. v. Edwards, 85 Miss. 322, 37 So. 748 (1905).

RESEARCH REFERENCES

ALR. Power of Legislature to revive a right of action barred by limitations or to revive an action which has abated by lapse of time. 36 A.L.R. 1316, 133 A.L.R. 384.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period. 79 A.L.R.2d 1080.

Sex discrimination in treatment of jail or prison inmates. 12 A.L.R.4th 1219.

Am Jur. 51 Am. Jur. 2d, Limitation of actions §§ 39 et seq.

Law Reviews. 1982 Mississippi Supreme Court Review: Miscellaneous. 53 Miss. L. J. 179, March 1983.

§ 98. Repealed

Repealed by Laws, 1992, ch. 713, eff December 8, 1992.
[1869 art XII § 15]

Editor's Note — Former Section 98 read as follows:

"Section 98. No lottery shall ever be allowed, or be advertised by newspapers, or otherwise, or its tickets be sold in this state; and the Legislature shall provide by law for the enforcement of this provision; nor shall any lottery heretofore authorized be permitted to be drawn or its tickets sold."

The repeal of Section 98 of Article 4 of the Mississippi Constitution of 1890 was proposed by Laws, 1992, ch. 713 (Senate Concurrent Resolution No. 512), and upon ratification by the electorate on November 3, 1992, was deleted from the Constitution by proclamation by the Secretary of State on December 8, 1992.

§ 99. Election of officers by Legislature

The Legislature shall not elect any other than its own officers and State Librarian.

Editor's Note — The 1990 amendment to Section 99 of Article 4 of the Mississippi Constitution of 1890 was proposed by Laws, 1990, Chapter 693 (Senate Concurrent Resolution No. 528), was ratified by the electorate on November 6, 1990, and was inserted as a part of the Constitution by proclamation of the Secretary of State on December 19, 1990.

The United State Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section by Laws, 1990, ch. 693, on September 11, 1990.

Cross References — Election of officers of Legislature, see MS Const Art. 4, §§ 38 and 39.

Election of state librarian, see Miss. Const. Art. 4, § 106.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 88, 89, 158-165, 196, 197.

C.J.S. United States §§ 16, 17, 46.

§ 100. Release of obligation or liability owed to State or political subdivision

No obligation or liability of any person, association, or corporation held or owned by this state, or levee board, or any county, city, or town thereof, shall ever be remitted, released or postponed, or in any way diminished by the Legislature, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; but this shall not be construed to prevent the Legislature from providing by general law for the compromise of doubtful claims.

JUDICIAL DECISIONS

1. Obligations within section.
2. Remission, release and postponement—In general.
3. Attorney's fees, remission, release and postponement.
4. Taxes, remission, release and postponement.
5. Penalties and forfeitures, remission, release and postponement.
6. Antitrust actions, remission, release and postponement.
7. Reimbursements, remission, release and postponement.
8. Compromise of claims.

1. Obligations within section.

This provision refers to obligations payable to governmental units, and does not govern securities purchased by such units for investment purposes. Daniels v. Sones, 245 Miss. 461, 147 So. 2d 626 (1962).

The word liability in the section is used interchangeably with obligation. Adams v. Fragiacomo, 71 Miss. 417, 15 So. 798 (1893).

2. Remission, release and postponement—In general.

Act (Laws 1948, ch 738) authorizing city to pay from its general funds to special improvement fund amounts necessary to pay principal and interests on special street improvement bonds equal to sum of assessments authorized to be canceled by the act is unconstitutional under this section. City of Greenwood v. Telfair, 207 Miss. 200, 42 So. 2d 120 (1949).

3. Attorney's fees, remission, release and postponement.

Where a board of supervisors in issuing refunding bonds as provided by law, engaged in connection therewith the services of an attorney, who on declining to proceed further without increased compensation received a settlement for his work done and expenses incurred, and new attorneys were engaged to complete the work, and the board of supervisors made appropriations for the payment of such attorney's fees under their authority to appropriate money for the payment of the expenses incurred in issuing the bonds, no liability accrued against the board of supervisors in the absence of a charge of corruption or that the appropriations were made to an object not authorized by law, notwithstanding that such appropriations for attorney's fees may have exceeded the amount authorized or that they were in violation of constitutional provision prohibiting release of any obligation or liability owing to any county, etc. New York Life Ins. Co. v. Backstrom, 10 So. 2d 451 (Miss. 1942).

4. Taxes, remission, release and postponement.

A city ordinance which would in effect rebate ad valorem property taxes to the elderly and disabled for the tax year of 1982 was repugnant to both statutory law and the Mississippi Constitution, and the ordinance was an ultra vires act beyond the authority of the city to enact. City of Jackson v. Pittman, 484 So. 2d 998 (Miss. 1986).

This section is not violated by a statute providing for suit to confirm title in tax forfeited land and requiring the court upon hearing of such cases to validate and perfect the title in the complainant, unless the court shall find as a fact that the state had not acquired title to the land by virtue of the tax sale, or that the purchase price had not been paid, or that actual fraud had been committed by the patentee, or his representative, in the procurement of the patent. State v. Roell, 192 Miss. 873, 7 So. 2d 867 (1942).

In action by a tax collector to recover gasoline excise taxes, this section did not prevent setting up as res judicata to full amount of claim, a judgment for the tax collector in another action which was less than the amount sued for in that action, since Constitution does not prevent an agreement by judgment for ascertainment of amount which is uncertain. Pan Am. Petro. Corp. v. Gully, 179 Miss. 847, 175 So. 185 (1937).

Bill offering to redeem land from State by payment of State and county taxes held demurrable, where complainant did not offer to pay drainage assessment thereon for nonpayment of which land had been sold to State. Howie v. Panola-Quitman

Drainage Dist., 168 Miss. 387, 151 So. 154 (1933).

Statutory construction that purchaser of land on sale for State and county taxes does not receive land free from lien of drainage assessments held not unconstitutional as releasing, postponing, or diminishing taxes. Howie v. Panola-Quitman Drainage Dist., 168 Miss. 387, 151 So. 154 (1933).

Under constitutional provision prohibiting extinguishment of obligations owned by State, legislature cannot release obligation to State for inheritance taxes. McDonald v. State Tax Comm'n, 158 Miss. 331, 130 So. 473 (1930).

Inheritance taxes which had accrued and were due under existing statute were not released by subsequent statute reducing tax, which amounted only to amendment of prior statute. McDonald v. State Tax Comm'n, 158 Miss. 331, 130 So. 473 (1930).

Statute providing that after tax sale to state, county and levee districts taxes shall remain in abeyance held not in violation of this section. Carrier Lumber & Mfg. Co. v. Quitman County, 156 Miss. 396, 125 So. 416, 66 A.L.R. 614 (1930), error overruled, 156 Miss. 406, 125 So. 416, 66 A.L.R. 619 (1930).

Statute withdrawing from state revenue agent authority to prosecute suits or appeals to assess for taxation, or to collect taxes on, agricultural products, and abating all such pending suits, does not deal with assessments which under the law have become fixed liabilities against any of the taxpayers of the state, and is, therefore, not invalid under this section. Johnston v. Reeves & Co., 112 Miss. 227, 72 So. 925 (1916).

It is beyond the power of a municipality, under the section, to remit or release liability to it for due and unpaid taxes. Morris Ice Co. v. Adams, 75 Miss. 410, 22 So. 944 (1898).

5. Penalties and forfeitures, remission, release and postponement.

Chapter 704, Laws of 1924 being an act to ratify payment by a board of supervisors, of claims which were unauthorized when incurred, giving rise to individual liability of members of the board to the state, such liability could not be remitted under this section of the Constitution. Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925).

A municipality has no power under this section to refund money forfeited by the depositor's breach of contract for public work. Jackson Elec. Ry. & L. Power Co. v. Adams, 79 Miss. 408, 30 So. 694 (1901).

6. Antitrust actions, remission, release and postponement.

Chapter 287, Laws of 1926 withdrawing the power of the revenue agent to prosecute anti-trust suits had the effect of abating such suits unless revived in the proper manner by officers therein provided, and that the act would not postpone the cause of action within the meaning of this section. It seems that the suit will remain pending until dismissed by the court, and that a proper practice would be to move to dismiss. Miller v. Johnston, 144 Miss. 201, 109 So. 715 (1926).

The legislature may reduce the power of revenue agent by providing that he shall not bring suit under the anti-trust law nor prosecute one previously brought and the obligation to the state is not postponed or released by such statute. Miller v. Globe-Rutgers Fire Ins. Co., 143 Miss. 489, 108 So. 180 (1926).

7. Reimbursements, remission, release and postponement.

Chapter 57, Laws of 1904 authorizing reimbursement of tax collector for money erroneously paid into state treasury was not objectionable as providing for an appropriation in the form of a donation to release and discharge a liability due the state in violation of this section. Henry v. Carter, 88 Miss. 21, 40 So. 995 (1906).

8. Compromise of claims.

A stipulation between a levee district and a town that, if preferences were allowed to such town and levee district in a fund to be distributed by the receiver of an insolvent bank which was the depository for both the town and levee district, the aggregate amount allowed should be apportioned pro rata in accordance with the unsecured deposit balances due each of them, was not within the exception in this section permitting the compromise of doubtful claims. Board of Levee Comm'rs v. Parker, 187 Miss. 621, 193 So. 346 (1940).

This section of the Constitution does not prohibit an authorized officer who brings suit for a demand sounding in tort for an unascertained and unliquidated demand, in good faith, compromising said suit. Robertson v. H. Weston Lumber Co., 124 Miss. 606, 87 So. 120 (1921).

This section does not prohibit the board of supervisors settling an unliquidated claim for wrongful cutting of timber on 16th section lands. Eastman, Gardiner & Co. v. Adams, 101 Miss. 460, 58 So. 221 (1912).

ATTORNEY GENERAL OPINIONS

The board of supervisors may not enter into a settlement agreement that would diminish the tax assessments owed to the county, but if the issue in dispute concerns the valuation of property for tax assessment purposes or the applicability of a statutory exemption, the board could settle the issue without violating this section. Ross, Aug. 8, 1997, A.G. Op. #97-0433.

The use of the value of prior donations and/or loans of equipment as credit towards a subsequently incurred debt would be a violation of the section; however, this was not to say that a debt, or a portion thereof, could not be satisfied by future cash payment, loans of equipment, or provision of services, provided that appropriate findings of valuation were made by a county port commission and placed in the record of its meeting to support the acceptance of such as payment. Heidel, June 9, 2000, A.G. Op. #2000-0311.

A county cannot contract to receive less than the full amount of the delinquent amounts due to it that are collected by a private collection agency. Sumners, Nov. 10, 2000, A.G. Op. #2000-0648.

A municipality may not exempt a homeowner from paying property taxes if the municipality is unable to solve a problem with rainwater coming from a cemetery and getting into his or her home. Jones, Apr. 5, 2002, A.G. Op. #02-0149.

A county may not enter into a contract that requires it to waive the right of trial by jury. Chamberlin, Oct. 18, 2002, A.G. Op. #02-0606.

A county may not enter into a contract that waives consequential or special damages, punitive damages, or damages of any type. Chamberlin, Oct. 18, 2002, A.G. Op. #02-0606.

A county may not enter into a contract that limits damages to the contract price or to some certain amount. Chamberlin, Oct. 18, 2002, A.G. Op. #02-0606.

A county may not enter into a contract that limits the county's right to cancel, reduce or set off for any reason. Chamberlin, Oct. 18, 2002, A.G. Op. #02-0606.

A county may not enter into a contract that indemnifies the other party. Chamberlin, Oct. 18, 2002, A.G. Op. #02-0606.

A county may not enter into a contract that waives rights and remedies conferred upon a lessee by Article 2(a) of the UCC. Chamberlin, Oct. 18, 2002, A.G. Op. #02-0606.

A county may not enter into a contract that lowers or modifies the statute of limitations for the filing of a claim. Chamberlin, Oct. 18, 2002, A.G. Op. #02-0606.

A county may not enter into a contract that limits warranty of merchantability. Chamberlin, Oct. 18, 2002, A.G. Op. #02-0606.

Forgiveness of the debt owed on a loan to a county by the Mississippi Development Authority would violate this section. Rohrlack, Oct. 18, 2002, A.G. Op. #02-0610.

Conversion of a loan to a county by the Mississippi Development Authority to a grant by administrative action so as to obliterate the debt would violate this section. Rohrlack, Oct. 18, 2002, A.G. Op. #02-0610.

A municipality is prohibited from subordinating its existing lien or security interest to the lien or security interest of another creditor under any circumstances; thus, a town had the authority to sue an individual to whom a loan was made, due to her failure to pay the remaining balance on the loan. Thomas, Jan. 17, 2003, A.G. Op. #03-0007.

There is no authority for a county board of supervisors to forgive or reduce the amount of ad valorem taxes, penalties and interest due on property. O'Donnell, Feb. 7, 2003, A.G. Op. #03-0053.

A county is prohibited from forgiving uncollectible debts; however, it may utilize accounting procedures to move uncollectible debts to a special category on the county's books entitled "uncollectible" or "inactive" accounts, so that these debts do not show up in the yearly audits as "assets"; any such uncollectible debts could still be collected if circumstances changed at a later date since those debts would not actually have been forgiven. Trapp, Jr., June 20, 2003, A.G. Op. 03-0306.

An arrangement whereby a municipality would agree to pay a retail business a certain amount of money proportional to the sales taxes generated by that business would result in violations of the Mississippi Constitution prohibiting the forgiveness of obligations owed to municipalities, and prohibiting donations. Kerby, Dec. 5, 2003, A.G. Op. 03-0647.

A city may not discount or reduce the amount of indebtedness owed to it pursuant to a promissory note and deed of trust. Farmer, Sept. 16, 2005, A.G. Op. 05-0394.

A county is constitutionally prohibited from entering into a contract which provides that the terms of the contract shall be governed by the laws of another state, and/or which provides that the venue for any contractual dispute will be in the foreign jurisdiction. Nowak, Nov. 18, 2005, A.G. Op. 05-0515.

Although a city could not normally take or release a subordinate lien without violating Miss. Const. Art. 4, § 100, it is our opinion that loan contracts made pursuant to a proper federal program do not violate that section. Thomas, Dec. 27, 2005, A.G. Op. 05-0601.

RESEARCH REFERENCES

ALR. Power to remit, release or compromise tax claims. 99 A.L.R. 1062, 28 A.L.R.2d 1425.

CJS. C.J.S. Social Security and Public Welfare §§ 352, 377-379.

C.J.S. States §§ 265, 267, 294.

C.J.S. Taxation §§ 851, 885-887, 910, 911, 1688.

§ 101. Seat of state government

The seat of government of the state shall be at the city of Jackson, and shall not be removed or relocated without the assent of a majority of the electors of the state.

JUDICIAL DECISIONS

1. Venue for actions against state officials.

Where plaintiff sued the Mississippi Attorney General to obtain discovery from him for use in an administrative proceeding, as the suit was against him in his official capacity, and under Miss. Const. art. 4, § 101, the seat of state government was in Hinds County, venue was proper there, not in Rankin County, where he lived. Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC, 864 So. 2d 939 (Miss. 2004).

RESEARCH REFERENCES

CJS. C.J.S. States § 38.

MISCELLANEOUS

SEC.
102. Elections for State and county officers
103. Filling public officer vacancies; compensation and powers of officers
104. Statutes of limitation not to run against State and political subdivisions
105. Repealed.
106. State librarian
107. Bidding and other requirements for certain contracts
108. Termination of duties pertaining to office
109. Interest of public officer in contracts
110. Rights of way for private roads
111. Sale of land by decree or execution
112. Equal taxation; property tax assessments
113. Auditor's statement of money expended at session
114. Election returns
115. Fiscal year; report of transactions; bonded indebtedness limitation

§ 102. Elections for State and county officers

All general elections for State and county officers shall commence and be holden every four years, on the first Tuesday after the first Monday in November, until altered by the law; and the electors, in all cases except in cases of treason, felony, and breach of peace, shall be privileged from arrest during their attendance at elections and in going to and returning therefrom.

SOURCES: 1869 art IV § 7.

Cross References — Election of governor, see Miss. Const. Art. 5, § 140.

Election of state officers, see Miss. Const. Art. 5, § 143.

Election of Supreme Court judges, see Miss. Const. Art. 6, §§ 145, 145A and 145B.

Elections and right to vote, generally, see Miss. Const. Art. 12, §§ 242 and 244-A et seq.

Political year, see Miss. Const. Art. 14, § 257.

Elections generally, see § 23-15-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where court could enter no judgment in proceeding to restrain election commissioners from ordering printing and distribution of official ballots for general election which could be enforced, because time for holding general election was provided by Constitution, appeal in such proceeding was dismissed as involving a moot question. Sellier v. Board of Election Comm'rs, 174 Miss. 360, 164 So. 767 (1935).

If Highway Commissioners are not de jure officers because not elected at time required by Constitution, they are nevertheless de facto officers whose acts are valid so long as not challenged in legal manner. Trahan v. State Hwy. Comm'n, 169 Miss. 732, 151 So. 178 (1933).

RESEARCH REFERENCES

CJS. C.J.S. Arrest §§ 5, 9, 10. C.J.S. Elections §§ 76, 77.

§ 103. Filling public officer vacancies; compensation and powers of officers

In all cases, not otherwise provided for in this constitution, the Legislature may determine the mode of filling all vacancies, in all offices, and in cases of emergency provisional appointments may be made by the Governor, to continue until the vacancy is regularly filled; and the Legislature shall provide suitable compensation for all officers, and shall define their respective powers.

SOURCES: 1832 art V § 13; 1869 art XII § 7.

Cross References — Vacancy in office of governor, see Miss. Const. Art. 5, § 131. Governor's power to fill vacancies, see Miss. Const. Art. 6, § 177.

JUDICIAL DECISIONS

1. Existence and filling of vacancy—In general.
2. Provisional appointments by governor in emergency, existence and filling of vacancy.
3. Compensation of public officers.
4. Powers of public officers defined—In general.
5. Attorney discipline, powers of public officers defined.
6. Taxation, powers of public officers defined.

1. Existence and filling of vacancy—In general.

Fact that office incumbent holds over under statutory authority until successor has qualified held not to preclude "vacancy" as basis for selecting successor. Berry v. Berry, 165 Miss. 472, 144 So. 695 (1932).

Where duly elected justice of peace failed to qualify, incumbent was authorized to hold over until election and qualification of successor. Berry v. Berry, 165 Miss. 472, 144 So. 695 (1932).

Failure of person appointed commissioner of levee district to qualify creates vacancy. State ex rel. Hairston v. Baggett, 145 Miss. 142, 110 So. 240 (1926).

2. Provisional appointments by governor in emergency, existence and filling of vacancy.

Under this section of the Constitution the Governor has the right to make a provisional appointment of a justice of the peace, where no election had been held, to hold office until the vacancy is regularly filled; so where the board of supervisors pursuant to statutory authority created an additional justice of the peace and, there being no election, the Governor appointed a justice of the peace, such justice of the peace became justice of the peace de jure on being appointed and qualified; at any rate such justice, having possession of the office and exercising the functions thereof under color of authority, was a de facto justice of the peace whose right to the office could not be challenged by one convicted of an offense by a motion in arrest of judgment on appeal from the justice's court. Rawson v. State, 183 Miss. 284, 184 So. 309 (1938).

Whether an "emergency" exists justifying an appointment by Governor to vacant office is reviewable by courts. State ex rel. Parks v. Tucei, 175 Miss. 218, 166 So. 370 (1936).

Where city councilman's term expired two days after resignation and remaining city officers constituted a quorum for transaction of municipal affairs, vacancy caused by resignation of councilman was not such an "emergency" as to justify an appointment by Governor on failure of remaining city officers to name a successor. State ex rel. Parks v. Tucei, 175 Miss. 218, 166 So. 370 (1936).

A mayor duly elected and continuing in office beyond his regular term because no successor was elected held not to constitute an emergency justifying the appointment of a successor by the governor under this section. State ex rel. Booze v. Cresswell, 117 Miss. 795, 78 So. 770 (1918).

Appointment by Governor of certain persons as aldermen of a town, whether legal or illegal, and the performance by them of the duties of the office constituted them de facto officers at least, whose right and title to the office could properly be tried by a quo warranto proceeding. Town of Sumner v. Henderson, 116 Miss. 64, 76 So. 829 (1917).

Although the statute provides that the deputy may continue to discharge the duties of the sheriff in the name of the deceased sheriff until the vacancy is filled, does not prevent the governor from making an emergency appointment under this section. Baker v. Nichols, 111 Miss. 673, 72 So. 1 (1916).

An emergency is created under this section where the deputy sheriff was not qualified elector and eligible to succeed the sheriff upon the death of the sheriff, and hence the governor could appoint a successor to the sheriff. State ex rel. Baker v. Nichols, 106 Miss. 419, 63 So. 1025 (1914).

The mode of filling vacancies in the office of justice of the peace is committed by the section to the legislature; but if it be not filled as prescribed by statute, a case of emergency arises and the governor may fill it provisionally. State v. Lovell, 70 Miss. 309, 12 So. 341 (1893).

3. Compensation of public officers.

The salaries of certain constitutional county officers cannot be abolished by the legislature. Moore v. Tunica County, 143 Miss. 821, 107 So. 659 (1926), motion overruled, 143 Miss. 839, 108 So. 900 (1926).

4. Powers of public officers defined—In general.

A conflict appears in the decisions of the Supreme Court as to the right of the Legislature, under this section, to define the powers of the attorney general so as to deprive him of any power he might have at common law, which conflict can be resolved only in a case where this right vel non of the Legislature is necessarily involved. Dunn Constr. Co. v. Craig, 191 Miss. 682, 2 So. 2d 166 (1941), error overruled, 191 Miss. 715, 3 So. 2d 834 (1941).

5. Attorney discipline, powers of public officers defined.

It is competent for legislature to confer exclusive jurisdiction of disbarring or reinstating attorneys. Ex parte Marshall, 165 Miss. 523, 147 So. 791 (1933).

6. Taxation, powers of public officers defined.

Legislature has power to authorize county tax assessor to back assessed property which has escaped taxation. Reed v. Norman-Breaux Lumber Co., 149 Miss. 395, 115 So. 724 (1928), appeal dismissed, 278 U.S. 556, 49 S. Ct. 14, 73 L. Ed. 503 (1928).

The attorney-general's powers are only such as are conferred by statute, and it is held that he was not authorized to appeal from judgments of the circuit court on appeal from the board of supervisors in tax proceedings. Board of Supvrs. v. Guaranty Loan, Trust & Banking Co., 117 Miss. 132, 77 So. 955 (1918).

RESEARCH REFERENCES

ALR. Death or disability of one elected to office before qualifying as creating a vacancy. 74 A.L.R. 486.

Reconsideration of appointment, or confirmation of appointment, to office. 89 A.L.R. 132.

Right of de facto officer to salary or other compensation annexed to office. 93 A.L.R. 258, 151 A.L.R. 952.

Election within contemplation of constitutional or statutory provisions relating to filling vacancy in public office occurring before expiration of regular term. 132 A.L.R. 574.

Vacancy in public office within constitutional or statutory provision for filling vacancy, where incumbent appointed or elected for fixed term and until successor is appointed or elected is holding over. 164 A.L.R. 1248.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation. 159 A.L.R. 606.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 127 et seq.

42 Am. Jur., Public Officers §§ 129-142.

CJS. C.J.S. Officers and Public Employees § 107.

§ 104. Statutes of limitation not to run against State and political subdivisions

Statutes of limitation in civil causes shall not run against the State, or any subdivision or municipal corporation thereof.

Cross References — Revival of remedies, see Miss. Const. Art. 4, § 97.
Limitations of actions generally, see § 15-1-1 et seq.

JUDICIAL DECISIONS

1. Limitations—In general.
2. Commencement and running of period, limitations.
3. Right of appeal, limitations.
4. Adverse possession, limitations.
5. Redemption from tax sales, limitations.
6. Actions to assess property which has escaped taxation, limitations.
7. Subdivisions, agencies, etc., protected.

1. Limitations—In general.

Pursuant to § 15-1-51 and Miss. Const. Art. 4, § 104, the statute of limitations in civil cases does not run against the state, its political subdivisions, or municipal corporations thereof. Parish v. Frazier, 195 F.3d 761 (5th Cir. 1999).

Where an underlying debt was owed to a community hospital, existing under §§ 41-13-10 et seq., the hospital was a subdivision of the state and the statute of limitations was inoperative against it. Parish v. Frazier, 195 F.3d 761 (5th Cir. 1999).

State's delay in asserting dominion over public trust tidelands does not give rise to an estoppel. Cinque Bambini Partnership v. State, 491 So. 2d 508 (Miss. 1986), certiorari granted 107 S.Ct. 1284, 479 U.S. 1084, 94 L.E.2d 142, dismissal denied, 481 U.S. 1003, 107 S. Ct. 1623, 95 L. Ed. 2d 197 (1987), aff'd, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988), reh'g denied, 486 U.S. 1018, 108 S. Ct. 1760, 100 L. Ed. 2d 221 (1988).

The state's title to public trust tidelands may not be lost via adverse possession, limitations or laches. Cinque Bambini Partnership v. State, 491 So. 2d 508 (Miss. 1986), certiorari granted 107 S.Ct. 1284, 479 U.S. 1084, 94 L.E.2d 142, dismissal denied, 481 U.S. 1003, 107 S. Ct. 1623, 95 L. Ed. 2d 197 (1987), aff'd, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988), reh'g denied, 486 U.S. 1018, 108 S. Ct. 1760, 100 L. Ed. 2d 221 (1988).

This section does not have the effect of continuing indefinitely a judgment lien obtained by the United States in proceedings in Federal district courts, and such lien is subject to state statutes limiting the duration of liens of judgments to seven years (§§ 733, 735, Code 1942). United States v. Williams-Richardson Co., 206 Miss. 378, 40 So. 2d 177 (1949).

Statutes of limitation in civil cases may run in favor of the state and its political subdivisions as provided in § 3096, Code 1906. Wilson v. Naylor, 116 Miss. 573, 77 So. 606 (1918).

The statute of limitations ran against counties and cities prior to the adoption of this section. Warren County v. Lamkin, 93 Miss. 123, 46 So. 497 (1908).

This section suspended the statute of limitations on contracts then existing. Hartman v. Moore, 79 Miss. 74, 29 So. 820 (1901).

The section went into effect on the adoption of the Constitution and was not suspended by § 274. Bradley v. State, 103 Ala. 29, 15 So. 640 (1894).

2. Commencement and running of period, limitations.

The statute of limitations does not begin to run against the purchase of state lands until the land commissioner cancels the patent and presents it to the auditor. Wilson v. Naylor, 116 Miss. 573, 77 So. 606 (1918).

A suit against the state to recover the purchase price of a tax title subsequently declared void is not authorized, until the claim is presented to the auditor and the auditor has refused to issue a warrant for its payment. Brown v. Ford, 112 Miss. 678, 73 So. 722 (1917).

3. Right of appeal, limitations.

The right of appeal exists only by virtue of statute, and a municipal corporation must appeal within the time limit, or it will be barred. Town of Tutwiler v. Gibson, 117 Miss. 879, 78 So. 926 (1918).

4. Adverse possession, limitations.

The adverse possession statute may not run against a county; if there be any conflict between Article 4, § 104 of the Mississippi Constitution and § 29-3-7, the constitutional provision takes precedence. Board of Educ. v. Loague, 405 So. 2d 122 (Miss. 1981).

In an action for confirmation of title to certain 16th section lands that had long been adversely possessed by private individuals, the 25-year adverse possession statute was inapplicable and could not be invoked against the state where there was no presumption of lost grant and no written instrument evidencing a claim or color of title in claimant or her predecessors in title to the 80 acres of land at issue; in addition, the constitution prohibited the running of statutes of limitation against the state in civil causes. Gibson v. State Land Comm'r, 374 So. 2d 212 (Miss. 1979).

Where tax title of state and city to land in question had ripened before defendants in possession of such land had acquired title by adverse possession, and a suit to confirm the tax title was commenced within ten years after a conveyance thereof by the city, defendants could not and did not acquire title by adverse possession. Melvin v. Parker, 223 Miss. 430, 78 So. 2d 477 (1955).

Where state and city hold tax title unto lands, adverse possession will not ripen to vest title into private person. Melvin v. Parker, 223 Miss. 430, 78 So. 2d 477 (1955).

One cannot claim land by adverse possession against city. City of Ellisville v. Webb, 151 Miss. 302, 117 So. 836 (1928).

Adverse possession of land dedicated for a street, does not affect the right of a city to open the street. City of Lexington v. Hoskins, 96 Miss. 163, 50 So. 561 (1909).

5. Redemption from tax sales, limitations.

Statute allowing two years within which to redeem property from tax sale is not a statute of limitations within the meaning of this section, and a county cannot redeem from a valid tax sale after the expiration of the two year period of redemption. Tallahatchie County v. Little, 93 Miss. 88, 46 So. 257 (1908).

6. Actions to assess property which has escaped taxation, limitations.

The six year limitation contained in § 6996, Code of 1930, on the power of the state tax collector to bring suit for the assessment of escaped taxation on behalf of the county, is not a limitation on the cause of action, but a limitation on the right of the revenue agent to sue on an existing cause of action in favor of the county. Gully v. Bew, 170 Miss. 427, 154 So. 284 (1934).

Suit by State Tax Collector to foreclose trust deeds securing illegal loans of county sinking funds held barred as to trust deed securing loan made more than six years before filing of bill, since limitation period for Tax Collector's suit began running as soon as illegal loans were made. Gully v. Bew, 170 Miss. 427, 154 So. 284 (1934).

7. Subdivisions, agencies, etc., protected.

Statute of limitations did not apply to a school district's claim for a refund of oil and gas severance taxes because Miss. Const. art. IV, § 104 and Miss. Code Ann. § 15-1-51 provided that statutes of limitation in civil causes did not run against the state or its subdivisions. Jones County Sch. Dist. v. Miss. Dep't of Revenue, 111 So. 3d 588 (Miss. 2013).

A hospital which was jointly owned by a city and a hospital district, and was governed by a board of trustees jointly appointed by the city council and the county board of supervisors, was a "subdivision [of the state] or municipal corporation thereof" within the meaning and contemplation of Art 4, § 104 of the Mississippi Constitution and § 15-1-51. Thus, the 7-year period of limitations governing judgment liens set forth in § 15-1-47 was inoperative against the hospital. Enroth v. Memorial Hosp., 566 So. 2d 202 (Miss. 1990).

Mississippi Constitution Article 4 § 104 directs that statute of limitations in civil cases shall not run against state or any subdivision thereof; therefore, one year statute of limitations provided in § 15-1-33 is inoperative when suit is brought on behalf of state against School Board and Superintendent for violation of conflict of interest statute. State ex rel. Pittman v. Ladner, 512 So. 2d 1271 (Miss. 1987).

Unless the city is barred by laches or estoppel, it has a right to have a building removed from its present location in the street. Brown v. City of Gulfport, 213 Miss. 457, 57 So. 2d 290 (1952).

A county is a political subdivision of the state within the purview of this section. Gully v. Bew, 170 Miss. 427, 154 So. 284 (1934).

The statute of limitations does not run against the state and cannot be invoked in a suit by the state revenue agent for the benefit of the state to recover penalties for violating the anti-trust statutes. Nugent & Pullen v. Robertson, 126 Miss. 419, 88 So. 895 (1921).

The statute of limitations does not run against a township, and cannot be invoked in suits to recover the property or funds of the township. Robertson v. H. Weston Lumber Co., 124 Miss. 606, 87 So. 120 (1921).

This section is applicable to protect the suit of a town against a county to recover one half of the road tax collected by the county on property within the town limits, and the county could not invoke the statute of limitations. Town of Crenshaw v. Panola County, 115 Miss. 891, 76 So. 741 (1917).

A proceeding against the land commissioner to recover the purchase price of a tax title declared void is an action against the state in its sovereign capacity. Brown v. Ford, 112 Miss. 678, 73 So. 722 (1917).

The Yazoo-Mississippi Delta Levee District (recognized by art II) is a subdivision of the state within the section. Bradley v. State, 103 Ala. 29, 15 So. 640 (1894).

RESEARCH REFERENCES

Am Jur. 51 Am. Jur. 2d, Limitation of Actions § 60.

CJS. C.J.S. Limitations of Actions § 17.

§ 105. Repealed

Repealed by Laws, 1977, ch. 586, eff December 22, 1978.
[1869, art IV § 33]

Editor's Note — Former Section 105 provided for the decennial enumeration of inhabitants and qualified electors in the state.

An amendment eliminating the foregoing section was submitted to the people by the legislature at the session of 1894, see Laws 1894 c 43; an election was held in November, 1894, and seems to have resulted in favor of the elimination of the section, but no action was taken by the legislature after the election.

The repeal of Section 105 of Article 4 of the Constitution of 1890 was proposed by Laws, 1977, Ch. 586 (Senate Concurrent Resolution No. 555) and upon ratification by the electorate on November 7, 1978, was deleted from the Constitution by proclamation of the Secretary of State on December 22, 1978.

§ 106. State librarian

There shall be a State Librarian, to be chosen by the Legislature, on joint vote of the two (2) houses, to serve four (4) years, whose duties and compensation shall be prescribed by law.

SOURCES: Laws, 1977, ch. 591, eff December 22, 1978.

Editor's Note — The 1977 amendment to Section 106 of Article 4 of the Constitution of 1890 was proposed by Laws, 1977, ch. 591, being Senate Concurrent Resolution No. 587 of the 1977 regular session of the Legislature, and upon ratification by the electorate on November 7, 1978, was inserted by proclamation of the Secretary of State on December 22, 1978.

Cross References — Election of state librarian, see Miss. Const. Art. 4, § 99.

§ 107. Bidding and other requirements for certain contracts

All stationery, printing, paper, and fuel, used by the Legislature, and other departments of the government, shall be furnished, and the printing and binding of the laws, journals, department reports, and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the Legislature and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum and under such regulations as may be prescribed by law. No member of the Legislature or officer of any department shall be in any way interested in such contract, and all such contracts shall be subject to the approval of the Governor and State Treasurer.

Editor's Note — Senate Concurrent Resolution No. 514, enacted as Chapter 655, Laws, 1984, adopted by the Senate on April 26, 1984, and the House of Representatives on April 25, 1984, proposed to repeal section 107 of the Mississippi Constitution of 1890. The proposed repeal was submitted to the electorate on November 6, 1984, but was rejected.

Cross References — Prohibition against public officer having interest in certain contracts and sales, see Miss. Const. Art. 4, § 109.

JUDICIAL DECISIONS

1. In general.
2. Validity of statutes.
3. Responsible bidder.

1. In general.

This section was probably adopted by the Convention mainly for the purpose of doing away with the old Public Printer, who was elected by the legislature, and to substitute therefor competitive bidding for the state's printing. Dixon-Paul Printing Co. v. Board of Pub. Contracts, 117 Miss. 83, 77 So. 908 (1918).

This section relates only to contracts for the stationery, etc., of the legislature and other departments of the state government, and has no application to a subdivision of the state, such as a county;

accordingly, this section will not be considered with respect to the constitutionality of a statute relating to contracts for printing and supplies by counties. State ex rel. Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 76 So. 258, Am. Ann. Cas. 1918B,953 (1917).

2. Validity of statutes.
Validity of statute providing for letting of contracts for public printing and limiting persons entitled to bid to those resident of the state and engaged in printing business therein sustained. State ex rel. Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 76 So. 258 (1917); Madison County v. Rhyne, 76 So. 280 (Miss. 1917); Dixon-Paul Printing Co. v. Board of Pub. Contracts, 117 Miss. 83, 77 So. 908 (1918).

3. Responsible bidder.
Statute providing for letting of public printing and that no bidder who was a nonresident of the state, who had not a printing plant in the state, or who was not a bona fide resident of the state and actually engaged in the printing business in the state, should be regarded or treated as a "responsible bidder," did not violate this section, since the power to prescribe regulations for the letting of printing contracts confided to the legislature hereunder included the power to prescribe the qualifications which the bidder must possess, and the definition of "responsible bidder" to confine such to residents of the state was not unreasonable or arbitrary. Dixon-Paul Printing Co. v. Board of Pub. Contracts, 117 Miss. 83, 77 So. 908 (1918).

ETHICS OPINIONS

A school board member's spouse is prohibited by Miss. Const. art. 4, § 109 and § 25-4-105(2) from performing work and receiving living allowances and education awards provided by the national service program related to the regional service program's contract with the school district concerning the district's early head start program. Op. of Miss. Ethics Comm. Op. No. 02-084-E.

RESEARCH REFERENCES

CJS. C.J.S. Reports §§ 6, 7.
C.J.S. States §§ 270-288.

§ 108. Termination of duties pertaining to office

Whenever the Legislature shall take away the duties pertaining to any office, then the salary of the officer shall cease.

JUDICIAL DECISIONS

1. In general.
Act (Laws 1940, ch 287; Code 1942 §§ 3472-3494), providing for retirement benefits for firemen and policemen but making them available for supernumerary tasks after retirement does not violate this section. Mayor & Aldermen of Vicksburg v. Crichlow, 196 Miss. 259, 16 So. 2d 749 (1944).

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees §§ 130, 270, 271, 274, 286.

§ 109. Interest of public officer in contracts

No public officer or member of the Legislature shall be interested, directly or indirectly, in any contract with the State, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Editor's Note — Senate Concurrent Resolution No. 548, enacted as Chapter 655, Laws, 1984, adopted by the Senate on April 26, 1984, and by the House of Representatives on April 25, 1984, proposed to amend Section 109 of the Mississippi Constitution of 1890. The proposed amendment was submitted to the electorate on November 6, 1984, but was rejected.

Chapter 526 (HCR No. 63), Laws, 1986, proposed to amend Section 109, Mississippi Constitution of 1890. The electorate, however, rejected the proposed amendment on June 3, 1986.

For summaries of opinions of Mississippi Ethics Commission see § 25-4-105.

Cross References — Prohibitions against public officer having interest in certain contracts and sales, see Miss. Const. Art. 4, § 107 and Art. 8, § 210.

Public officials not to derive income from issuance of bonds by Mississippi Home Corporation, see § 43-33-763.

Prohibition against public official deriving income from issuance of bonds under Mississippi Major Economic Impact Act, see § 57-75-25.

Application of this section to the Mississippi Gaming Commission, see § 75-76-9.

JUDICIAL DECISIONS

1. Officers within section.
2. Contracts with state or political subdivision—Standing.
3. Contracts with state or political subdivision—In general.
4. Indirect interest, contracts with state or political subdivision.
5. Direct interest, contracts with state or political subdivision.
6. Liability for public funds, contracts with state or political subdivision.
7. Appropriation of agency funds.

1. Officers within section.

This section applies to officer of the levee board. L.A. Becker Co. v. Clardy, 96 Miss. 301, 51 So. 211, Am. Ann. Cas. 1912B,355 (1910).

2. Contracts with state or political subdivision—Standing.

A terminated town employee did not have standing to sue the board of aldermen for a violation of this section. Shelton v. Town of Hickory Flat, 724 So. 2d 1075 (Ct. App. 1998).

3. Contracts with state or political subdivision—In general.

The mere grant of medical staff privileges to a physician by a public hospital does not, in and of itself, create a contract between the hospital and the physician within the meaning of Article 4, § 109 of the Mississippi Constitution. State ex rel. Miss. Ethics Comm'n v. Aseme, 583 So. 2d 955 (Miss. 1991).

An alderman, although his contract is ratified by the city council, cannot contract with his city. Noxubee County Hdwe. Co. v. City of Macon, 90 Miss. 636, 43 So. 304 (1907).

4. Indirect interest, contracts with state or political subdivision.

A school board member and his school teacher wife would be required to make restitution for the salary paid to the wife where the school district entered into the contract with the wife in violation of the prohibitions of § 25-4-105(2) and Article 4, § 109 of the Mississippi Constitution, even if the husband and wife acted in good faith and the school district received value; furthermore, the husband's negative vote on hiring his wife did not insulate him from the violation and liabilities since it was his interest in his wife's contract, not his vote, that was prohibited. Waller v. Attorney Gen. Moore ex rel. Quitman County Sch. Dist., 604 So. 2d 265 (Miss. 1992).

A local school board may not contract with the spouses of its members since the school board members would have an indirect interest in the public school employment contracts of their spouses, which is prohibited by § 109, Article 4, Miss. Const. Smith v. Dorsey, 530 So. 2d 5 (Miss. 1988).

Public school or state college teachers also serving in state Legislature engaged in dual employment involving conflict of interest prohibited by § 109 of Mississippi Constitution, but § 109 was never intended to prohibit any individual from serving in Legislature and voting on general public school laws simply because his or her spouse was employed as public school teacher; where portion of salary under teaching contract comes from discretionary rather than mandatory local tax levies, teachers cannot validly contract with school district while on board of governing authority making such tax levies, or within one year after expiration of term on governing board, and it follows that in so far as § 25-4-105(3)(h) attempts to make exception and authorize such contract it is unconstitutional under § 109; individual serving as member of county board of supervisors which contracts with bank of which he is officer and stockholder violates § 109 and it follows that § 25-4-105(3)(a) authorizing such contract is unconstitutional and void; declaratory judgment to be without force and effect until January 1, 1988. Frazier v. State ex rel. Pittman, 504 So. 2d 675 (Miss. 1987).

Member of board of supervisors making contract with county and other participating members and adjudicating the liability of such members, see Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925).

5. Direct interest, contracts with state or political subdivision.

A state senator who had voted on appropriations bills which provided funds for the State Department of Public Welfare and who had thereafter actively represented and received compensation from a profit-making corporation which had been created with his help specifically for the purpose of entering into a contract with the Welfare Department to provide educational services for handicapped children violated § 97-11-19 [repealed] and Article 4, § 109 of the Mississippi Constitution where no payment of state funds under any of the contracts would have been legally permissible without the passage of the bills and the contract with the Welfare Department was therefore "authorized" by the legislation within the meaning of the statute; the statute is not unconstitutionally vague insofar as it prohibits "indirect interest" in a contract and, in any event, the defendant had a direct interest in the contract where his compensation depended upon such contract and he was paid directly out of funds received from the Welfare Department under the contract terms. Cassibry v. State, 404 So. 2d 1360 (Miss. 1981).

County hospital trustees may not make themselves an allowance for services, where the law makes no provision therefor, although they act in good faith and from honest motives. Golding v. Salter, 234 Miss. 567, 107 So. 2d 348 (1958).

6. Liability for public funds, contracts with state or political subdivision.

County hospital trustees are personally liable for funds used in purchasing supplies from co-trustees, although they acted in good faith and paid only prevailing market prices. Golding v. Salter, 234 Miss. 567, 107 So. 2d 348 (1958).

7. Appropriation of agency funds.

Two legislator pharmacists were not in violation of Miss. Const. Art. 4, § 109, by participating in the legislature's appropriation of funds to the Mississippi Division of Medicaid, because there was no danger of graft or self-dealing, and § 109 was only to be interpreted to provide a rational prohibition against self-dealing and abuse of power. Jones v. Howell, 827 So. 2d 691 (Miss. 2002).

ATTORNEY GENERAL OPINIONS

This section and § 25-4-105(2) will prohibit a legislator from contracting with a Head Start agency receiving funding through the legislative appropriation process even if the funding is indirect. Lanford, September 4, 1998, A.G. Op. #98-0551.

State law contrary to 42 U.S.C. § 1437 is preempted, and a tenant may serve on a board of commissioners of a public housing authority/regional public housing authority until a court of competent jurisdiction rules otherwise. Johnson, III, May 19, 2000, A.G. Op. #2000-0265.

The prohibitions imposed by Section 109 of the Mississippi Constitution and § 25-4-105(2) are eliminated if the school board and school superintendent follow the procedure stated in § 37-7-333 when selecting a depository; however, the constitutional prohibitions are eliminated only with regard to the selection of a depository, and there would still be a conflict for other purposes, such as selecting and opening accounts in various banks, approval of securities pledged, and transfer and deposit of funds between depositories, etc. Manning, July 14, 2000, A.G. Op. #2000-0324.

Section 25-1-53 would not bar the father from continued employment by the board of supervisors if his son is subsequently elected to the position of supervisor. Torrey, Feb. 14, 2003, A.G. Op. #03-0023.

ETHICS OPINIONS

It is not a violation of the state conflict of interest laws for a state legislator, who is also an attorney, to file suit on behalf of a client against the state, its agencies or employees regarding coverage by the Mississippi Tort Claims Board; further, there would be no violation should a court of competent jurisdiction award a judgment, including attorney fees, in favor of the state legislator/attorney's client. However, this section of the Constitution and § 25-4-105(2) prohibit a state legislator/attorney from receiving attorney fees, directly or indirectly, through a settlement agreement in such cases involving the Mississippi Tort Claims Board on behalf of his or her client. Op. of Miss. Ethics Comm. Op. No. 98-053-E.

This section of the Constitution and § 25-4-105(2) prohibit a county school district's employment of a county school board member's son if the county school board member is directly or indirectly interested in the son's employment. In order for the county school board member to not be interested in the son's employment with the county school district, the county school board member must be totally and completely financially independent from his son and the son must be totally and completely financially independent from the county school board member. Op. of Miss. Ethics Comm. Op. No. 98-052-E.

A school board member who is employed by a timber company cannot avoid a violation of this section of the Constitution and § 25-4-105(2) when the school board is acting to approve a bid and/or a contract to sell timber to a timber company employing the school board member as it is not a situation in which the school board member can recuse himself. Op. of Miss. Ethics Comm. Op. No. 98-050-E.

This section of the Constitution and § 25-4-105(2) absolutely prohibit an alderman from being employed by a library system that is partially funded by the alderman's municipality. Op. of Miss. Ethics. Comm. Op. No. 97-139-E.

This section of the Constitution and § 25-4-105(2) prohibit a city council member from being employed as a sales person for an automobile dealership when the dealership is providing repair services, repair parts and warranty services to the city. Op. of Miss. Ethics Comm. Op. No 98-033-E.

A member of the Mississippi Legislature may not participate with a group that contracts with a regional correctional facility, jointly operated by certain counties, to provide collect telephone call services to inmates when the Mississippi Department of Corrections is contracting with these counties' boards of supervisors to house state inmates where the legislature, during the member's term, passed legislation establishing and funding the county owned or leased regional correctional facilities. Op. of Miss. Ethics Comm. Op. No. 98-024-E.

This section of the Constitution and § 25-4-105(2) prohibit a municipality's governing authority, the mayor and board of aldermen, from entering into a lease modification agreement or a new lease agreement with a company that employs two aldermen during the two aldermen's terms of office and for one year thereafter. Op. of Miss. Ethics Comm. Op. No. 98-012-E.

An alderman or an alderman's businesses may not have consultant and/or construction contracts and/or a percentage of ownership in utilities with a company when the company may be contracting with the alderman's city to purchase the city's utility operation should the city privatize its utility operation. Op. of Miss. Ethics Comm. Op. No. 98-009-E.

This section of the Constitution and § 25-4-105(2) prohibit a city council member from having an interest in any banks serving as the city's depositories or contracting with the city for any other purpose; certainly, stock ownership or having a bank's equities and opportunities are such prohibited interests unless those interests are "de minimis non curet lex." Op. of Miss. Ethics Comm. Op. No. 98-008-E.

A member of a community hospital's board of trustees is prohibited from purchasing an interest in a limited liability company that will own 50% of another limited liability company when the remaining 50% ownership interest will be purchased by a nonprofit corporation to which the community hospital's board of trustees authorizes financial assistance and appoints its board members. Op. of Miss. Ethics Comm. Op. No. 98-005-E.

An officer of a bank may not be appointed to the State Board of Education if another subsidiary of the bank's holding company intends to offer investment vehicles for State Department of Education funds or minimum education funds allocated by the State Department of Education to local school districts after the date of the bank officer's appointment to the State Board of Education. Op. of Miss. Ethics. Comm. Op. No. 97-165-E.

An officer of a bank may not be appointed to the State Board of Education if the bank intends to participate in bond offerings by the State Department of Education and to do other business with the State Department of Education after the date of the bank officer's appointment to the State Board of Education. Op. of Miss. Ethics. Comm. Op. No. 97-165-E.

This section of the Constitution and § 25-4-105(2) prohibit a county supervisor's business from contracting with a regional mental retardation commission which is funded in part by the county board of supervisors, during his term of office and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 97-163-E.

This section of the Constitution and § 25-4-105(2) prohibit the city's employment of an alderman's son-in-law if the alderman is directly or indirectly interested in the son-in-law's employment; in order for an alderman to not be interested in the son-in-law's employment with the city, the alderman must be totally and completely financially independent from his son-in-law and daughter. Further, the alderman may not in any way be involved in the board of aldermen's decision to employ his son-in-law as a police officer, should it be determined that the alderman's son-in-law and daughter are financially independent from him. The alderman may not be involved in any decisions of the board of aldermen concerning pay raises or the increasing of other benefits that would benefit the alderman's son-in-law should he be employed by the city. Op. of Miss. Ethics. Comm. Op. No. 97-161-E.

This section of the Constitution and § 25-4-105 do not prohibit a legislator's spouse from participating in the Mississippi Small Business Assistance Program where the authorizing legislation, including the bonding authority, was passed by the legislature prior to the legislator's current term of office. Op. of Miss. Ethics. Comm. Op. No. 97-159-E.

This section of the Constitution and § 25-4-105(2) prohibit an alderman from being employed by a business when his or her city contracts with that business during the alderman's term of office or for one year thereafter, and the prohibition includes the city contracting to purchase real property from the business employing the alderman. Op. of Miss. Ethics. Comm. Op. No. 97-157-E.

This section of the Constitution and § 25-4-105(2) prohibit a member of a governmental body from having an interest, direct or indirect, in a contract authorized by the governmental body during the member's term and for one year thereafter; thus, a governmental board with authority over certain federal grant funds may not expend those funds on contracts the board has entered into with private, nonprofit associations when the governmental board's enabling legislation requires that the executive officers, or their designees, of certain of these nonprofit associations be voting members of the governmental board. Op. of Miss. Ethics. Comm. Op. No. 97-155-E.

This section of the Constitution and § 25-4-105(2) prohibit a state legislator from having an interest in any contract with a school district that is authorized by any law passed by the legislature during the state legislator's term or within one year thereafter and, therefore, a state legislator may not receive architectural/engineering fees for services performed for a school district even when those fees are not paid from state funds. Op. of Miss. Ethics. Comm. Op. No. 97-152-E.

This section of the Constitution and § 25-4-105(2) prohibit county supervisors from having an interest in any sixteenth section lease contracts with the county school district when the lease contracts' rental amounts were approved by the county board of supervisors during the members' terms or within one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 97-148-E.

An individual may not provide medical treatment to inmates under a contract between a community hospital, a private prison and the governmental authority over the private prison when the individual is a board member of the governmental authority. Op. of Miss. Ethics. Comm. Op. No. 97-147-E.

This section of the Constitution and § 25-4-105(2) absolutely prohibit the county board of supervisors from authorizing a contract that provides assistance, directly or indirectly, to a company when one of the supervisors has an ownership interest in a company; this prohibition applies during the supervisor's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 97-142-E.

The parent of a county supervisor may receive financial assistance for homeowner rehabilitation through a grant for the Home Investment Partnerships Program that was awarded to the county board of supervisors unless the supervisor is interested, directly or indirectly, in the parent's receipt of the financial assistance for her homeowners' rehabilitation and so long as the supervisor totally and completely recuses himself from any aspect of the grant/application process. Op. of Miss. Ethics Comm. Op. No. 98-015-E.

The parent of an agent who is administering a grant for the Home Investment Partnerships Program for a county board of supervisors may receive financial assistance for homeowner rehabilitation through the grant, so long as the agent totally and completely recuses himself from any aspect of the grant/application process. Op. of Miss. Ethics Comm. Op. No. 98-015-E.

This section of the Constitution and § 25-4-105(2) do not prohibit a state agency from employing a legislator's spouse as a time-limited, non-state service employee; however, the legislator will be required to recuse himself from matters before the legislature and its committees which might provide a pecuniary benefit to his spouse. Op. of Miss. Ethics Comm. Op. No. 98-041-E.

A state commission is prohibited by this section of the Constitution and § 25-4-105(2) from entering into a service contract with a legislator's spouse. Op. of Miss. Ethics Comm. Op. No. 98-041-E.

This section and § 25-4-105(2) do not prohibit a legislator's spouse from being employed as a public school teacher. Op. of Miss. Ethics Comm. Op. No. 99-045-E.

If a parent/city council member and her daughter who is employed by a long distance telephone service company are totally and completely financially independent of each other and the parent/city council member does not have an interest, direct or indirect, in the daughter's employment contract or the city's long distance telephone service contract with the company, then it would not be a violation of this section and § 25-4-105(2) for the city to contract with the long distance telephone service company and for the parent/city council member's daughter to be the long distance telephone service company's sales representative handling the city's service contract. Op. of Miss. Ethics Comm. Op. No. 99-051-E.

A board member of a county port authority is prohibited from entering into a memorandum of understanding with the county port authority as a property owner who agrees to acquire the county port authority's water and sewer services which may be available by way of a proposed water and sewer extension, as such a memorandum of understanding would not have as its purpose an indemnity agreement with the single objective of protecting the financial interest of the port authority and, therefore, the interests involved were not solely interests of a public nature. Op. of Miss. Ethics. Comm. Op. No. 99-110-E.

A school district may not sell property to a rural water association when the president of the school board is also the president of the rural water association as a school board member is prohibited from having an interest, direct or indirect, in a contract authorized by the school board of which he is a member during his term or for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 99-111-E.

The employment of a county supervisor's financially dependent child in the county tax assessor's office is prohibited. Op. of Miss. Ethics. Comm. Op. No. 99-115E.

A legislator cannot serve as the executive director for a nonprofit corporation which has as its purpose the raising of money for the advancement of a community college. Op. of Miss. Ethics. Comm. Op. No. 99-119-E.

A former public service commissioner is prohibited from being selected as an arbitrator by the Public Service Commission within one year of the end of his term of office. Op. of Miss. Ethics. Comm. Op. No. 99-122-E.

A nonprofit corporation, whose board of directors included all or some of the members of a board of trustees of a community hospital, could not lease the community hospital from the county board of supervisors as the board of trustees' actions to establish the nonprofit and to appoint themselves members of its board of directors under the facts and circumstances presented would in fact result in those actions being a part of the authorization of the lease contract for the community hospital. Op. of Miss. Ethics. Comm. Op. No. 99-123-E.

Although an employee of a planning and development district is not as such prohibited from serving as a member of the board of trustees of a community college, a violation of the conflict of interest laws could arise in the event of the existence of contracts between the two entities in which the public servant would have a private pecuniary interest or an inherent interest. Op. of Miss. Ethics. Comm. Op. No. 99-124-E.

The state conflict of interest laws did not as such prohibit an alderman being employed at a county tax assessor/collector's office; but a circumstance could exist that would cause a violation of the conflict of interest laws should there be a contract between the two governmental entities in which the public servant would have a private pecuniary interest. Op. of Miss. Ethics. Comm. Op. No. 99-125-E.

A company could maintain an existing sixteenth section land lease where the principal owner of the company had been elected to serve on the county board of supervisors, as the company's authorization by the county board of supervisors was not during the owner's term or within one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 99-126-E.

The medical practice of the spouse of a legislator cannot have a Medicaid agreement with the state and receive Medicaid payments by way of a Medicaid agreement when the Medicaid payments will be funded through an appropriation bill passed by the legislature during the legislator's term or for one year thereafter, and a recusal or abstention by the legislator would not alter this result. Op. of Miss. Ethics. Comm. Op. No. 99-128-E.

Simultaneous service as a senior planner for a regional planning commission that served as the metropolitan planning commission for the region within which a city was located and on the city's planning commission could cause a violation of the conflict of interest laws in the event of the existence of contracts between the regional planning commission and the city, if the planner had an inherent interest and/or a private pecuniary benefit in such contracts, and a recusal or an abstention would not prevent such a violation. Op. of Miss. Ethics. Comm. Op. No. 99-E.

The section does not prohibit a county supervisor from nominating his spouse and the county board of supervisors thereafter appointing the county supervisor's spouse to a county planning commission created pursuant to Code Section 17-1-11 as a member of such a planning commission is a public officer and, therefore, does not hold his or her position by contract. Op. of Miss. Ethics. Comm. Op. No. 00-001-E.

A county supervisor is prohibited from having an employment contract with the county sheriff's department during his term of office and is also prohibited from having an employment contract with the county sheriff's department within one year of the end of his term of office. Op. of Miss. Ethics. Comm. Op. No. 00-002-E.

A member of an economic development district was prohibited from accepting employment with a limited partnership during his term and for one year thereafter where the economic development district and the limited partnership had entered into contracts during his term. Op. of Miss. Ethics. Comm. Op. No. 00-004-E.

A school board member cannot be indirectly employed and compensated by a bank as an agent for an insurance company owned by the bank where the bank is the school district's depository or otherwise contracts with the school district, and a recusal or abstention by the board member would not alter the result. Op. of Miss. Ethics. Comm. Op. No. 00-009-E.

A former state legislator within one year of his last term in the legislature cannot contract with a state university to serve as a facilitator of a lecture series where the former legislator is to be paid by the foundation established to support the state university. Op. of Miss. Ethics. Comm. Op. No. 00-010-E.

A county cannot enter into a contract with an ambulance service that employs the son of one of the county supervisors where the son resides with the county supervisor, and a recusal or abstention by the county supervisor will not alter the result. Op. of Miss. Ethics. Comm. Op. No. 00-012-E.

The spouse of a newly elected supervisor cannot remain employed by the county as a road employee in a beat other than the beat of the newly elected supervisor when the county operates under the beat system of road administration, as a violation of the section will occur once the newly elected supervisor's spouse is paid with funds approved in a budget authorized by the county board of supervisors of which the newly elected supervisor is a member, and an abstention or recusal by the supervisor will not prevent the violation. Op. of Miss. Ethics. Comm. Op. No. 00-015-E.

A county cannot continue as a member of a nonprofit opportunity agency and thereby continue to fund the nonprofit opportunity agency when a newly elected supervisor's spouse is employed by the nonprofit opportunity agency, as a violation of the section will occur when the county board of supervisors either authorizes a new membership agreement with the nonprofit opportunity agency employing the newly elected supervisor's spouse during the newly elected supervisor's term of office or within one year thereafter or provides funds to the nonprofit opportunity agency employing the newly elected supervisor's spouse, from monies approved in a budget authorized by the county board of supervisors during the newly elected supervisor's term of office or within one year thereafter, and an abstention or recusal by the supervisor will not prevent the violation. Op. of Miss. Ethics. Comm. Op. No. 00-016-E.

A county supervisor is prohibited from contracting as a consultant with Keep Mississippi Beautiful, Inc. to assist it in implementing its programs if the county in which the supervisor serves also contracts with Keep Mississippi Beautiful, Inc. to implement its state-wide communication programs. Op. of Miss. Ethics. Comm. Op. No. 00-017-E.

A newly elected supervisor's spouse is prohibited from continuing her employment, or from contracting in any other way, with a county-owned hospital after the county board of supervisors of which he is a member approves its first budget submitted by the county-owned hospital, and a recusal or abstention by the supervisor will not alter the result. Op. of Miss. Ethics. Comm. Op. No. 00-019-E.

A public school board member's spouse is prohibited from being employed, or from contracting in any other way, with his or her school district during the school board member's term and for one year thereafter, and a recusal or abstention by the school board member will not alter the result. Op. of Miss. Ethics. Comm. Op. No. 00-020-E.

A newly elected/appointed public school board member's company is prohibited from selling to the public school district during the school board member's term and for one year thereafter, and a recusal or abstention by the school board member will not alter the result. Op. of Miss. Ethics. Comm. Op. No. 00-020-E.

A newly elected/appointed public school board member's spouse is prohibited from retaining her employment position with the public school district, as a violation of the section will occur once the newly elected/appointed public school board member's spouse is paid with funds approved in a budget authorized by the public school district's board of which he is a member. Op. of Miss. Ethics. Comm. Op. No. 00-020-E.

A city cannot employ an alderman's stepdaughter if the alderman is directly or indirectly interested in the stepdaughter's employment contract; in order for the alderman to avoid a violation, the alderman's stepdaughter must be totally and completely financially independent from the alderman and the alderman must have no interest, direct or indirect, in the stepdaughter's employment contract with the city; further, the alderman may not participate in employment matters concerning his stepdaughter, as well as matters concerning pay raises or the increasing of other benefits that would benefit the alderman's stepdaughter. Op. of Miss. Ethics. Comm. Op. No. 00-021-E.

A county board of supervisors is prohibited from obtaining a block grant from the state for use as an economic development loan to a corporation whose president and part-owner is the spouse of a former county supervisor whose term on the board of supervisors expired within one year of the obtaining of the grant and/or the providing of the loan. Op. of Miss. Ethics. Comm. Op. No. 00-022-E.

The spouse of a newly elected member of the county board of supervisors cannot remain employed as a registered nurse by the community hospital owned by the county after the county board of supervisors of which he is a member approves its first budget submitted by the county-owned hospital, and an abstention or a recusal will not prevent a violation of the section. Op. of Miss. Ethics. Comm. Op. No. 00-023-E.

The spouse of a newly elected superintendent of education cannot remain employed with a community college in a work study program made available through the spouse's application for financial assistance from the community college as a full-time student once the funding for the program and/or the spouse's continued employment through the program are authorized by the board of trustees during the trustee/superintendent's term and/or within one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 00-025-E.

An individual cannot continue to serve as the attorney for a nonprofit economic development foundation after being appointed to the board of a port authority when the port authority appoints two of its own board members to the nonprofit foundation's board and also funds the nonprofit foundation, as such individual would then have a prohibited interest in the agreement between the port authority and the nonprofit economic development foundation due to the port authority's funding of the nonprofit foundation; a violation of the section will occur when the port authority's board funds the nonprofit economic development foundation employing the individual as its attorney with monies approved in a budget authorized by the port authority's board during the requestor's term of office or within one year thereafter, and an abstention or refusal will not prevent a violation of the section. Op. of Miss. Ethics. Comm. Op. No. 00-031-E.

A county supervisor's child can be employed by the county board of supervisors in the position of a combined coordinator with the duties of the E-911 director, the emergency management director, and the fire coordinator if the child is totally and completely financially independent from the supervisor and the supervisor has no interest, direct or indirect, in the child's employment contract with the county; however, the supervisor would be required to recuse himself from any action coming before the board of supervisors in connection with the child's original employment and also which would increase his child's compensation or fringe benefits as an employee of the county or that would result in a promotion or re-employment. Op. of Miss. Ethics. Comm. Op. No. 00-033-E.

An independent contractor with the Yazoo-Mississippi Delta Levee District can simultaneously serve as a member of the Board of Commissioners of the Yazoo Mississippi Delta Joint Water Management District, unless the board of the Yazoo Mississippi Delta Joint Water Management District in any way authorizes the board member's contract with the Yazoo-Mississippi Delta Levee District during the board member's term or within one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 00-035-E.

A city is prohibited from purchasing from a large national corporation's retail store when a member of the board of aldermen is employed by the large national corporation at one of its retail stores, and this prohibition will apply during the alderman's term and for one year thereafter; the only applicable exception is if the goods or services involved are reasonably available from two or fewer commercial sources, provided such transactions comply with the public purchases laws. Op. of Miss. Ethics. Comm. Op. No. 00-036-E.

A city is prohibited from purchasing from a large national corporation's retail store when a spouse of a member of the board of aldermen is employed by the large national corporation at one of its retail stores, and this prohibition will apply during the alderman's term and for one year thereafter; the only applicable exception is if the goods or services involved are reasonably available from two or fewer commercial sources, provided such transactions comply with the public purchases laws. Op. of Miss. Ethics. Comm. Op. No. 00-036-E.

A waterway district was not prohibited from contracting with a county supervisor's corporation should the waterway district's board determine the county supervisor's corporation was the lowest and best bid for the construction of 20 cabins as the state bond issue and its monies to fund the contract to build the 20 cabins were independent and separate from the waterway district's normal indebtedness/liabilities, contracts, and county funding; however, such a contract would be prohibited either if the waterway district would fund the contract project with monies derived from the counties' payments or with monies that supplant monies derived from the counties' payments or if the waterway district would fund the contract project with borrowed monies or bond monies when the indebtedness and/or liabilities would be paid for with monies derived from the counties' payments; further the county supervisor would be required to recuse himself from any matter coming before the board of supervisors that concerned the waterway district, an appointment to the waterway district board, and/or the county's funding of the waterway district during the existence of the construction contract should the waterway district board award the contract to the supervisor's corporation. Op. of Miss. Ethics. Comm. Op. No. 00-037-E.

The executive director of a nonprofit corporation could not continue to serve on the county human resource agency's board when the county human resource agency had been awarded a HUD grant that required several local agencies to agree to partner with the county human resource agency, including the nonprofit corporation, if the grant and/or additional support agreement were authorized by the county human resource agency board during the executive director's term. Op. of Miss. Ethics. Comm. Op. No. 00-040-E.

An incorporated restaurant in which an individual was part of the management team and a minority owner would be prohibited from doing business with casinos that had contracts with the city, such as lease contracts, if the individual became a member of the city council, and a recusal or abstention by the city council member would not avoid the violation of the section. Op. of Miss. Ethics. Comm. Op. No. 00-041-E.

A newly elected supervisor's spouse is prohibited from continuing her employment, or from contracting in any other way, with a county-owned hospital after the county board of supervisors of which he is a member approves its first budget submitted by the county-owned hospital, and a recusal or abstention by the supervisor will not prevent a violation of the section. Op. of Miss. Ethics. Comm. Op. No. 00-042-E.

A county supervisor may donate real property to the county for the purpose of establishing a rubbish site within the county; however, the section would be violated should the transfer of the real property from the supervisor to the county not be a true donation or should there be an interest or benefit accruing to the supervisor. Op. of Miss. Ethics. Comm. Op. No. 00-045-E.

Until such time as a court of competent jurisdiction rules that the State Constitution and the Ethics in Government law are preempted by the amended Section 2 of the United States Housing Act of 1937 (42 U.S.C.S. § 1437), an individual assisted by a public housing authority who is appointed to the board of that same public housing authority will be deemed to be in violation of the section at such time as his or her lease agreement is approved by the public housing authority board during his or her term or with in one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 00-059-E.

A county school district would be prohibited from contracting with a county school board member's child or the child's business to provide screen printing supplies, services, and/or materials to the county school district if the school board member was directly or indirectly interested in the child's contract; in order for the school board member to avoid a violation of the section, the school board member's child would have to be totally and completely financially independent from the school board member and the school board member would be required to have no interest, direct or indirect, in the child's contract with the county school district; further, the school board member could not in any way be involved in the county school board's decision to contract with his child or the child's business. Op. of Miss. Ethics. Comm. Op. No. 00-064-E.

A state legislator could not serve as a member of the boards of directors of two nonprofit corporations as one was directly receiving and the second was by affiliation with the first indirectly receiving funds appropriated by the legislature. Op. of Miss. Ethics. Comm. Op. No. 00-070-E.

An industrial development authority was prohibited from purchasing commodities, equipment, and/or furniture from a business in which one of the industrial development authority board members held an ownership interest and this prohibition would apply during the board member's term and for one year thereafter; further, an abstention or recusal by the board member would not prevent a violation of the section. Op. of Miss. Ethics. Comm. Op. No. 00-072-E.

A city's employment of an alderman's son-in-law is prohibited if the alderman is directly or indirectly interested in the son-in-law's employment; in order for an alderman to be uninterested in the son-in-law's employment with the city, the alderman must be totally and completely financially independent from his son-in-law and daughter. Op. of Miss. Ethics. Comm. Op. No. 00-077-E.

A city's employment of one of its alderman's spouses during the alderman's term and for one year thereafter is prohibited; thus, where a police officer's spouse is elected to the board of aldermen, the police officer must resign prior to the newly elected board of aldermen rehiring the city's employees and/or the employees being compensated through a budget having been approved by the newly elected board of aldermen. Op. of Miss. Ethics. Comm. Op. No. 00-078-E.

A legislator or a legislator's business is prohibited from conducting workshops for community college or public school district personnel on location at the schools or some other location and being paid by the respective community colleges or public school districts, and this prohibition will apply during the period during which the legislator is a member of the legislature that appropriated funds to the respective community colleges or public school districts and for one year after the termination of the legislator's term of office. Op. of Miss. Ethics. Comm. Op. No. 00-081-E.

A legislator or a legislator's business is prohibited from contracting with a community college through the college's skill tech center or workforce development office to teach personnel and personal development classes on location at businesses and factories, and this prohibition will apply during the period during which the legislator is a member of the legislature that appropriated funds to the respective community colleges or public school districts and for one year after the termination of the legislator's term of office. Op. of Miss. Ethics. Comm. Op. No. 00-081-E.

A legislator may not be paid by a community college or any other governmental entity funded by the legislature for the participation of the community college's employee or other governmental entity's employee in open-to-the-public classes conducted by the legislator or the legislator's business at chambers of commerce or other such venues, and this prohibition will apply during the period during which the legislator is a member of the legislature that appropriated funds to the respective community colleges or public school districts and for one year after the termination of the legislator's term of office. Op. of Miss. Ethics. Comm. Op. No. 00-081-E.

School board members and their spouses and dependent children are prohibited from purchasing surplus mobile classrooms from the school district. Op. of Miss. Ethics. Comm. Op. No. 00-084-E.

A legislator can be employed by and receive compensation from a 501-C-3 not-for-profit corporation when such compensation is paid from a federal grant that comes directly to the corporation from the United States Department of Education; however, if the corporation also receives funding through the state legislative appropriation process, a legislator can be so employed and compensated only if the state legislative appropriated funds cannot be legally commingled with the federal funds, the local grantee maintains detailed accounting records of all its funds, and the payments to the legislator are not only from funds not appropriated by the legislature, but also from funds that may not be supplanted by the state legislative appropriated funds. Op. of Miss. Ethics. Comm. Op. No. 00-086-E.

A city is prohibited from contracting with a large national corporation through one of its divisions where a member of the city's board of aldermen is employed by the corporation in one if its other divisions and where the alderman holds shares in the corporation, and this prohibition will apply during the alderman's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 00-087-E.

It is not a violation of the state conflict of interest laws for a city council member to be employed by the county to coordinate work between the county and the Mississippi Emergency Management Agency; however, a violation of the section would occur if there existed contracts between the two governmental entities in which the public servant would have an inherent interest and/or a private pecuniary benefit. Op. of Miss. Ethics. Comm. Op. No. 00-089-E.

It is not a violation of the state conflict of interest laws for a city police department employee to serve as a county E-911 commissioner; however, the city police department employee would have a prohibited interest in the E-911 contract between the city and the county authorized by the E-911 commission of which he or she was a member if his duties as a city police department employee were related to the E-911 contract. Op. of Miss. Ethics. Comm. Op. No. 00-092-E.

The director of an emergency ambulance service is prohibited from serving on the E-911 commission if the emergency ambulance service contracts with the county to provide E-911 services. Op. of Miss. Ethics. Comm. Op. No. 00-092-E.

A nurse of a regional hospital is not prohibited from being a county E-911 commissioner; however, a violation of the section would occur in the event of a future contract between the regional hospital and the county for E-911 services. Op. of Miss. Ethics. Comm. Op. No. 00-092-E.

It is not a violation of the state conflict of interest laws for a county E-911 commissioner's son to be employed by the county sheriff's department; however, a violation of the section would occur if the E-911 service contracted with the county sheriff's department to provide E-911 services and the son's employment with the county sheriff's department related to the E-911 service contract with the county sheriff's department if the facts were such that the E-911 commissioner had an interest in the son's employment contract with the county sheriff's department. Op. of Miss Ethics. Comm. Op. No. 00-092-E.

An executive of a telephone corporation is prohibited from serving on the E-911 commission when the county's E-911 equipment is leased from the telephone corporation employing him. Op. of Miss. Ethics. Comm. Op. No. 00-092-E.

A deputy sheriff is prohibited from serving as an alderman if and when the city during his term or within one year thereafter enters into an interlocal agreement with the county in which he would have a private pecuniary interest, such as the county sheriff's department providing police protection or jail services to the city. Op. of Miss. Ethics. Comm. Op. No. 00-094-E.

An attorney or the attorney's law firm cannot be compensated as the closing attorney by the buyer or seller in regard to a mortgage loan funded by bond funds through Mississippi Home Corporation where the attorney's spouse has been appointed to the Mississippi Home Corporation's board of directors if the closing attorney fees incurred in connection with the mortgage loan are paid from monies provided the buyer/borrower from a three percent cash advance or a one percent premium cash advance or if the seller employs the closing attorney and the sales contract provides that the buyer/borrower will reimburse the seller for such costs and the buyer/borrower does so with a three percent cash advance or a one percent premium cash advance. Op. of Miss. Ethics. Comm. Op. No. 00-101-E.

A county tourism commission's agreement to pay and its actual authorization and payment of funds to a restaurant for meals associated with tourism when the restaurant is owned by a member of the county tourism commission results in the member having a direct interest in a contract authorized by the county tourism commission in violation of the section. Op. of Miss. Ethics. Comm. Op. No. 00-102-E.

School board members and their spouses and dependent children are prohibited from purchasing surplus equipment from the school district at auction; however, relatives of school board members other than spouses and dependent children are not prohibited from purchasing surplus equipment from the school district at auction. Op. of Miss. Ethics. Comm. Op. No. 00-106-E.

A member, officer, or director of the volunteer fire department is prohibited from serving as a commissioner of a fire protection district and simultaneously maintaining his or her position with the volunteer fire department, as long as there are contractual arrangements between the district and the fire department authorized by the fire protection board during his or her term or within one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 00-109-E.

An appointed commissioner of a fire protection district is prohibited from serving as either a member, officer, or director of a volunteer fire department for as long as there are contractual arrangements between the district and the fire department authorized by the fire protection board during his or her term or within one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 00-109-E.

An alderperson accepting a position as deputy county tax collector or currently serving in a position of deputy county tax collector would violate the section if an interlocal agreement between the city and the county for the county tax collector's office to collect the city's taxes was entered into during the alderperson's term, was renewed during the alderperson's term, and/or if payments under such an agreement were made or continued during the alderperson's term; further, the same prohibitions that applied during the alderperson's term would apply for one year after the end of the alderperson's term. Op. of Miss. Ethics. Comm. Op. No. 00-118-E.

A mayor cannot be employed and compensated by an engineering firm for as long as the engineering firm remains the city's engineering firm. Op. of Miss. Ethics. Comm. Op. No. 00-119-E.

A state legislator is not prohibited from being employed by a Mississippi nonprofit corporation because he is a legislator where the Mississippi nonprofit corporation does not receive direct or indirect funding through legislative appropriations and has no contracts authorized by the Legislature. Op. of Miss. Ethics. Comm. Op. No. 00-126-E.

It is not a violation of the state conflict of interest laws for a city council member to be employed by a county-owned community hospital to plan and promote special activities for senior citizens in a multi-county service area; however, a violation of the section will arise in the event of a contract between the two governmental entities in which the public servant would have an inherent interest and/or a private pecuniary benefit. Op. of Miss. Ethics. Comm. Op. No. 00-127-E.

An alderman was prohibited from performing masonry work on houses for his father, who was the builder and developer of the subdivision in which the houses were located, where the alderman's father received a loan approved by the board of aldermen to assist him in the development of the subdivision, and this prohibition would apply during the alderman's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 00-128-E.

A member of a regional commission, the members of which were made up of individuals from three states including Mississippi, was prohibited from resigning from the commission and immediately accepting the position of executive director of the commission; the current Mississippi member of the regional commission could not accept the position of executive director of the commission within one year of her resignation as a member of the commission. Op. of Miss. Ethics. Comm. Op. No. 00-129-E.

It is a violation of the state conflict of interest laws for a school board member to sell prepaid legal service agreements to the employees of the school district on a payroll deduction plan under the school district's cafeteria plan; the violation of the section 109 will occur when the school board approves the cafeteria plan and its related agreements during the school board member's term or within one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 00-130-E.

A county supervisor's daughter-in-law cannot be employed by the county tax assessor/collector's office if the county supervisor's son and daughter-in-law are financially dependent on the county supervisor and/or if the county supervisor is interested, directly or indirectly, in the daughter-in-law's county employment contract. Op. of Miss. Ethics. Comm. Op. No. 00-135-E.

A business in which a city advisory board member has a material financial interest can sell goods and services to the city after the effective date of the advisory board member's resignation; however, if a city's park board has the authority to recommend or approve the recreation equipment purchased by the city's governing board, then its members would be prohibited not only during their term but for one year thereafter from having an interest, direct or indirect, in the city's contract to purchase the recreation equipment. Op. of Miss. Ethics. Comm. Op. No. 00-140-E.

It is not a violation of the state conflict of interest laws on the part of the city's governing authority for them to appoint an individual as a member of the municipal school district's board of trustees when that individual's spouse is a noninstructional employee of the municipal school district; however, when a contract of employment with the spouse is renewed or changed by the municipal school board once the proposed appointee becomes a member of the municipal school board, a definite conflict of interest will arise. Op. of Miss. Ethics. Comm. Op. No. 01-006-E.

An individual would not be prohibited from continuing to serve as mayor should he be employed by the county sheriff's department where there were no contracts existing between the municipality and the county as the municipality and the county were separate governmental entities; however a violation of the section would arise in the event of a contract between the municipality and the county in which the individual, as an employee of the sheriff's department and as the mayor of the city, would have a private pecuniary interest. Op. of Miss. Ethics. Comm. Op. No. 01-010-E.

A newly appointed school board member's spouse could not remain employed in a noninstructional position with the school district as the school board was prohibited from entering into a new employment contract with the school board member's spouse. Op. of Miss. Ethics. Comm. Op. No. 01-011-E.

A state coordinating council and its designated selection committee could approve a bid to provide services for the establishment of a strategic plan where the bid included as a subcontractor a center at a state university and where employees of that state university were designated members of the state coordinating council by state statute as there was no information that revealed that the state university members of the coordinating council would personally or pecuniarily benefit from the selection of the bid which had the state university's center included as a subcontractor. Op. of Miss. Ethics. Comm. Op. No. 01-012-E.

A state coordinating council and its designated selection committee could approve a bid to provide services for the establishment of a strategic plan where the director and a contract employee of a state entity that has competed with the losing bidder for other projects participated in the bid selection review process and where the director of the state entity was designated a member of the state coordinating council by state statute as there was no information that revealed that the state university members of the coordinating council would personally or pecuniarily benefit from the selection of the bid which had the state university's center included as a subcontractor. Op. of Miss. Ethics. Comm. Op. No. 01-012-E.

A city could purchase a historical property from the estate of the mother of an alderman's former spouse where the alderman's adult child was an heir of the estate and would share in the proceeds from the sale of the historical property if the alderman's child was totally and completely financially independent from the alderman and the alderman had no interest, direct or indirect, in the purchase contract. Op. of Miss. Ethics. Comm. Op. No. 01-013-E.

A city was prohibited from authorizing a contract with a bank to serve as its depository, or for other purposes, while an alderman serving the city had a spouse that the bank employed, and the prohibition would apply during the alderman's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-016-E.

An employee of a natural gas district can serve as an alderman of a city that participated in the creation of the district and that receives significant funding from the district; however, a violation of the statute could arise if there was a contract between the district and the city in which the employee of the natural gas district had a private pecuniary interest. Op. of Miss. Ethics. Comm. Op. No. 01-017-E.

An alderman can serve as an uncompensated member of the board of directors of a quasi-governmental, nonprofit industrial development authority established by the county's industrial development district where the city does not provide any direct funding to either the authority or the district; however, the alderman would be required to totally and completely recuse herself from any matter coming before the board of aldermen that concerned the nonprofit industrial development authority. Op. of Miss. Ethics. Comm. Op. No. 01-022-E.

A legislator's spouse could not be employed by a county board of supervisors at the request of the county judge as a youth court victim/witness coordinator where the victim/witness coordinator position was partially funded by a grant from a state department that was appropriated by the legislature during the legislator/spouse's term or for one year thereafter unless the large class rule set forth by the State Supreme Court was applicable. Op. of Miss. Ethics. Comm. Op. No. 01-024-E.

A business owned by the former director of pharmaceutical services of a community hospital could contract with the community hospital within one year of his resignation. Op. of Miss. Ethics. Comm. Op. No. 01-029-E.

A county board of supervisors is prohibited from contracting with the spouse of one of its members by employing the spouse as computer support personnel, and this prohibition will apply during the supervisor's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-030-E.

It is not a violation of the state conflict of interest laws for an employee of a state department to simultaneously serve as a municipality's mayor; however, a violation of the section could arise in the event of a contract between the two governmental entities in which the mayor would have an inherent interest and/or a private pecuniary benefit. Op. of Miss. Ethics. Comm. Op. No. 01-031-E.

A community mental health center is prohibited from contracting with a construction company owned by a county supervisor who is a member of one of the boards of supervisors that appropriates funding to the community mental health center, and this prohibition will apply during the supervisor's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-032-E.

A mayor could not be employed by a nonprofit corporation where the city the mayor served transferred a health agency to the nonprofit corporation during his previous term of office. Op. of Miss. Ethics. Comm. Op. No. 01-034-E.

A county board of supervisors is prohibited from authorizing the purchase of one of its members' property and/or approving the funds to purchase one of its members' property for any purpose, including expanding the existing industrial park at the recommendation of the county economic development foundation. Op. of Miss. Ethics. Comm. Op. No. 01-038-E.

The spouse of a newly elected mayor cannot continue to contract with the city if the spouse's contract is authorized by the city's newly elected governing authority or if the funding to pay for the spouse's contract is approved by the city's newly elected governing authority. Op. of Miss. Ethics. Comm. Op. No. 01-039-E.

A former trustee of a county economic development district is prohibited from selling land to the county as state law gives the power to purchase land to the county economic development district, and this prohibition will apply for one year from the date of the former member's resignation from the county economic development district. Op. of Miss. Ethics. Comm. Op. No. 01-046-E.

It is not a violation of the state conflict of interest laws for an employee of a regional housing authority to serve as the town's mayor, with the understanding that the regional housing authority receives no funding of any kind or no additional bond issuing authority from the mayor and board of aldermen during the authority employee's term and for one year thereafter; such funding would result in the authority employee as mayor having a prohibited interest by way of his employment contract with the regional housing authority in violation of the section. Op. of Miss. Ethics. Comm. Op. No. 01-048-E.

A school district's board of trustees is prohibited from entering into a memorandum of agreement with a nonprofit organization so that the nonprofit organization can perform its subgrantee responsibilities under a grant from the Mississippi Department of Human Services where the nonprofit organization's executive director is the spouse of one of the school district's trustees, and this prohibition will apply during the school district trustee's term of office and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-050-E.

A public water and sewer district board was prohibited from entering into a water maintenance contract with a private company where two of the district's board members were employees of and stockholders in the private company, another district board member was an employee of the private company, and another district board member's spouse was an employee of the private company; however, the district board was not prohibited from accepting a gift from the private company of the funds and services described in the water maintenance contract. Op. of Miss. Ethics. Comm. Op. No. 01-055-E.

The appointment of the parent to the board of trustees of the community hospital can certainly result in a violation of the state conflict of interest laws due to the child's employment with the community hospital; in order for the potential hospital trustee to avoid a violation of the section, the potential hospital trustee's child must be totally and completely financially independent from the potential hospital trustee and the potential hospital trustee must have no interest, direct or indirect, in the child's employment contract with the county hospital. Op. of Miss. Ethics. Comm. Op. No. 01-056-E.

A legislator can be employed by a county as director of the county's office of planning and development, but must totally and completely recuse himself from any and all matters coming before the legislature or its committees that concern his county employer and matters that concern planning, building, housing, and development that he is involved with as the county's director of office of planning and development. Op. of Miss. Ethics. Comm. Op. No. 01-057-E.

A community hospital is prohibited from contracting with a physician to pay his moving and relocation expenses and a portion of his student loans where the physician will be employed by the medical clinic in which the hospital trustee is an equity member. Op. of Miss. Ethics. Comm. Op. No. 01-062-E.

A county supervisor was prohibited from having an interest as a not-for-profit corporation's employed administrator in the county's lease contract with the nonprofit corporation where the lease contract between the county and the nonprofit corporation was executed during the supervisor's term of office by an order of the county board of supervisors. Op. of Miss. Ethics. Comm. Op. No. 01-067-E.

It is not a violation of the conflict of interest laws for an elected school board member to simultaneously serve as a mayor, even though the municipality the mayor serves is located within the school district; however, the individual would be prohibited from directly or indirectly having an inherent interest and/or receiving a personal or pecuniary benefit from the school district or the municipality as a result of any contracts existing between the two governmental entities authorized during his terms of office or within one thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-071-E.

A school board is prohibited from authorizing a contract with a bank to serve as its depository, or for other purposes, when a school board member has a spouse that the bank employs. Op. of Miss. Ethics. Comm. Op. No. 01-072-E.

A town board is prohibited from reappointing/re-employing a new mayor's child as city clerk if the mayor will have an interest, direct or indirect, in the child's employment contract with the town; in order for the mayor to avoid a violation of the section 109, the mayor must be totally and completely financially independent from his child and have no interest, direct or indirect, in the child's employment contract with the town. Op. of Miss. Ethics. Comm. Op. No. 01-073-E.

A school district can contract with a tire company to provide the school district with its school bus tires where the company has its new service trucks used in its tire business retrofitted with equipment by another company that employs one of the school district's board members who is its employee that actually does the retrofitting of the tire company's service trucks as the school board member's employing company's retrofitting of the tire company's new trucks is not a subcontract to the school district's proposed contract with the tire company to provide school bus tires. Op. of Miss. Ethics. Comm. Op. No. 01-074-E.

A city is prohibited from authorizing a contract with a bank to secure interim financing of a sewer bond issue, or for other purposes, when an alderman serving the city has a spouse that the bank employs, and the prohibition applies during the alderman's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-075-E.

An individual employed by the county as a veterans advocate can simultaneously serve as an alderman as a city and a county are separate governmental entities; however a violation of the section would arise in the event of a contract between the two governmental entities in which the individual would have an inherent interest and/or would receive a personal or pecuniary benefit or where the governmental entity that the individual served as a board member appropriated funds to the governmental entity employing the individual and that funding directly or indirectly resulted in a personal and pecuniary benefit to the public servant. Op. of Miss. Ethics. Comm. Op. No. 01-077-E.

A city is prohibited from contracting for the maintenance and repair of its vehicles with a business in which an alderman has an ownership interest despite the fact that no other business located within the city can provide these services, and this prohibition will apply during the alderman's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-078-E.

A city is prohibited from contracting with an alderman's son-in-law's business if the alderman is directly or indirectly interested in the son-in-law's business contracts; in order for the alderman to avoid a violation of the section, the alderman must be totally and completely financially independent from his son-in-law and daughter and have no interest, direct or indirect, in the son-in-law's business' contracts with the city. Op. of Miss. Ethics. Comm. Op. No. 01-079-E.

The spouse of an alderman was prohibited from being a developer in a housing development project for which the town was the governmental entity that procured the federal grants and loan funds and in which the town acted as mortgagor, and this prohibition applied during the alderman's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-081-E.

A county supervisor is prohibited from being employed by a community college funded by the county supervisor's board during the county supervisor's term and for one year thereafter, when any funding provided by the county to the community college during the supervisor's term is nondiscretionary. Op. of Miss. Ethics. Comm. Op. No. 01-089-E.

A county school board member could not be employed by the county sheriff's department as a county school resource officer where the county school board of which he was a member had entered into an agreement to pay the salary of the county school resource officer the fourth year in compliance with a grant retention requirement. Op. of Miss. Ethics. Comm. Op. No. 01-091-E.

A state agency is prohibited from employing a new board member's spouse as of the beginning of the upcoming new budget year. Op. of Miss. Ethics. Comm. Op. No. 01-098-E.

An individual that owned and operated a solid waste disposal company that used the landfill of a solid waste management authority could not serve on the board of the authority as the understanding between the authority board and the company owned by the board member to allow his company to dispose of the waste it collected as part of its contracts with governmental entities and private commercial businesses was sufficient to be interpreted as a contract where the company was allowed a line of credit and agreed to the requirements that were imposed with the acceptance of the line of credit. Op. of Miss. Ethics. Comm. Op. No. 01-105-E.

A member of a port commission cannot represent clients in litigation about public tidelands interests and taxes on tidelands lease parcels which may adversely affect the port commission and reduce tax revenues in which the port commission shares, even if the member recuses himself from voting and from being present at those parts of meetings of the port commission at which discussions or decisions pertaining to the litigation occurred. Op. of Miss. Ethics. Comm. Op. No. 01-107-E.

A town could proceed with a grant for funding the construction of rental units to be built on property of the spouse of a newly elected board member where the application and approval of the grant occurred prior to the newly elected board member taking office as no further actions on the part of the town's board of aldermen was required in the grant process other than the board's approval of the payment draws, which was part of the terms of the grant application and grant contract approved by the previous board of aldermen. Op. of Miss. Ethics. Comm. Op. No. 01-109-E.

A public school teacher, if elected to the State Legislature, will be in violation of this section and § 25-4-105(2) upon entering into a contract with a public school district for the school year that the appropriation bill passed during his or her first legislative session applies; in other words, a teacher elected to the State Legislature may complete the school year covered by his or her existing contract, but may not continue in that position or as a substitute teacher on a part-time basis after being elected to the State Legislature. Op. of Miss. Ethics Comm. Op. No. 99-045-E.

A water management district could obtain a temporary easement from a county supervisor to perform cleaning and maintenance on a creek to correct flooding problems where the supervisor was not compensated for the easement and the county as a member of the district provided funding to the district; the easement resulted in a contract where the interests were public and not private as the ultimate and overwhelming benefit of controlling the flooding was to the public at large, public roads, and a public bridge project. Op. of Miss. Ethics. Comm. Op. No. 01-114-E.

A municipality is prohibited from continuing to purchase vehicles, receive services, or contract in any other way with a car dealership that employs the mayor during the mayor's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-118-E.

A legislator/attorney could form a law firm that would be a limited-liability corporation that would enter into a contractual agreement for legal services with another law firm that was representing or would represent in the future certain state agencies where, under the proposed contractual agreement, the limited-liability corporation would be hired to work on specific, nongovernmental files as the vast majority of the other firm's clients and the work performed by the firm involved legal matters which were not pursuant to a state contract or funded with state dollars and the the legislator/attorney's incorporated law firm would not be providing legal services exclusively for the other firm and, therefore, the legislator/attorney's firm would not be interested, directly or indirectly, in the other firm's limited number of state or state funded contracts under the proposed contractual agreement. Op. of Miss. Ethics. Comm. Op. No. 01-119-E.

A school board may not enter into a new employment contract with the spouse of a newly elected school board member once the board member takes office; however, it is possible, although not prudent, for the board member's spouse to complete her current employment contract without the board member violating the state conflict of interest laws. Op. of Miss. Ethics. Comm. Op. No. 01-125-E.

A city may not contract with a company to lay water lines when one of the city's aldermen is employed by the company. Op. of Miss. Ethics. Comm. Op. No. 01-128-E.

A city may not authorize a contract with a bank to serve as its depository, or for other purposes, when the mayor serving the city has a spouse that the bank employs; and this prohibition applies during the mayor's term and for one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 01-129-E.

An individual who is purchasing a house from an alderman's son and his partner may use moneys from the city's Community Development Block Grant as the down payment on the house when the individual's approval for participation in the block grant program and the authorization of the down payment must be approved by the mayor and board of aldermen, so long as the alderman will not profit from the transaction. Op. of Miss. Ethics. Comm. Op. No. 02-001-E.

The mayor and board of aldermen may appoint an individual to the board of trustees of the municipal school district where the individual's spouse ceased to be employed by the municipal school district prior to the individual's appointment. Op. of Miss. Ethics. Comm. Op. No. 02-004-E.

A board of supervisors may not authorize a contract with a bank to serve as its depository, or for other purposes, when the bank employs one of the county supervisor's spouses. Op. of Miss. Ethics. Comm. Op. No. 02-010-E.

A city's superintendent of its solid waste department, who also serves as commissioner for the regional solid waste authority, may not simultaneously serve as a member of the county board of supervisors if the city, county, and regional solid waste authority have an interlocal agreement to operate and maintain a solid waste transfer station. Op. of Miss. Ethics. Comm. Op. No. 02-012-E.

An individual may not remain town attorney after marrying one of the town alderman, even if the individual volunteers his services and receives no compensation. Op. of Miss. Ethics. Comm. Op. No. 02-020-E.

A city council member may not sell property to the city under the Flood Acquisition Assistance program, which the city council member approved, even if the council member derives no profit from sale of the property and the city pays less than appraised fair market value for the property; further, the city council member may not sell the property to a third party without profit, with the third party then selling the property to the city under the Flood Acquisition Assistance program. Op. of Miss. Ethics. Comm. Op. No. 02-021-E.

A county supervisor, who is also a licensed auctioneer, may not conduct an auction to sell county surplus property, even if he does not charge the county a fee. Op. of Miss. Ethics. Comm. Op. No. 02-022-E.

A school board member's spouse may not contract with the school district to perform electrical work. Op. of Miss. Ethics. Comm. Op. No. 02-031-E.

It is not as such a violation of the conflict of interest laws for a former city employee to immediately contract with the city upon his or her termination from the city. Op. of Miss. Ethics. Comm. Op. No. 02-057-E.

A water management district may not purchase land from a bank when several of the district's directors are stockholders of the bank, and such prohibition will extend until one year after the terms of the district directors. Op. of Miss. Ethics. Comm. Op. No. 02-067-E.

A county supervisor may be employed by the community college his or her county funds through a tax levy only if the current funding of the particular community college by the county board of supervisors is a maximum mandatory amount set by statute and said levy cannot be reduced from the previous year, removing the funding discretion from the county board of supervisors. Op. of Miss. Ethics Comm. Op. No. 02-072-E.

A county supervisor will not violate §§ 25-4-105(3)(a) or 25-4-105(3)(b), should he or his business contract with or sell goods or services to, or make purchases from, a community college because the county and community college are separate governmental entities as defined by § 25-4-103(g)(h). Op. of Miss. Ethics Comm. Op. No. 02-072-E.

The only way a county supervisor can be certain to avoid violating § 25-4-105(1) is to recuse himself from all matters coming before the county board of supervisors that concern a community college employing the requestor or contracting with the requestor by way of his business. Op. of Miss. Ethics Comm. Op. No. 02-072-E.

Because a county supervisor is prohibited by Miss. Const. art. 4, § 109 and § 25-4-105(2) from directly or indirectly having an inherent interest and/or receiving a pecuniary benefit from his county or a community college as a result of any contracts existing between the two governmental entities, a recusal or an abstention will not prevent a violation since, even without a board member's vote, the authorization by the member's board nonetheless results in a contract in which the board member has a prohibited interest. Op. of Miss. Ethics Comm. Op. No. 02-072-E.

A city may not accept a donation from a beverage company in exchange for an exclusive contract with the company to sell soft drinks on city property and at city functions, when a bottling company employing one of the city's aldermen has an exclusive franchise with the company for the area in which the city is located. Op. of Miss. Ethics Comm. Op. No. 02-073-E.

It is not a violation of Miss. Const. Art. 4, § 109 and § 25-4-105(2) for a mayor to request and receive a historic preservation district tax abatement from the city he also serves since granting the tax abatement results in the city withholding its right to impose its legal authority to tax and does not result in an authorization of a contract. Op.of Miss. Ethics Comm. Op. No. 02-075-E.

The fact of membership on the state board overseeing state-sponsored savings plans of a person who is also a registered investment broker employed by an investment company would not prevent the member's employer from participating in brokering a state savings plan to its customers as long as the member does not act as the broker/dealer for or otherwise receive compensation from customers purchasing the plan. Op. of Miss. Ethics Comm. Op. No. 02-076-E.

A county economic development authority is not prohibited by Miss. Const. art. 4, § 109 and § 25-4-105(2) from contracting with a nonprofit economic development joint venture partnership to provide marketing and management services; however, the partnership board members, who are also county economic development board members, would be prohibited by those constitutional and statutory provisions from having any private pecuniary interest in the contract between the two governmental entities. Op. of Miss. Ethics Comm. Op. No. 02-079-E.

This section and § 25-4-105(2) prohibit a city airport authority from entering into a contract during a commissioner's term and for one year thereafter with construction companies, either as a contractor or subcontractor, that purchase glass for an airport authority project from a business employing the commissioner's spouse. Op. of Miss. Ethics Comm. Op. No. 02-092-E.

A city is prohibited from purchasing insurance from an insurance company in which an alderman and/or his spouse serve as officers and which leases office space from an alderman until one year after the alderman leaves office. Op. of Miss. Ethics Comm. Op. No. 02-099-E.

A legislator is prohibited from serving on the board of a community action agency or any other organization receiving "pass through" funds authorized by the Legislature during the legislator's term or for one year after the expiration of that term. Op. of Miss. Ethics Comm. Op. No. 02-103-E.

An alderman is prohibited from being employed as an apartment manager by a corporation that received a multifamily complex building grant during the alderman's term and for one year thereafter. Op. of Miss. Ethics Comm. Op. No. 02-106-E.

A convention and visitors bureau board member is prohibited from having an interest, direct or indirect, in any contract authorized by the board of which he serves during his term or for one year thereafter. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau board member is prohibited from serving as an officer/director of a nonprofit organization which receives publicly funded grants from the bureau. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau board is prohibited from providing grant funding to a nonprofit historic foundation when a member of the bureau board serves as an officer/director of the historic foundation. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau is prohibited from providing grant funding to a nonprofit historic foundation to provide advertising and promotional material when a bureau board member serves as president of the historic foundation. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau is prohibited from providing grant funding to a nonprofit historic foundation to provide advertising and publish promotional material for a pilgrimage when a bureau board member is an antebellum home owner who participates in the pilgrimage and receives fees from the nonprofit historic foundation from ticket sales paid by the general public to tour the antebellum homes. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may not purchase and place tourism related advertising with a television station and newspaper that both have a bureau board member as one of their owners. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may not contract with one of its board members, or a business with which the member is associated, to prepare and print pilgrimage brochures on a cost-only basis.

Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may not contract to provide grant funding to a non-profit downtown festival for sponsorship and advertising of the festival when a bureau board member is an officer/director thereof. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau is not prohibited from contracting with a nonprofit downtown festival when one of the bureau board members is one of a class of business owners who may derive some benefit from the festival. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may not contract to provide grant funding to a non-profit downtown festival for sponsorship and advertising of the festival when bureau board members are restaurant owners who contract with the festival to sell prepared foods to attendees. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may not contract to provide grant funding to a non-profit arts council for a music festival and other related programs when a bureau board member is an officer/director of the council. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may not contract to provide grant funding to a tournament organization for hotel/motel rebates when a bureau board member is a manager/employee of a hotel/motel receiving benefits from the rebates. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may not lease office space from a chamber of commerce when a bureau board member is also an officer/director of the chamber. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau board member is not prohibited from being a member of a chamber of commerce which has a lease with the bureau. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may not contract with a chamber of commerce to provide services when a bureau board member is also an officer/director of the chamber. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may contract with a chamber of commerce to provide services when a bureau board member is also a member of the chamber. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau may not contract to provide funding to a nonprofit new organization formed from a merger of the chamber of commerce and an economic development association when a bureau board member is also an officer/director of the new organization. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A convention and visitors bureau board member is not prohibited from being a member of a nonprofit new organization that receives budgetary funding by contract from the bureau. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

Local and private statutes requiring members of nonprofit organizations be appointed to a convention and visitors bureau board are not prohibited by conflict the state conflict of interest laws, however, circumstances of individual board members can violate the state conflict of interest laws when such dual service exists. Op. of Miss. Ethics Comm. Op. No. 02-108-E.

A city board is not barred from authorizing a contract with an insurance company when such authorization occurs after an alderman's and his spouse's full divestiture of their interests in the insurance company; however, the alderman must be advised that he should totally and completely recuse himself from any decision of the city board to contract with the company. Op. of Miss. Ethics Comm. Op. No. 02-115-E.

The mayor of a city is prohibited from receiving a grant contract approved and issued by the mayor and aldermen to rehabilitate the facade of the mayor's building until one year after the mayor leaves office. Op. of Miss. Ethics Comm. Op. No. 02-116-E.

If a county supervisor was a member of the board that authorized the levy of an emergency telephone service charge to fund the E-911 Commission, Constitutional Section 109 and Code Section 25-4-105(2) prohibit the supervisor's spouse from remaining employed with the E-911 Commission after their marriage and this prohibition will apply until one year after the supervisor has left office. Op. of Miss. Ethics Comm. Op. No. 02-119-E.

A school board is prohibited by Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) from hiring a prospective school board member's law firm and/or an insurance company when the school district's contract with the law firm or the insurance company was authorized by the school board during the prospective school board member's term or within one year thereafter. Op. of Miss. Ethics Comm. Op. No. 02-120-E.

A community college may contract for energy savings services with Company C company when that company and Company A, for which a college trustee serves as a member of the board of directors, are both subsidiaries of Company B because the trustee's interest in Company C's energy savings agreement with the college by way of his directorship with Company A is outside the "edge of the target" necessary for violating Constitutional Section 109 and Code Section 25-4-105(2). Op. of Miss. Ethics Comm. Op. No. 02-122-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) absolutely prohibit first time home buyers from using grants partially funded by the county to purchase housing from the County Community Development Coalition employing a county supervisor as its executive director during the supervisor's term or within one year thereafter. Op. of Miss. Ethics Comm. Op. No. 02-123-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) will prohibit an insurance agency employing a water supply district board member from selling insurance to a sewer authority during the member's term and for one year thereafter. Op. of Miss. Ethics Comm. Op. No. 02-124-E.

Conflict of interest laws do not prohibit a planning commission from contracting with a business whose past employee now works as executive director of the planning commission nor do the conflict of interest laws impose a waiting period before such a contract may occur. Op. of Miss. Ethics Comm. Op. No. 02-127-E.

A state legislator serving as the executive director of a nonprofit organization that receives federal funds, state funds or any other funds that are appropriated by the Legislature is prohibited by Mississippi Constitution Section 4-109 and Code Section 25-4-105(2), during his term or for one year thereafter from being interested, directly or indirectly, in any contract authorized by the Legislature of which the legislator is a member or was a member within one year. Op. of Miss. Ethics Comm. Op. No. 02-130-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) absolutely prohibit the mayor or a member of the city council from participating in HUD-funded down payment assistance program. Op. of Miss. Ethics Comm. Op. No. 02-134-E.

The conflict of interest laws do not prohibit a municipality from purchasing sports uniforms from an alderman's son's business as long as the alderman has no direct or indirect interest in the son's business's contract with the city to sell the uniforms. Op. of Miss. Ethics. Comm. Op. No. 03-001-E.

A school district would not be prohibited from continuing to furnish teachers to a city operated community center employing the newly elected school board member as the assistant director of the city community center. Op. of Miss. Ethics. Comm. Op. No. 03-002-E.

A member of the county board of supervisors would be prohibited from using his official position in approving his father's employment as the county district's road construction manager in a beat system county; to avoid a violation, the supervisor may not, in any way, be involved in the decision to employ his father with the county and, in addition, may not be involved in any decisions concerning pay raises or the increasing of other benefits that would benefit his father's county employment. Op. of Miss. Ethics. Comm. Op. No. 03-003-E.

It is not a violation of the conflict of interest laws for a city's buildings and grounds director to simultaneously serve as a county supervisor when the employing city is located within the county he will serve. Op. of Miss. Ethics. Comm. Op. No. 03-009-E.

The employment contract of a legislator's spouse with a planning and development district as a nurse case manager for the Medicaid waiver program does not violate Mississippi Constitution Section 4-109 and Code Section 25-4-105(2). Op. of Miss. Ethics. Comm. Op. No. 03-010-E.

Conflict of interest laws do not prohibit City A's alderman from also serving as the board attorney of City B when City B's alderman is employed by City A because the two municipalities are separate governmental entities as set forth in the definitions in Code Section 25-4-103(g)(ii) and (h). Op. of Miss. Ethics. Comm. Op. No. 03-013-E.

It is not a violation of the conflict of interest laws for a city firefighter to simultaneously serve as a county supervisor, even though the employing city is located within the county he will serve. Op. of Miss. Ethics. Comm. Op. No. 03-014-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) would prohibit the son of a member of the city council from remaining employed with the city if the council member does, in fact, have an interest, direct or indirect, in the son's employment contract; to avoid using his official position to obtain a pecuniary benefit for his son, the council member must totally and completely recuse himself from subject matter providing a pecuniary benefit to his son. Op. of Miss. Ethics. Comm. Op. No. 03-015-E.

After purchasing a residential property from the county board of education, a town is prohibited from selling or leasing the property to an alderman who currently resides in the property as the school's principal. Comm. Op. No. 03-017-E.

After purchasing a residential property from the county board of education, a town is prohibited from leasing the property to the county board of education for use as the residence of the school's principal who is also the town's alderman. Comm. Op. No. 03-017-E.

It is not a violation of the conflict of interest laws for a school teacher to simultaneously serve as a county supervisor, even though the employing school district is located within the county he will serve. Op. of Miss. Ethics. Comm. Op. No. 03-018-E.

Code Section 25-4-105(1) would absolutely prohibit a county supervisor from participating and voting on the issuance of Tax Increment Financing Bonds, if a subsidiary corporation employing the supervisor's daughter was developing the area or involved in any other way; the only way the supervisor could avoid a violation would be to totally and completely recuse himself from all discussions, actions and votes of the board of supervisors related to the authorization and issuance of the bonds. Op. of Miss. Ethics. Comm. Op. No. 03-019-E.

Conflict of interest laws do not prohibit an individual from serving as city judge when the individual's sister or brother serves as an alderman for the same city. Op. of Miss. Ethics. Comm. Op. No. 03-021-E.

Conflict of interest laws will not prohibit a police chief from serving a city, whose cousin also serves the same city as alderman, unless the alderman has a direct or indirect interest in the employment contract. Op. of Miss. Ethics. Comm. Op. No. 03-021-E.

Code Section 25-4-105(3)(a) prohibits a state agency from purchasing parts, supplies or equipment, or leasing equipment, from any businesses in which the agency's commissioner has a material financial interest. Op. of Miss. Ethics. Comm. Op. No. 03-024-E.

A legislator is prohibited by Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) from being employed as legal counsel with a correctional facility when the facility contracts with the Department of Corrections to house, care and control state inmates during the legislator's term or within one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 03-025-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) prohibit the spouse of a county hospital board of trustees member from remaining employed with the hospital after the trustee takes office and the board of which he is a member approves a budget authorizing the salary of the spouse. Op. of Miss. Ethics. Comm. Op. No. 03-029-E.

A state university instructor, if elected as a member of the Legislature, must resign from her employment position with the university prior to the Legislature's appropriation of funding for the university during her term of office. Op. of Miss. Ethics. Comm. Op. No. 03-033-E.

State conflict of interest laws do not prohibit a state university instructor from being a candidate for the Legislature; however, Code Sections 25-4-101 and 25-4-105(1) both prohibit a university instructor from campaigning for elected office during those hours when she is carrying out public duties and being compensated by the state, and from using state equipment, supplies or other resources in any campaign activity. Op. of Miss. Ethics. Comm. Op. No. 03-033-E.

The employment of a Legislator's spouse as a university instructor compensated with funds appropriated by the Legislature would not violate Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) due to the Supreme Court's "large class rule"being applicable to the circumstance. Op. of Miss. Ethics. Comm. Op. No. 03-033-E.

Conflict of interest laws do not as such prohibit a Legislator's spouse from serving as a county public defender. Op. of Miss. Ethics. Comm. Op. No. 03-033-E.

Conflict of interest laws do not as such prohibit a legislative candidate or an elected Legislator from serving on a city planning and zoning commission. Op. of Miss. Ethics. Comm. Op. No. 03-033-E.

It is not a violation of the conflict of interest laws for a city planning and zoning commissioner's spouse to receive compensation from the same city, related to city misdemeanor cases. Op. of Miss. Ethics. Comm. Op. No. 03-033-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) do not prohibit a state commission from approving payments to an architect for a project associated with a grant approved by the commission prior to the appointment of the architect's spouse to the board of directors of the commission. Op. of Miss. Ethics. Comm. Op. No. 03-035-E.

An individual simultaneously serving a city as an alderman and a county as a coroner is not in a situational violation of the conflict of interest laws; however, Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) would prohibit the alderman from being, directly or indirectly, paid any fees or other compensation by his city as coroner which arise from a contract authorized by the board of aldermen during his term on said board or within one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 03-036-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) will not prohibit a Convention and Visitors Bureau board member from simultaneously serving as an officer/director of an economic development organization; even though the organization may receive grant funding from the Bureau and may enter into a service contract with the Bureau. Op. of Miss. Ethics. Comm. Op. No. 03-037-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) will prohibit a Convention and Visitors Bureau board member from simultaneously serving as an officer/director of a nonprofit main street organization if the organization receives grant funding from the Bureau during the member's term or one year thereafter. Op. of Miss. Ethics. Comm. Op. No 03-037-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) will prohibit a Convention and Visitors Bureau board member from simultaneously serving as an officer/director of a nonprofit historic foundation if the foundation receives grant funding from the Bureau during the member's term or one year thereafter. Op. of Miss. Ethics. Comm. Op. No. 03-037-E.

A Convention and Visitors Bureau may award a grant to a nonprofit historic foundation when a board member of the Bureau is an antebellum home owner who participates in the foundation-sponsored annual pilgrimage but receives no fees related to the pilgrimage. Op. of Miss. Ethics. Comm. Op. No. 03-037-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) prohibit a Convention and Visitors Bureau from purchasing brochures from a board member of the Bureau, or a business with which he is associated, regardless of a cost savings to the Bureau. Op. of Miss. Ethics. Comm. Op. No. 03-037-E.

Convention and Visitors Bureau may award a grant to a private organizations for hotel/motel cost rebates when a board member of the Bureau is an employee of one of the hotel/motels that may be used by the organizations' participants without violating Mississippi Constitution 4-109 and Code Section 25-4-105(2).Op. of Miss. Ethics. Comm. Op. No. 03-037-E.

A retired state university employee, who receives retirement payments from the PERS system, may serve in the state Legislature. Op. of Miss. Ethics. Comm. Op. No. 03-043-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) prohibit a state legislator's law firm from being paid directly from loan monies from the Water Pollution Control Revolving Loan Fund as the regional utility authority's regular attorney and/or receiving additional benefits and/or compensation as a authority's regular attorney if those additional benefits/compensation arise from or are due to the pollution control project for which the authority received the Revolving Loan Fund monies from the Department of Environmental Quality. Op. of Miss. Ethics. Comm. Op. No. 03-044-E.

A state legislator's law firm is not prohibited from performing litigation and/or acting in matters such as bond issues as long as such actions are not a result of a regional utility authority's loan from the Water Pollution Control Revolving Loan Fund. Op. of Miss. Ethics. Comm. Op. No. 03-044-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) prohibit a state legislator's law firm from being paid attorney fees out of loan funds received from the Water Pollution Control Revolving Loan Fund administered by the Department of Environmental Quality where the firm has a direct interest in the loan agreement contract authorized by the laws passed by the Legislature of which the legislator was a member. Op. of Miss. Ethics. Comm. Op. No. 03-044-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) would prohibit the child of a member of the city council from remaining employed with the city as a member of the police department if the child is not completely financially independent and the member, in fact, has an interest, direct or indirect, in the child's employment contract. Op. of Miss. Ethics. Comm. Op. No. 03-046-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) prohibit a town from selling or leasing property to an alderman, who resides in the property as a school principal, after the town purchases the property from the school district. Op. of Miss. Ethics. Comm. Op. No. 03-048-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) prohibit the sale by a town of property purchased from a school district to a third party, who intends to allow an alderman, who resides in the property as a school principal, to continue use the property for his residence. Op. of Miss. Ethics. Comm. Op. No. 03-048-E.

An alderman will be prohibited from purchasing or leasing property purchased by a town from a school district for a period of one year after he leaves office. Op. of Miss. Ethics. Comm. Op. No. 03-048-E.

Mississippi Constitution Section 4-109 and Code Section 25-4-105(2) would prohibit a Mayor-Council municipality from contracting with a business employing the mayor's son if the mayor was directly or indirectly interested in the contract. Op. of Miss. Ethics. Comm. Op. No. 03-049-E.

RESEARCH REFERENCES

ALR. Liability of municipality on quasi contract for value of property or work furnished without compliance with bidding requirements. 33 A.L.R.3d 1164.

What constitutes acts affecting personal financial interest within meaning of 18 USCS § 208(a), penalizing participation by government employees in matters in which they have personal financial interest. 59 A.L.R. Fed. 872.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 247, 249, 250, 251.

43 Am. Jur., Public Officers §§ 297-302.

CJS. C.J.S. Counties § 152.

C.J.S. Municipal Corporations § 906.

C.J.S. States §§ 275-277.

Law Reviews. Legislator Guilty of Misdemeanor if He Has Direct Interest in Contract Authorized by Legislature. 52 Miss. L. J. 659, September 1982.

Corlew, Section 109: Dilemma of the Public Official and the Public. 56 Miss L. J. 119, April, 1986.

1987 Mississippi Supreme Court Review, Professional Responsibility. 57 Miss. L. J. 433, August, 1987.

§ 110. Rights of way for private roads

The Legislature may provide, by general law, for condemning rights of way for private roads, where necessary for ingress and egress by the party applying, on due compensation being first made to the owner of the property; but such rights of way shall not be provided for in incorporated cities and towns.

JUDICIAL DECISIONS

1. In general.
2. Compensation.

1. In general.

An easement by necessity was required for land owned by a power company as the property was bounded by no property owner from whom it could seek access other than the defendant and it was unreasonable to require the power company to build a bridge across a creek to obtain access. Mississippi Power Co. v. Fairchild, 791 So. 2d 262 (Miss. Ct. App. 2001).

Section 110 of the Mississippi Constitution permits the legislature to provide by general vote for condemning rights for a private road, and Code 1942 § 8419 was enacted under the power granted by the Constitution. Rotenberry v. Renfro, 214 So. 2d 275 (Miss. 1968).

A statute enacted in strict accordance with this section is a delegation of the state's power of eminent domain. Day v. Crosby Lumber & Mfg. Co., 146 So. 2d 357 (Miss. 1962).

2. Compensation.

In a proceeding to have private road laid out through the owner's land, where the petitioners did not offer to pay the owner proposed easement but merely offered the cost of constructing road and did not sign a petition in such manner as to agree to any offer therein contained as to payment of damages, etc., and did not attempt to acquire easement by contract or purchase, and where some of the petitioners who owned lands in the area to be served by the private road had access to their land over other road, the board of supervisors was without authority to sustain their petition. Roberts v. Prassenos, 219 Miss. 486, 69 So. 2d 215 (1954).

RESEARCH REFERENCES

ALR. Locating easement of way created by necessity. 36 A.L.R.4th 769.

CJS. C.J.S. Eminent Domain §§ 30, 31, 54.

C.J.S. Private Roads § 4.

§ 111. Sale of land by decree or execution

All lands comprising a single tract sold in pursuance of decree of court, or execution, shall be first offered in subdivisions not exceeding one hundred and sixty acres, or one-quarter section, and then offered as an entirety, and the price bid for the latter shall control only when it shall exceed the aggregate of the bids for the same in subdivisions as aforesaid; but the chancery court, in cases before it, may decree otherwise if deemed advisable to do so.

SOURCES: 1869 art XII § 18.

Cross References — Suspension of inconsistent laws regarding foreclosure of mortgaged property in certain emergency situations, see § 89-1-319.

JUDICIAL DECISIONS

1. In general.
2. Offer and sale in whole and in part—In general.
3. Deed of trust, offer and sale in whole and in part.

1. In general.

In suit attacking validity of foreclosure sale under deed of trust, burden of proof is on complainant to show invalidity. Clark v. Sayle, 208 Miss. 559, 45 So. 2d 138 (1950).

The objection that lands were sold in tracts exceeding one hundred and sixty acres must be made within time prescribed by law. Alsop v. Cowan, 66 Miss. 451, 6 So. 208 (1889).

2. Offer and sale in whole and in part—In general.

In the sale of three 80-acre tracts, two of the tracts which were contiguous should have been offered together as well as separately; and failure so to do vitiated the sale as to all three tracts. Clark v. Carpenter, 201 Miss. 436, 29 So. 2d 215 (1947).

Where the premises are susceptible of division, or have been actually divided, yet if they are used, occupied, or naturally constitute one farm or lot, the property should be offered and sold as a whole. Provine v. Thornton, 92 Miss. 395, 46 So. 950 (1908).

3. Deed of trust, offer and sale in whole and in part.

Foreclosure sale of three 80-acre tracts of land under deed of trust is not void, although separated 80-acre tract was not combined with two contiguous 80-acre tracts so as to sell the 240 acres as whole, where homestead stood on the 160 acres, which owners used for farming purposes and separated 80-acre tract was detached by about quarter or half mile, there was no road connecting them, there was no house on this 80-acre tract and it had been abandoned for farming purposes for many years. Clark v. Sayle, 208 Miss. 559, 45 So. 2d 138 (1950).

This section is not violated by offering the land, after foreclosure of trust deed, for sale by forties and then as a whole. Gulf Ref. Co. v. Harrison, 201 Miss. 323, 30 So. 2d 44 (1947), error overruled, 201 Miss. 335, 30 So. 2d 807 (1947).

Land which is not so described in a trust deed as to make it capable of sale in subdivisions of governmental surveys when the trust deed was executed does not come within the language of this section. Texas Pac. Coal & Oil Co. v. Mulvihill, 200 Miss. 497, 27 So. 2d 719 (1946).

Although trustee under deed of trust did not comply with this section in offering subdivisions at sale, requirements of statute (Code 1942 § 888) providing that sales under deeds of trust shall be conducted in manner provided by this section, were waived by provision in deed authorizing trustee to sell the land "in parcel or as a whole, as he may deem best," and by fact that grantor of deed was present at sale and made no objection to the land not being offered for sale in accordance with the statutory requirements. Baker v. Connecticut Gen. Life Ins. Co., 196 Miss. 701, 18 So. 2d 438 (1944).

Four hundred acres in bulk cannot be sold in satisfaction of a trust deed without being first offered in subdivision, and such sale is void. McClusky v. Trussel, 90 Miss. 544, 44 So. 69 (1906).

RESEARCH REFERENCES

ALR. Propriety of setting minimum or "upset price" for sale of property at judicial foreclosure. 4 A.L.R.5th 693.

CJS. C.J.S. Judicial Sales § 21.

§ 112. Equal taxation; property tax assessments

Taxation shall be uniform and equal throughout the State. All property not exempt from ad valorem taxation shall be taxed at its assessed value. Property shall be assessed for taxes under general laws, and by uniform rules, and in proportion to its true value according to the classes defined herein. The Legislature may, by general laws, exempt particular species of property from taxation, in whole or in part.

The Legislature shall provide, by general laws, the method by which the true value of taxable property shall be ascertained; provided, however, in arriving at the true value of Class I and Class II property, the appraisal shall be made according to current use, regardless of location. The Legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one (1) county. All such property shall be assessed in proportion to its value according to its class, and no county, or other taxing authority, shall be denied the right to levy county and/or special taxes upon such assessment as in other cases of property situated and assessed in the county, except that the Legislature, by general law, may deny or limit a county or other taxing authority the right to levy county and/or special taxes on nuclear-powered electrical generating plants. In addition to or in lieu of any such county and/or special taxes on nuclear-powered electrical generating plants, the Legislature, by general law enacted by a majority vote of the members of each house present and voting, may provide for a special mode of valuation, assessment and levy upon nuclear-powered electrical generating plants and provide for the distribution of the revenue derived therefrom. The Legislature may provide a special mode of assessment, fixing the taxable year, date of the tax lien, and method and date of assessing and collecting taxes on all motor vehicles.

The assessed value of property shall be a percentage of its true value, which shall be known as its assessment ratio. The assessment ratio on each class of property as defined herein shall be uniform throughout the state upon the same class of property, provided that the assessment ratio of any one (1) class of property shall not be more than three (3) times the assessment ratio on any other class of property. For purposes of assessment for ad valorem taxes, taxable property shall be divided into five (5) classes and shall be assessed at a percentage of its true value as follows:

Class I. Single-family, owner-occupied, residential real property, at ten percent (10%) of true value.

Class II. All other real property, except for real property included in Class I or IV, at fifteen percent (15%) of true value.

Class III. Personal property, except for motor vehicles and for personal property included in Class IV, at fifteen percent (15%) of true value.

Class IV. Public utility property, which is property owned or used by public service corporations required by general laws to be appraised and assessed by the state or the county, excluding railroad and airline property and motor vehicles, at thirty percent (30%) of true value.

Class V. Motor vehicles, at thirty percent (30%) of true value.

The Legislature may, by general law, establish acreage limitations on Class I property.

SOURCES: 1869 art XII § 20; Laws, 1956, ch 438; Laws, 1958, ch 610; Laws, 1960, ch 513; Laws, 1982, ch. 622; Laws, 1986, ch. 522, eff June 19, 1986.

Editor's Note — The 1960 amendment to Section 112 of the Constitution proposed by Laws 1960, ch 513, was ratified by the electorate on Nov. 8, 1960, and was inserted by Proclamation of the Secretary of State on Nov. 23, 1960, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

The 1986 amendment to Section 112 of the Constitution was proposed by House Concurrent Resolution No. 41 (Chapter 522, Laws, 1986) and was submitted to the electorate on June 3, 1986 and ratified.

On June 16, 1986, the United States District Court for the Southern District of Mississippi enjoined the State of Mississippi from approving, implementing or administering the constitutional amendment until such time that the conduct of the election had been approved by the Attorney General of the United States.

By proclamation of the Secretary of State on June 19, 1986, the amendment to Section 112 of the Constitution of 1890, was inserted in the Constitution.

On July 7, 1986, the Attorney General of the United States approved the conduct of the election for ratification of House Concurrent Resolution No. 41 (Chapter 522, Laws, 1986) amending Section 112 of the Mississippi Constitution.

On July 10, 1986, the United States District Court for the Southern District of Mississippi, Jackson, Mississippi (Eddie Burrell, et al. v. William A. Allain, Governor of Mississippi, et al, Civil Action No. J86-0373(L)) lifted and dissolved the injunction issued on June 16, 1986 without prejudice to any right to relief the plaintiffs might establish upon further proceedings.

Cross References — Taxation of levee districts, see Miss. Const Art. 11, § 236 et seq.

Taxation of private corporations, see Miss. Const. Art. 7, § 182.

Issuance by counties of general obligation bonds for solid waste management facilities, see § 17-17-329.

Tax matters, generally, see §§ 27-1-1 et seq.

Rates of assessment, see § 27-35-4.

JUDICIAL DECISIONS

1. Validity of amendment.
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24. Stock of goods or merchandise tax.

1. Validity of amendment.

Nothing in Mississippi Constitution Article 15 § 273, which proscribes the submission of multiple amendments to the electorate, invalidates House Concurrent Resolution 41 nor its ratification and incorporation into Mississippi Constitution Article 4 § 112. Although H.C.R. 41 authorized the legislature to deny a county the right to levy taxes on a nuclear-powered electrical generating plant and altered the classification system for taxation, it may fairly be read as relating to a single subject matter: classification of property for ad valorem taxation purposes. Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

2. Construction and application.

The language of Article 4, § 112 of the Mississippi Constitution, which designates Class I property for ad valorem taxation as "single-family, owner-occupied, residential real property," includes and provides for land actually occupied as the principle home of a family group as contemplated by the homestead statute, § 27-33-3, and was intended to constitute further encouragement to homebuilders and homeowners. Where persons own and occupy more than one property, they may claim only one as a principle residence for tax purposes. The determination as to which of the owner-occupied residences is to be the principle residence must be made on a case-by-case basis. Board of Supvrs. v. Duplantier, 583 So. 2d 1275 (Miss. 1991).

This requirement relates to the levy of taxes and not to the distribution of the revenue therefrom; and hence is not contravened by the allocation to a water district of two mills of the levy on counties within the district out of a statewide four-mill ad valorem levy. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

Authorization of a special tax levy in a water district in event of insufficiency of other funds to pay its bonds does not violate this provision, where the act authorizing the formation of the district does not involve unconstitutional classification, and the counties in the district have voted to subject themselves to it. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

The Housing Authority Act (Code 1942, §§ 7295-7322-06, inclusive) neither violates this section nor § 182 of the Constitution. Biloxi-Pascagoula Real Estate Bd., Inc. v. Mississippi Regional Hous. Auth. No. VIII, 231 Miss. 89, 94 So. 2d 793 (1957).

Sections 112 and 181 of the Constitution must be construed together. People's Whse. Co. v. Yazoo City, 97 Miss. 500, 52 So. 481 (1910).

Municipal taxation is within the operation of the section. Adams v. Mississippi State Bank, 75 Miss. 701, 23 So. 395 (1898); Adams v. Bank of Oxford, 78 Miss. 532, 29 So. 402 (1900).

3. Public utility property.

Privately owned single customer natural gas pipeline companies, which did not sell to the public, did not hold certificates of public convenience and necessity from the Public Service Commission, and were not required to obtain any other franchise, license or certificate from the State of Mississippi in order to construct or operate their pipelines, were not "public service corporations" within the meaning of Mississippi Constitution Article 4, § 112 and §§ 27-35-301 et seq. Mississippi State Tax Comm'n v. Moselle Fuel Co., 568 So. 2d 720 (Miss. 1990).

4. Uniformity generally.

The constitutional requirement of uniformity and equality in taxation is satisfied when, in establishing the true value of property, the public assessor considers all factors affecting the value of the property and employs the same assessment ratio as is applied to other like properties. Thus, where the assessor considered the amount of federal subsidies received by a taxpayer as the owner of the property, § 112 of the Mississippi Constitution and the Equal Protection Clause of the United

States Constitution afforded the taxpayers no right to relief absent a showing that other federally subsidized housing projects were treated differently or that the assessor did not consider all factors affecting value. Rebelwood, Ltd. v. Hinds County, 544 So. 2d 1356 (Miss. 1989).

The requirement of § 112 of the Mississippi Constitution that "taxation shall be uniform and equal throughout the state" takes precedence even over the principle that assessment must be made on true value, for if there is no uniformity of evaluation of those taxed, then the result is that the taxpayer is deprived of the very protection guaranteed by § 112. Furthermore, under certain circumstances, lack of uniformity in valuation may lead to double taxation. Calhoun County Bd. of Supvrs. v. Grenada Bank, 543 So. 2d 138 (Miss. 1988).

Absent a legislatively-created "special mode" of assessment for banks providing otherwise, the guarantees of equal and uniform assessment conferred by Mississippi Constitution Article 4 § 112 and Article 7 § 181 extend to banks just as to all other taxpayers. As there is no stature authorizing the assessment of bank intangibles at a rate greater than other personal property in general, §§ 112 and 181 protects such bank property from disproportionate assessment. Calhoun County Bd. of Supvrs. v. Grenada Bank, 543 So. 2d 138 (Miss. 1988).

Section 27-39-304 [repealed], authorizing additional ad valorem taxes for general county purposes beyond the general levy authorized by § 27-39-303, violates Mississippi Constitution Article 4 § 112, requiring uniform and equal taxation, to the extent that authorization for additional taxes depends upon 1960 census figures and the presence of named highways within the taxing county. Wilson v. Jones County Bd. of Supvrs., 342 So. 2d 1293 (Miss. 1977).

The provision of Housing Authorities Act (Code 1942 §§ 7295 et seq.) referring to equal and uniform taxation with respect to the classes of municipalities set out, does not violate this section. Quinn v. City of McComb, 212 Miss. 730, 55 So. 2d 479 (1951).

This section requires that, for municipal tax purposes, the assessed valuation of a taxpayer's property be equal and uniform with that of other like property in the same city. Lavecchia v. Mayor & Aldermen, 197 Miss. 860, 20 So. 2d 831 (1945).

Statutes construed as not freeing title acquired at city's sale for ad valorem taxes from lien for special improvement assessment do not violate constitutional provision requiring uniform and equal taxation, as destroying the equality of the lien. Curlee v. Mutual Life Ins. Co., 144 So. 686 (Miss. 1932).

Property under this section should be assessed at its true value or there must be a uniform and equal assessment as to value, and if either method is to be sacrificed, it must be the former and not the latter, as otherwise it would deprive the taxpayer of equal protection of the law guaranty under the Federal Constitution. Knox v. Southern Paper Co., 143 Miss. 870, 108 So. 288 (1926).

Statute providing for the auditing and supervising of public offices and for the payment of certain expenses in connection therewith out of the county treasury did not deal with taxation or the raising of revenue, and, therefore, was not in conflict with this section providing for equality and uniformity of taxation. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

Chapter 113 Laws 1912 providing for a fixed charge on the gross receipts of a freight line company in lieu of all taxes on the property of the company used in its business is void, because it imposed a rate of taxation different from that imposed on other property. Chicago, R.I. & P.R. Co. v. Robertson, 122 Miss. 417, 84 So. 449 (1920) but see Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

Chapter 112 Laws 1912 which undertakes to impose an acreage tax on persons owning more than one thousand acres of timber lands violates this section of the Constitution. Thompson v. Kreutzer, 112 Miss. 165, 72 So. 891 (1916).

The equality and uniformity clause of this section applies only to ad valorem taxes. Daily v. Swope, 47 Miss. 367 (1872); Clarksdale Ins. Agency v. Cole, 87 Miss. 637, 40 So. 228 (1905).

5. Property subject to tax.

Corporeal property, to be taxable under this constitutional section, must be capable (1) of inspection, and after inspection of estimate and appraisal, and (2) of being made subject to a tax lien, and to a sale and delivery of the identical property, to make the tax money in case of default in payment. Gulf Ref. Co. v. Stone, 197 Miss. 713, 21 So. 2d 19 (1945).

Franchise granted to bus company is in nature of personal property and taxable. Teche Lines v. Board of Supvrs., 165 Miss. 617, 143 So. 486 (1932), rev'd, 165 Miss. 594, 142 So. 24 (1932).

Difficulty of collecting tax does not affect power of State to tax. Teche Lines v. Board of Supvrs., 165 Miss. 617, 143 So. 486 (1932), rev'd, 165 Miss. 594, 142 So. 24 (1932).

A domestic corporation was not taxable on that portion of its stock invested in shares of the capital stock of another domestic corporation (by a divided court). Robertson v. Mississippi Valley Co., 120 Miss. 159, 81 So. 799 (1919).

On the question of the right to tax solvent credits in the hands of an assignee of an insolvent bank, see Gerard v. Duncan, 84 Miss. 731, 36 So. 1034 (1904).

6. Classification of property.

Mere zoning laws will not change use of property in classifying it for property tax purposes. Riley v. Jefferson Davis County, 669 So. 2d 748 (Miss. 1996).

Irrebuttable presumption that taxpayer's property was used for nonagricultural purposes based solely upon fact that subdivision plat had been recorded, rather than upon present use of property, denied taxpayer constitutional right to equal protection of law. Riley v. Jefferson Davis County, 669 So. 2d 748 (Miss. 1996).

Whether land is residential or agricultural, both values are determined according to land's current use. Riley v. Jefferson Davis County, 669 So. 2d 748 (Miss. 1996).

Uniform and equal taxation clause does not require that all property be classified for taxation purposes at true value. First Nat'l Bank v. Board of Supvrs., 157 Miss. 197, 127 So. 686 (1930), cert. denied, 282 U.S. 856, 51 S. Ct. 32, 75 L. Ed. 758 (1930).

Under § 20 Art 12 Constitution 1869, the subjects of taxation could be classified at the discretion of the legislature, and if all of the same class were taxed alike there was no violation of the equality and uniformity therein required. The rule is different under the section supra. Bonner v. White, 78 Miss. 653, 29 So. 402 (1901).

A statute (Laws 1888, p 24) dividing the counties into classes and the lands therein into subclasses, fixing, according to quality, a maximum and minimum value for taxation on the lands in the several classes and confining the assessor to the limits so fixed, violated Art 5 § 21 Constitution 1869, providing for an assessor in each county, and Art 12 § 20, same requiring property to be taxed according to value. Hawkins v. Mangrum, 78 Miss. 97, 28 So. 872 (1900).

7. Valuation of property.

Legislature did not violate the constitution when it enacted Miss. Code Ann. § 27-35-50(4)(d) because this section explicitly allows the Legislature to adopt laws which dictate how true value is to be determined. Willow Bend Estates, LLC v. Humphreys County Bd. of Supervisors, — So. 3d —, 2013 Miss. LEXIS 550 (Miss. Oct. 17, 2013).

Trial court erred in finding that subsection (4)(d) did not preclude a county from including tax credits in the valuation privately owned housing complexes that were built in part using capital created by federal tax credits under the Low-Income Housing Tax Credit Program because the properties, in terms of value, were not similarly situated to ordinary private complexes; the Legislature properly exercised its prerogative in limiting the valuation method for such properties. Willow Bend Estates, LLC v. Humphreys County Bd. of Supervisors, — So. 3d —, 2013 Miss. LEXIS 550 (Miss. Oct. 17, 2013).

Taxpayer's property was improperly classified as residential land based on its location in area zoned for residential use, rather than as agricultural land, where land was never used for residential purposes, land was used for agricultural purposes when city zoned it as residential, and land was used strictly for growing pine trees at time taxpayer sought reclassification of land. Riley v. Jefferson Davis County, 669 So. 2d 748 (Miss. 1996).

Property valuation may consider the gross income generated by the property as an indicator of value. It is not, therefore, a constitutional violation to value differently otherwise identical property if the disparate values result from disparate revenue-generating capabilities. Rebelwood, Ltd. v. Hinds County, 544 So. 2d 1356 (Miss. 1989).

In determining the equitable portion of the intangible value of a parent bank attributable to branch banks for purposes of intangible property tax, the primary consideration in selecting a basis for the ratio by which a branch's share of the valuation constant will be computed is to arrive at a figure which would fairly, reasonably, and realistically represent a branch's relative worth to the parent bank and all its branches as a whole, i.e., its true value. Calhoun County Bd. of Supvrs. v. Grenada Bank, 543 So. 2d 138 (Miss. 1988).

Section 27-35-35 and § 27-35-37 are not unconstitutionally vague and ambiguous in that they fail to set forth a specific formula for valuation of branch bank intangibles. Any vagueness or ambiguity in § 27-35-35 and § 27-35-37 when read in isolation is cured by reading them in pari materia with other statutes dealing with the same or similar subjects, especially § 27-13-13. Additionally, § 27-35-35 is not unconstitutional on the ground that it fails to allow deduction from taxable capital (i.e., net worth) those amounts invested in tax exempt government securities since government obligations are expressly exempted from ad valorem taxation by § 27-31-1(u). It is clear that § 27-31-1(u) is to be read in pari materia with all taxation statutes and nothing in § 27-35-35 implies that the general exemptions of § 27-31-1 are inapplicable to banks. Calhoun County Bd. of Supvrs. v. Grenada Bank, 543 So. 2d 138 (Miss. 1988).

Where the testimony of the tax assessor showed conclusively that he had deviated from the normal manner of assessing improvements to real property in his county in assessing plaintiff's property, and had considered at least five other factors not normally considered in determining the value of such improvements, the plaintiff was entitled to a directed verdict assessing the property in an amount not exceeding the previous year's assessment. American Nat'l Ins. Co. v. Board of Supvrs., 303 So. 2d 457 (Miss. 1974).

A contract between the city and company for professional services by the company in making a detailed appraisal and valuation study of all properties in the city including its replacement, physical and other values does not unlawfully delegate the powers of the city assessor to a private organization in view of the provision where all final decisions as to valuations, procedures followed, and forms shall be made by the assessor. Alexander v. Mayor of City of Natchez, 219 Miss. 78, 68 So. 2d 434 (1953), motion overruled on other grounds, 220 Miss. 207, 70 So. 2d 529 (1954).

In a taxpayer's suit attacking the validity of a contract between the city and company for professional services by the company in making a detailed appraisal and valuation study of all properties in the city including its replacement, physical and other values, if the taxpayers were aggrieved by tax assessments affecting their property which were based upon valuations made by the city assessor under the contract, they should have sought relief by filing objections with the mayor and the board of aldermen and by appealing from such assessments in the manner provided by the statute. Alexander v. Mayor of City of Natchez, 219 Miss. 78, 68 So. 2d 434 (1953), motion overruled on other grounds, 220 Miss. 207, 70 So. 2d 529 (1954).

In proceeding to review action of municipal tax authorities in increasing assessment on taxpayer's property, the jury's province was to determine the taxable value of the property under the uniform method of ascertaining such value in that city, and it was not its duty to find expressly either for the city or the taxpayer. Lavecchia v. Mayor & Aldermen, 197 Miss. 860, 20 So. 2d 831 (1945).

In proceeding to review action of municipal tax authorities in increasing assessment on taxpayer's property, where all property in that city was assessed for municipal tax purpose at two-thirds of its value, the question should have been submitted to the jury as to what was two-thirds of the fair, full worth and market value of taxpayer's property, such value to be equal and uniform with that of like property in the city. Lavecchia v. Mayor &

Aldermen, 197 Miss. 860, 20 So. 2d 831 (1945).

Assessing any particular parcel of property at more than its actual value is not a permissible device in any constitutional procedure for equalization. Stuart v. Board of Supvrs., 195 Miss. 1, 11 So. 2d 212 (1943).

Under this section of the Constitution no parcel of real property and no piece of personal property shall be assessed at more than its actual value when the owner or other party legally bound to pay the ad valorem taxes thereon has shown in any manner provided by law that the assessment or proposed assessment is at a sum in excess of actual value and how much the excess is. Stuart v. Board of Supvrs., 195 Miss. 1, 11 So. 2d 212 (1943).

Where the state tax commission on review of an order of the board of supervisors reducing the ad valorem assessment of property on evidence produced by the owner thereof in the manner required by law, rejected and disapproved such order without referring to any evidence whatsoever, without hearing or notice to the taxpayer, and denying the taxpayer's request to present the evidence on which the board's order was based, order of rejection and disapproval was void and in violation of the constitutional provision that no property shall be assessed for taxes at more than its actual value. Stuart v. Board of Supvrs., 195 Miss. 1, 11 So. 2d 212 (1943).

Where the action and order of the state tax commission declining to approve the order of the board of supervisors reducing the ad valorem assessment on real estate pursuant to evidence adduced by the owners thereof in the manner provided by law, was without legal support and was void as contravening the constitutional prohibition against assessing property at more than its true value, the effect thereof was to leave the order of the board of supervisors, made in response to the petition of the taxpayer, in full effect, and the taxpayer was entitled to equitable relief. Stuart v. Board of Supvrs., 195 Miss. 1, 11 So. 2d 212 (1943).

The supreme court was without authority to review the action of the president of the board of supervisors and the clerk of the chancery court, whereby they had declined to approve, and had disallowed, an official bond tendered to them for approval by a newly elected member of the board of supervisors. Fairley v. Ladnier, 190 Miss. 514, 200 So. 724, 134 A.L.R. 1355 (1941).

A substantial increase in the assessment of taxpayer's lands over what similar lands of other taxpayers generally and systematically were assessed at, is a discrimination against the taxpayer and a violation of the constitutional principle of uniformity, regardless of the percentage of true value used as a basis of valuation. Edward Hines Yellow Pine Trustees v. Stewart, 46 F.2d 910 (5th Cir. 1931), cert. denied, 283 U.S. 861, 51 S. Ct. 654, 75 L. Ed. 1466 (1931).

True value of bank real estate must be deducted from aggregate true value of assets in determining true value of capital stock for taxation. Bank of Tupelo v. Board of Supvrs., 155 Miss. 436, 124 So. 482 (1929).

Equality of city assessment is equality over city as a whole, and assessment at no greater than general rate and not beyond true value will be affirmed. Redmond v. City of Jackson, 143 Miss. 114, 108 So. 444 (1926).

Chapter 113 Laws 1912 providing for a fixed charge on the gross receipts of a freight line railroad company in lieu of all taxes on the property of the company violated the requirement that all property must be taxed at its true value, gross earnings being substituted for true value. Chicago, R.I. & P.R. Co. v. Robertson, 122 Miss. 417, 84 So. 449 (1920) but see Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

A lessee of school land is liable for the total value of the land to be taxed and not for its value as a leasehold. Board of Supvrs. v. Whittington, 118 Miss. 799, 80 So. 8 (1918).

Privilege tax imposed on railroads, if considered an ad valorem tax, based on fact that railroad was exempt from state supervision under maximum and minimum rate provisions in its charter, was invalid as not being based on true value. Gulf & S.I.R.R. v. Adams, 90 Miss. 559, 45 So. 91 (1907).

8. Double taxation.

Statute imposing tax on sales of retail merchants in addition to ad valorem tax on property used by them in their business and a privilege tax for engaging therein was not unconstitutional as double taxation. Notgrass Drug Co. v. State ex rel. Rice, 175 Miss. 358, 165 So. 884 (1936).

The Supreme Court will not allow double taxation. Panola County v. C.M. Carrier & Sons, 92 Miss. 148, 45 So. 426 (1908).

9. Assessments—In general.

In challenge to state constitution's property tax assessment system which, generally, combined one percent ceiling on real property tax rates based on assessed valuations for certain tax year and 2 percent cap on annual increases in assessed valuations, but which provided exceptions for persons aged 55 and older who exchanged principal residences and for children who acquired property from their parents, homeowner lacked standing to assert federal constitutional right to travel as basis for heightened equal protection scrutiny, thus standard of review was whether system rationally furthered legitimate state interest. Under such standard, system did not violate equal protection where it was enacted to achieve benefits of "acquisition value" system, and where system did not discriminate between older owners and more recent owners with respect to either tax rate or annual rate of adjustments, and state had rational reason to deny new owner benefits of older owners' lower assessments, stemming from legitimate interest in local neighborhood preservation, continuity, and stability and from fact that new owners did not have same reliance interest warranting protection against higher taxes; furthermore, narrow exemptions rationally furthered legitimate state interests. Nordlinger v. Hahn, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

Substantial increase of assessment of timber lands over other similar land of other taxpayers generally and systematically would constitute unlawful discrimination, irrespective of basis of valuation. Edward Hines Yellow Pine Trustees v. Stewart, 46 F.2d 910 (5th Cir. 1931), cert. denied, 283 U.S. 861, 51 S. Ct. 654, 75 L. Ed. 1466 (1931).

Local and private legislation authorizing a county board of supervisors to impose a two-mill ad valorem tax for garbage collection and disposal in certain unincorporated areas of the county did not violate the constitutional requirement for uniform and equal taxation throughout the state or the constitutional prohibition against the enactment of special or local laws for the benefit of individuals or corporations, where the assessments and tax levy were equal and uniform throughout the respective garbage disposal districts and where it could not be said that the sanitary condition existing in the county at issue was a common characteristic or constituted a classification for every other county in the state. Harris v. Harrison County Bd. of Supvrs., 366 So. 2d 651 (Miss. 1979).

In a taxpayer's suit to enjoin the State Tax Commission from approving each county's recapitulation of its assessment rolls until such time as the Commission should comply with its duty to equalize assessments among counties as provided by Code 1972 §§ 27-35-113 et seq. and Const. 1890 Art 4 § 112, the complaint was sufficient to warrant the conclusion that the Commission's actions result in the collection of taxes "without authority of law" as a prerequisite for injunctive relief under Code 1972 § 11-13-11, where the complaint alleged the Commission's failure over a period of many years to carry out its duty of equalizing assessments and in essence alleged that owners of parcels of land of identical value in different counties may face radically different tax liabilities; no adequate legal remedies were provided by Code 1972 § 27-35-163, which allow a taxpayer to obtain a judicial determination that a particular piece of property has been improperly assessed and to obtain a reduction in the tax, or by Code 1972 § 27-35-93 & § 27-35-119, which prescribe methods by which to determine the proper assessment of the particular piece of property, since plaintiff-taxpayer was not alleging an erroneous computation of the value of his property and was not seeking a new calculation of his tax. Fondren v. State Tax Comm'n, 350 So. 2d 1329 (Miss. 1977).

Legislature has right to establish different method of assessment for interests in real estate owned separately from surface right, as was done under § 9770, Code 1942, so long as law applies equally on all within class and is not discriminatory against others occupying like position. Hendrix v. Foote, 205 Miss. 1, 38 So. 2d 111 (1948), motion granted, 38 So. 2d 919 (Miss. 1949).

Where the buses of a foreign corporation were operated from headquarters outside the state through various counties and municipalities of Mississippi on schedules submitted to and approved by the Mississippi Public Service Commission, and such buses, therefore, had no situs in the state for assessment for ad valorem taxes, the city of Jackson was without authority to assess them at their value; and if the city of Jackson had such authority to assess the buses at their value, every municipality through which they ran would have equal authority, in which event there would be a violation of this section of the Constitution. City of Jackson v. Dixie Greyhound Lines, 192 Miss. 133, 4 So. 2d 721 (1941).

Chapter 98 Laws 1916 which provides for the equalization of assessments by State Board of Tax Commission was not violative of § 112 of the Constitution. State ex rel. Forman v. Wheatley, 113 Miss. 555, 74 So. 427 (1917).

Assessment at full value of all property of a bank, including stock, but excluding real estate of the bank, is not violative of this section. Magnolia Bank v. Board of Supvrs., 111 Miss. 857, 72 So. 697, 3 A.L.R. 1365 (1916), error dismissed, 248 U.S. 546, 39 S. Ct. 135, 63 L. Ed. 414 (1919).

Where an assessment made by the board of supervisors is in violation of law, the court may compel a re-assessment in conformity with law. Darnell v. Johnston, 109 Miss. 570, 68 So. 780 (1915).

Chapter 239, Laws 1908 authorizing board of supervisors of Lincoln County to order an assessment to be made in all respects as required for regular land assessments and in lieu of the last regular assessment, is special and local legislation and violates this section. Horton v. King, 113 Miss. 60, 73 So. 871 (1913).

It is not competent for the legislature to pass a special act applicable alone to one county for the assessment of property. Horton v. King, 113 Miss. 60, 73 So. 871 (1913); Bullock v. Covington County, 77 So. 662 (Miss. 1918); Pearl River County v. Lacey Lumber Co., 124 Miss. 85, 86 So. 755 (1921).

Chapter 475, Laws 1916 authorizing Pearl River County to order a new assessment of real property is void. Horton v. King, 113 Miss. 60, 73 So. 871 (1913); Pearl River County v. Lacey Lumber Co., 124 Miss. 85, 86 So. 755 (1921).

The legislature may authorize a tax collector to assess such persons and personal property as he may find unassessed, as was done by § 3804 of the Code of 1892 (Code 1906 § 4320). Powell v. McKee, 81 Miss. 229, 32 So. 919 (1902).

The section contemplates that the assessment shall be made by the assessor, provided for in § 138. Adams v. Tonella, 70 Miss. 701, 14 So. 17 (1893).

Whenever a tax is according to value, an assessment is a prerequisite to its validity. State ex rel. Adams v. Thibodeaux, 69 Miss. 683, 13 So. 352 (1892).

Act of Feb. 22, 1890 p 16, requiring the auditor to list all lands held by state under tax sales and to certify the same to the chancery clerks of the respective counties, requiring certain county officers to make the list conform to the assessment roll in such county, and providing for sale thereof was constitutional. Marble v. Fife, 69 Miss. 596, 13 So. 842 (1891).

An assessment is a prerequisite to ad valorem taxation on property. State v. Adler, 68 Miss. 487, 9 So. 645 (1891).

The legislature cannot dispense with an assessment. Adams v. Vicksburg Bank, 69 Miss. 99, 10 So. 102 (1890).

10. Local assessments for local improvements.

Where the assessment imposed against the property by front foot assessment in a city exceeded the value of the benefit conferred, such was not a violation of this nor § 17 of the Constitution; but the legislature had the power to declare the improvement would benefit the property, and that it might fix the front foot, or other method of assessment, and might impose the charge in excess of the benefit. Swayne v.

City of Hattiesburg, 147 Miss. 244, 111 So. 818, 56 A.L.R. 926 (1927), aff'd, 276 U.S. 599, 48 S. Ct. 320, 72 L. Ed. 724 (1928).

A city does not violate the equality and uniformity clause of this section by assessing the entire cost of paving a street against the property abutting thereon, although prior thereto it had paid a portion of the cost of paving other streets out of money raised by general taxation. Stingily v. City of Jackson, 140 Miss. 19, 104 So. 465 (1925).

An acreage tax of 2 cents an acre levied by a board of supervisors on all lands of the county as a special road tax under § 2, c 172, Laws 1906 does not violate this section of the Constitution, as such tax was for local improvements and not for the purpose of general revenue. Locke v. L.N. Dantzler Lumber Co., 119 Miss. 783, 81 So. 175 (1919).

This section of the Constitution is inapplicable to local assessments levied for drainage improvements. Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911); Jones v. Belzoni Drainage Dist., 102 Miss. 796, 59 So. 921 (1912).

This section is not prohibitive of local assessments for local convenience, where as to the locality the assessment is equal and uniform. Turner v. Cochran, 89 Miss. 206, 42 So. 876 (1907).

Chapter 168, Laws 1906 dividing Jasper County into two judicial districts and providing for construction of courthouse and jail and placing obligation for expenditure upon the new district is not violative of this section. Turner v. Cochran, 89 Miss. 206, 42 So. 876 (1907).

The uniformity and equality rule prescribed by the section is not required to be observed in the imposition of special assessments, as for making sidewalks, etc. Nugent v. Mayor of Jackson, 72 Miss. 1040, 18 So. 493 (1895).

This section of the Constitution has no application to local and special assessments for local improvements. Alcorn v. Hamer, 38 Miss. 652 (1860); Daily v. Swope, 47 Miss. 367 (1872); Vasser v. George, 47 Miss. 713 (1873); Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911); Jones v. Belzoni Drainage Dist., 102 Miss. 796, 59 So. 921 (1912); Locke v. L.N. Dantzler Lumber Co., 119 Miss. 783, 81 So. 175 (1919).

11. Railroads, assessments.

Constitution permits separate mode of assessment of all property owned by railroad having property in more than one county. Gulf & S.I.R.R. v. Draughon, 148 Miss. 433, 114 So. 269 (1927).

This section authorizes the legislature to provide for a special mode of assessment and valuation of railroads, which was done by c 247 Laws 1914 and c 138 Laws 1918. Illinois Cent. R.R. v. Miller, 141 Miss. 223, 106 So. 636 (1926).

Under this section the legislature enacted a general scheme for the assessment of railroad property and gave the power of assessment to the railroad commission, hence, a municipality cannot assess railroads. Yazoo & Miss. V. Ry. v. City of Vicksburg, 95 Miss. 701, 49 So. 185 (1909).

A statute providing for the assessment of railroads for back taxes by the State Railroad Commission, without appeal, does not violate the uniformity and equality rule under the section, and does not deprive of property without due process of law, although other taxpayers may, under general laws, appeal from the tribunal fixing their taxes. Yazoo & Miss. V. Ry. v. Adams, 77 Miss. 764, 25 So. 355 (1899).

12. Property situated in more than one county, assessments.

The "particular species of property" referred to in this section relates to the character of the "persons, corporations, or associations" operating their "property" as a unit, thus empowering the legislature to divest local taxing authorities of the right to assess separately segregated items of an integrated and unit operation such as an electric utility company operating and holding property in more than one county, and to vest exclusive authority in the state tax commission to assess all of such company's property as an integrated whole. Mississippi Power Co. v. City of Laurel, 201 Miss. 144, 28 So. 2d 750 (1947), error overruled, 201 Miss. 157, 29 So. 2d 313 (1947).

The provision that no county shall be denied the right to levy county or special taxes, etc., applies only to assessments of railroads or other like property not situated wholly in one county. Holly v. Cook, 70 Miss. 590, 13 So. 228 (1893).

13. Reduction of assessments.

Before the state tax commission can lawfully reject or disapprove an order of the board of supervisors making a reduction of an ad valorem assessment on real estate, the commission must have before it competent evidence to the effect that the order of the board of supervisors is in fact erroneous. Stuart v. Board of Supvrs., 195 Miss. 1, 11 So. 2d 212 (1943).

Since a taxpayer would have been entitled to an appeal to the circuit court and trial de novo therein from an unfavorable decision of the board of supervisors on the question of reduction of ad valorem assessment on his property, and the jury therein would be governed by an instruction that no specific parcel of real estate may be assessed at more than its actual value, the right of the taxpayer in this respect could not be less with respect to a review by the state tax commission of a favorable decision of the board of supervisors, the state tax commission being subject to the same instruction. Stuart v. Board of Supvrs., 195 Miss. 1, 11 So. 2d 212 (1943).

14. Exemptions.

A city ordinance which would in effect rebate ad valorem property taxes to the elderly and disabled for the tax year of 1982 was repugnant to both statutory law and the Mississippi Constitution, and the ordinance was an ultra vires act beyond the authority of the city to enact. City of Jackson v. Pittman, 484 So. 2d 998 (Miss. 1986).

If an exemption from taxation is valid per se, it cannot be rendered invalid by another section of the same act which contains a saving clause. Mississippi Power & Light Co. v. Love, 201 Miss. 676, 27 So. 2d 850 (1946).

The exemption from ad valorem taxes of both existing and subsequently acquired non-producing leasehold interests in oil, gas and other minerals within the state is within the legislative province. Mississippi Power & Light Co. v. Love, 201 Miss. 676, 27 So. 2d 850 (1946).

Statute imposing sales tax that exempted sales of school books, agricultural products, and articles in preparing such products for market held not unconstitutional as denying due process because discriminating against those required to pay the tax. Notgrass Drug Co. v. State ex rel. Rice, 175 Miss. 358, 165 So. 884 (1936).

This section relates entirely to ad valorem taxation; and it does not prohibit the legislature from taxing certain occupations and exempting others or protecting certain classes of the same occupation and exempting other classes. Penny Stores, Inc. v. Mitchell, 59 F.2d 789 (S.D. Miss. 1932), appeal dismissed, 287 U.S. 672, 53 S. Ct. 122, 77 L. Ed. 580 (1932).

Statute exempting surplus of banks from taxation until outstanding guaranty certificates are liquidated does not violate constitutional provisions respecting uniformity of taxation. City of Jackson v. Deposit Guar. Bank & Trust Co., 160 Miss. 752, 133 So. 195 (1931).

Statutes exempting domestic insurance corporations from ad valorem taxes did not violate constitutional provision requiring uniformity and equality in matters of taxation. Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

Under statute exempting from taxes all notes or evidences of indebtedness bearing a rate of interest not greater than 6 per cent per annum, a finance corporation holding notes bearing 6 per cent interest per annum was not liable to be assessed on such notes, although it bought the notes at a rate which enabled it to realize more than 6 per cent per annum on its investment. Equitable Fin. Co. v. Board of Supvrs., 146 Miss. 734, 111 So. 871 (1927).

To exempt a particular hotel from taxes, without at the same time exempting all other hotels of like kind, would violate this section, and an ordinance of a municipality exempting such hotels should be general ordinance and not special. City of Jackson v. Edwards House, 145 Miss. 135, 110 So. 231 (1926).

The legislature has the power to make reasonable classification with reference to exemption from income tax and in doing so does not violate the equality clauses of either the state or Federal Constitution. State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

Property of educational institutions used exclusively for educational purposes is exempt from taxation, though operated for private gain, and such exception is not in conflict with this section. Board of Supvrs. v. Gulf Coast Military Academy, 126 Miss. 729, 89 So. 617 (1921).

The legislature is without power to classify property for taxation except as provided in this section, which is self-executing, and hence a provision in a municipal charter granted by the legislature of 1884, exempting from taxation bills and notes given in whole or in part payment for property within the city subject to taxation is void, either under this provision or under § 20, art 12 Constitution of 1869. Adams v. Kuykendall, 83 Miss. 571, 35 So. 830 (1904).

Section 13 of Art 12 of the Constitution of 1869 was self-executing, and the legislature had no power to relieve from taxation corporate property of the kind taxed to individuals. Yazoo & Miss. V. Ry. v. Adams, 81 Miss. 90, 32 So. 937 (1902).

The railroad commission as assessor of railroad property is without power to determine questions of exemptions from taxation so as to render them res judicata. Yazoo & Miss. V. Ry. v. Adams, 81 Miss. 90, 32 So. 937 (1902).

This section does not authorize the railroad commission to conclusively determine the judicial question of exemption. Yazoo & Miss. V. Ry. v. Adams, 81 Miss. 90, 32 So. 937 (1902).

The constitutionality of a statute exempting a property owner from liability to taxes is a question which a tax collector, being merely a ministerial officer, cannot determine, but the question is a judicial one for the courts to determine. Yazoo & Miss. V. Ry. v. West, 78 Miss. 789, 29 So. 475 (1901).

This section is the only constitutional limitation on the power of the legislature to exempt property from county and municipal taxation. Holly v. Cook, 70 Miss. 590, 13 So. 228 (1893).

This section does not prohibit exemptions. Mississippi Mills v. Cook, 56 Miss. 40 (1878), overruled on other grounds, Adams v. Yazoo & Miss. V.R.R. 77 Miss. 194 (1898).

15. Docket tax.

The legislature cannot prescribe the payment of a docket tax in a particular judicial district for the payment of the judge. Murray v. Lehman, 61 Miss. 283 (1883).

16. Domestic animal tax.

The dog tax imposed by c 148, Laws 1910 of $1.00 on male dogs and $3.00 on female dogs does not violate this section. State v. Widman, 112 Miss. 1, 72 So. 782 (1916).

17. Franchise taxes.

A legislative delegation to the tax commission of the duty to determine the portion of taxable income of a given person or corporation which should be allocated to sources within the state is a delegation of a fact-finding duty, and where the legislature provided the standard to be followed in evaluating the taxpayer's earned income in Mississippi, as distinguished from its earned income from other sources, such delegation is not unconstitutional. Columbia Gulf Transmission Co. v. Barr, 194 So. 2d 890 (Miss. 1967).

A statute (Laws 1934, c 121) imposing a franchise or excise tax upon corporations, associations, joint stock companies and every form of organization for pecuniary gain, having capital stock represented by shares, having privileges not possessed by individuals or partnerships, and doing business in the state, "doing business" being defined to mean and include each and every act, power, and privilege exercised or enjoyed in the state as an incident to or by virtue of the powers and privileges acquired by the nature of such organization, is not within the purview of this section notwithstanding that the tax is measured by the value of property invested in the state, since the taxpayer is not taxed because it owns it but because it has come into and remains in the state to use it. Stone v. Interstate Natural Gas Co., 103 F.2d 544 (5th Cir. 1939), aff'd, 308 U.S. 522, 60 S. Ct. 292, 84 L. Ed. 442 (1939), reh'g denied, 308 U.S. 639, 60 S. Ct. 381, 84 L. Ed. 530 (1940).

Situs for purpose of taxation of franchise granted to nonresident corporation to operate bus in state was in Mississippi, and situs of particular property involved was in county through which bus line operated. Teche Lines v. Board of Supvrs., 165 Miss. 617, 143 So. 486 (1932), rev'd, 165 Miss. 594, 142 So. 24 (1932).

The difference between the value of real and personal property belonging to a corporation and the market value of the stock of the corporation, where the value of the stock exceeds the other property in value, represents the value of the franchise of the corporation and it is proper to tax the franchise. People's Whse. Co. v. Yazoo City, 97 Miss. 500, 52 So. 481 (1910).

18. Income tax.

Provision of 1924 income tax statute that, in computing net "income" on timber acquired before effective date of 1912 statute, fair market value on such date should be taken in lieu of cost, held not to violate constitutional provision respecting taxation of "property." Fernwood Lumber Co. v. Mississippi State Tax Comm'n, 167 Miss. 273, 149 So. 727 (1933).

That 1924 income tax statute in directing computation of net income on timber acquired before effective date of 1912 statute, provided fair market value on such date should be taken in lieu of cost, held not to violate constitutional equality clauses, though 1912 statute allegedly permitted taxpayer to be sole judge of value of property, while 1924 statute required computation on actual value. Fernwood Lumber Co. v. Mississippi State Tax Comm'n, 167 Miss. 273, 149 So. 727 (1933).

An income tax is not a tax on property within the meaning of this section. State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

And a tax on income, graduated according to the amount of the income, does not violate the equality clause of this section, nor the equal protection of the laws of the Fourteenth Amendment of the Federal Constitution. State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

An income tax is not a tax on property within the meaning of this section, but is an excise tax. State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

19. License and privilege taxes.

The chain store taxing statutes do not violate the concepts of due process and equal protection of the law embodied in the Mississippi and United States Constitutions, and did not, in this case, deny equal protection of the law to a corporate retailer operating a chain of stores within and without the state. Interco, Inc. v. Rhoden, 220 So. 2d 290 (Miss. 1969), appeal dismissed, 396 U.S. 7, 90 S. Ct. 26, 24 L. Ed. 2d 7 (1969).

Statute (§§ 1, 2 and 11, ch 134, Laws of 1944 (Code 1942, §§ 9417-01, 9417-02, 9417-12)) levying an annual privilege tax upon every group acting as a unit engaged in the business of producing or severing oil for commercial purposes is not unconstitutional as violating the provisions of this section that taxation shall be uniform and equal throughout the state, and that property shall be assessed for taxes under general laws and by uniform rules according and in proportion, to its true value. Gulf Ref. Co. v. Stone, 197 Miss. 713, 21 So. 2d 19 (1945).

A tax imposed upon persons, firms, corporations, or associations doing a business of purchasing, discounting or otherwise acquiring notes, trust receipts, etc., secured by lien upon motor vehicles, furniture, refrigerators, etc., the amount of the tax bearing a direct relationship to the value of the securities held, owned, or acquired, and exacted in return for the protection afforded by the government and laws of the state in the enjoyment of such ownership and rights acquired thereby, is a privilege tax and not a tax on property within the purview of this section. Stone v. General Contract Purchase Corp., 193 Miss. 301, 7 So. 2d 806, 140 A.L.R. 1029 (1942).

Statute imposing manufacturer's tax under which tax rate was not same for manufacturers of all products covered by tax was not unconstitutional on ground that it was not uniform, since constitutional provision requiring uniformity applied only to ad valorem taxes and not to privilege or excise taxes. Southern Package Corp. v. State Tax Comm'n, 174 Miss. 212, 164 So. 45 (1935).

A $500.00 license placed on employment agencies hiring laborers to go out of the state under c 94, Laws 1912 is not prohibitory. Bass v. Borries, 116 Miss. 419, 77 So. 189 (1918).

No constitutional principle is violated so long as all persons exercising any particular privilege are taxed alike by a taxing district authorized to collect privilege taxes. Postal Tel.-Cable Co. v. Robertson, 116 Miss. 204, 76 So. 560 (1917).

Chapter 90, Laws 1906 levying a license on dealers in coffins doing an undertaking business, except merchants paying a tax on their stock, a furniture company paying a tax on its coffin stock and also doing an undertaking business is liable for the tax. Johnston v. Long Furn. Co., 113 Miss. 373, 74 So. 283 (1917).

Section 1, c 112 Laws 1914, although it imposes a privilege tax upon a business made unlawful by another statute, is constitutional. State ex rel. Melton yv. Rombach, 112 Miss. 737, 73 So. 731 (1917).

It is a violation of this section to impose a privilege tax or occupation fee upon persons pursuing the business of extracting turpentine from standing trees. Thompson v. McLeod, 112 Miss. 383, 73 So. 193, Am. Ann. Cas. 1918A,674 (1916).

Chapter 192, Laws 1908 imposing a tax fee on each barrel of oysters canned and packed in the state in addition to the privilege tax imposed on each canning factory does not violate the equality and uniformity provision of this section. Barataria Canning Co. v. State, 101 Miss. 890, 58 So. 769 (1912).

The statute imposing a privilege tax on bottling, distributing and sale of Coca-Cola and similar drinks, and grading the tax according to the population of towns is not violative of this section. Coca-Cola Co. v. Skillman, 91 Miss. 677, 44 So. 985 (1907).

Chapter 76, Laws 1904 which imposes a privilege tax on Insurance Agencies, and also on agents, is not violative of this section. Clarksdale Ins. Agency v. Cole, 87 Miss. 637, 40 So. 228 (1906).

The act of March 9, 1900, p 43, imposing a privilege tax "on each land timber mill company," but excepting therefrom sawmill operators who do not ship timber or lumber out of the state, violates this section and also art 1, § 8, cl 3, Constitution United States. Adams v. Mississippi Lumber Co., 84 Miss. 23, 36 So. 68 (1904).

20. Occupation taxes.

Constitutional provision providing for equality and uniformity of taxation throughout the state, relating as it does entirely to ad valorem taxation, does not prohibit the legislature from taxing certain occupations and exempting others or protecting certain classes of the same occupation and exempting other classes, and, accordingly, a statute imposing upon persons engaged in the business of selling tangible property in the state a tax equivalent to a specified percentage of the gross income of the business, and levying an additional tax upon operators of more than five stores in the state, was not with the purview of the constitutional provision. Penny Stores, Inc. v. Mitchell, 59 F.2d 789 (S.D. Miss. 1932), appeal dismissed, 287 U.S. 672, 53 S. Ct. 122, 77 L. Ed. 580 (1932).

21. Registration fees.

Registration fee, prescribed by act regulating practice of barbering, is not a tax within the meaning of this section. Clark v. State, 169 Miss. 369, 152 So. 820 (1934).

22. Sales and use taxes.

Decision on former appeal of same case that Use Tax Law of this state is unconstitutional in its requirement that foreign seller collect and pay use tax on goods sold to Mississippi residents when seller is non-domesticated foreign corporation having no place of business or any agent in this state, its only intra-state activity being sending into state of non-resident solicitors to take orders effective only when approved at home office and sales being completed by delivery of goods to common carrier in foreign state, will be adhered to on subsequent appeal, and case does not become new case because state of Tennessee, from which state goods are shipped, is claimed to have relevant Sales Tax Law; because coming to rest in this state feature of original law has been eliminated; or because two salesmen of seller happen to reside in Mississippi for their own personal convenience and not that of employer, since principles controlling law of case doctrine are more binding upon courts than law of precedent. Stone v. Reichman-Crosby Co., 43 So. 2d 184 (Miss. 1949), appeal dismissed, cert. denied, 339 U.S. 917, 70 S. Ct. 625, 94 L. Ed. 1342 (1950).

Use Tax Law, Chapter 120, Laws of 1942 (Code 1942, §§ 10146-10167), is unconstitutional as to its requirement that a non-resident seller shall collect and pay tax on sales consummated in Tennessee by delivery of property to a common carrier for transportation to purchasers in Mississippi, when the non-resident seller is not doing business in Mississippi and property was sold on orders taken by non-resident salesmen, as it violates the commerce clause by imposing a burden on interstate commerce and denies to seller equal protection and due process of law. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 So. 2d 22 (1948).

Statute (Code 1942, section 10108), imposing tax on every person engaged in the business of selling tangible property, is not a property tax, does not constitute double taxation, and does not violate the equal and uniform clauses of the State and Federal Constitutions. Harry D. Kantor & Son v. Stone, 203 Miss. 260, 34 So. 2d 492 (1948).

Statute imposing tax on sales of retail merchants held within authority of legislature to levy as not being a tax on property. Notgrass Drug Co. v. State ex rel. Rice, 175 Miss. 358, 165 So. 884 (1936).

Statute imposing sales tax in greater amount on retail merchants than wholesalers, but requiring payment of the wholesale tax where retailer sold stock in bulk and taxing credit sales on basis of payments was not unconstitutional as an arbitrary classification violating due process. Notgrass Drug Co. v. State ex rel. Rice, 175 Miss. 358, 165 So. 884 (1936).

23. School taxes.

The adoption of a rule that property in a territory added to a municipal separate school district and lying outside the municipality should be assessed differently than property lying within the municipality would result in a constitutionally impermissible lack of uniformity and equality, despite the contention that § 21-33-11 provided the exclusive method for the assessment for school taxes of such lands and that assessments appearing on the county assessment rolls were conclusive upon the municipal taxing authorities. Thompson v. Anding, 370 So. 2d 1335 (Miss. 1979).

In an action challenging the validity of certain construction and renovation general obligation school bonds, the filing of a certified copy of the resolution adopted by the school district's board of trustees with the governing authority of the municipality fulfilled the requirement of § 37-59-11, even though the incorporation in full of the resolution in the minutes of the governing authority would have been the better practice; nor did the assessment of property for taxes pursuant to § 21-33-9 violate the Mississippi Constitution, Art. 4, § 112, where the assessment was not void on its face and where there was nothing showing that the orders of the municipality's governing body or the orders of the county board of supervisors in approving the assessments were void. Walters v. Validation of $3,750,000.00 Sch. Bonds of Petal Mun. Separate Sch. Dist., 364 So. 2d 274 (Miss. 1978).

Chapter 120, Laws 1910, authorizing municipalities to issue bonds for the location of a State college is not violative of this section. J. Livelar & Co. v. State, 98 Miss. 330, 53 So. 681 (1910).

Local taxation to pay bonds issued for the establishment of schools, outside of the established free school system, does not violate the equality and uniformity rule. Chrisman v. Mayor of Brookhaven, 70 Miss. 477, 12 So. 458 (1892).

24. Stock of goods or merchandise tax.

An ordinance of a municipality attempting to tax a stock of goods of persons beginning business after February 1st violates the uniformity requirements of this section. Gunter v. City of Jackson, 130 Miss. 637, 94 So. 844 (1923).

Under § 112 of the Constitution all property assessed for ad valorem taxes must be assessed by general laws and by uniform rules and c 75 of the Laws 1908 which undertakes to impose ad valorem tax on stocks of merchandise in a different manner than that by which other property is assessed is violative of this section. Reed Bros. v. Board of Supvrs., 126 Miss. 162, 88 So. 504 (1921).

ATTORNEY GENERAL OPINIONS

If a person were to own a home in the city and sign homestead stating that this was his primary home and receive the assessment of 10% plus this homestead allowance there and he also owns a farm 20 miles from the city and has a second home on the farm where he spends time almost everyday and on the weekends, if the taxpayer has claimed a homestead exemption for one residence, the other residence will not qualify for the other 10% assessment. Johnson, Jan. 28, 2005, A.G. Op. 04-0643.

Where a married couple owns a home in Mississippi where the husband lives full time, he files Mississippi income tax and has his automobile tagged in this state, and they also own a home in Tennessee where the wife works and claims her residency, she tags her automobile in Tennessee and does not pay Mississippi income tax, it appears that the Mississippi property would qualify for the 10% assessment. Johnson, Jan. 28, 2005, A.G. Op. 04-0643.

RESEARCH REFERENCES

ALR. Assessment of corporate property at full value according to law when valuations generally are illegally fixed lower. 3 A.L.R. 1370; 28 A.L.R. 983; 55 A.L.R. 503.

Income as "property" within constitutional limitations on taxation. 11 A.L.R. 313; 70 A.L.R. 468; 97 A.L.R. 1488.

Validity of so-called "sales tax." 89 A.L.R. 1432, 110 A.L.R. 1485, 117 A.L.R. 846, 128 A.L.R. 893.

Constitutionality of statutes providing for refund of taxes illegally or erroneously exacted. 98 A.L.R. 284.

Constitutionality of statutes authorizing or requiring the payment of, or assumption of legal liability for, tax anticipation warrants. 99 A.L.R. 1039.

Power to remit, release, or compromise tax claim. 99 A.L.R. 1062, 28 A.L.R.2d 1425.

Subjection to public supervision because of public service nature of business as basis of classification for purposes of taxation. 99 A.L.R. 1164.

Tolls as taxes within constitutional provisions respecting taxes. 167 A.L.R. 1356.

Tax equalization, reassessment, or revaluation program not completed within year, as violative of requirement of equal and uniform taxation. 76 A.L.R.2d 1077.

Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum. 20 A.L.R.3d 363.

Validity, construction, and effect of state statutes affording preferential tax treatment to land used for agriculture purposes. 98 A.L.R.3d 916.

Validity of statutory classifications based on population — tax statutes. 98 A.L.R.3d 1083.

Situs of tangible personal property for purposes of property taxation. 2 A.L.R.4th 432.

Recovery of tax paid on exempt property. 25 A.L.R.4th 186.

What constitutes church, religious society, or institution exempt from property tax under state constitutional or statutory provisions. 28 A.L.R.4th 344.

CJS. C.J.S. Taxation § 12.

§ 113. Auditor's statement of money expended at session

The auditor shall, within sixty days after the adjournment of the Legislature, prepare and publish a full statement of all money expended at such session, specifying the items and amount of each item, and to whom, and for what paid; and he shall also publish the amounts of all appropriations.

Editor's Note — Section 7-7-2 provides that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer.

Section § 27-104-6, provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration".

RESEARCH REFERENCES

CJS. C.J.S. States §§ 322, 323, 372.

§ 114. Election returns

Returns of all elections by the people shall be made to the Secretary of State in such manner as shall be provided by law.

SOURCES: 1817 art VI § 18; 1832 art VII § 16; 1869 art XII § 19.

Cross References — Election of Governor, see Miss. Const. Art. 5, § 140.

RESEARCH REFERENCES

CJS. C.J.S. Elections § 95.

§ 115. Fiscal year; report of transactions; bonded indebtedness limitation

The fiscal year of the State of Mississippi shall commence on the first day of July and end on the thirtieth day of June of each year; and the Auditor of Public Accounts and the Treasurer of the State shall compile, and have published, a full and complete report, showing the transactions of their respective offices on or before the thirty-first day of December of each year for the preceding fiscal year.

Neither the State nor any of its direct agencies, excluding the political subdivisions and other local districts, shall incur a bonded indebtedness in excess of one and one half (1½) times the sum of all the revenue collected by it for all purposes during any one of the preceding four fiscal years, whichever year might be higher.

SOURCES: 1817 art VI § 8; Laws, 1935, ch 115; Laws, 1960, ch 522, eff November 23, 1960.

Editor's Note — The 1960 amendment to Section 115 of the Constitution was proposed by Laws 1960, ch 522, and, upon ratification by the electorate on Nov. 8, 1960, was inserted by proclamation of the Secretary of State on Nov. 23, 1960, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

This section, prior to its amendment in 1935, provided for a fiscal year commencing on the first day of October, and ending on the thirtieth day of September.

Cross References — Political year, see Miss. Const. Art. 14, § 257.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 322, 323, 372.

ARTICLE 5.

EXECUTIVE.

SEC.
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138. Selection of county officers
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141. Choosing Governor in absence of electoral and popular vote majorities
142. Ineligibility of Legislators to receive certain appointments
143. Election of other state officers

§ 116. Governor; term of office

The chief executive power of this State shall be vested in a Governor, who shall hold his office for four (4) years. Any person elected to the office of Governor shall be eligible to succeed himself in office. However, no person shall be elected to the office of Governor more than twice, and no person who has held the office of Governor or has acted as Governor for more than two (2) years of a term to which another person was elected shall be elected to the office of Governor more than once.

SOURCES: 1817 art IV § 1; 1832 art V § 1; 1869 art V § 1; Laws, 1986, ch. 575, eff November 20, 1986.

Editor's Note — The 1986 amendment to Section 116 of Article 5 of the Mississippi Constitution of 1890 was proposed by Chapter 515, Laws, 1986 (House Concurrent Resolution No. 5), and upon ratification by the electorate on November 4, 1986, was inserted as part of the Constitution by proclamation of the Secretary of State on November 20, 1986.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

Qualifications of office, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

General provisions applicable to governor, see §§ 7-1-1 et seq.

JUDICIAL DECISIONS

1. In general.

Motion to intervene filed by the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund could not be set aside for a perceived lack of statutory or legal authority because: (1) the Governor unquestionably had not only the statutory but also the constitutional authority to intervene since the Governor was under a solemn duty to act in order to assure faithful execution of Mississippi's laws; (2) the division had a compelling interest to see that the annual payments of $20 million were placed in the Mississippi Health Care Trust Fund because the suit was initially brought to recoup monies expended by the division; (3) the Mississippi Health Care Trust Fund was authorized to recoup funds paid to a partnership, a non-profit organization created to reduce under age smoking; and (4) the Mississippi Attorney General declined to take action. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790 (Miss. 2007).

The power of the governor to institute a suit in the name of the state and for its benefit is not deducible from this section. Henry v. State, 87 Miss. 1, 39 So. 856 (1906).

This section did not give the governor authority to call in bonds issued under a statute reserving in the state the option to call them in before maturity, the discretion reserved to the state in this regard being a legislative and not an executive discretion. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

RESEARCH REFERENCES

ALR. Construction and application, under state law, of doctrine of "executive privilege". 10 A.L.R.4th 355.

Am Jur. 38 Am. Jur. 2d, Governor §§ 1-13.

CJS. C.J.S. States §§ 171-174, 240-243.

§ 117. Eligibility to serve as Governor

The Governor shall be at least thirty years of age, and shall have been a citizen of the United States twenty years, and shall have resided in this State five years next preceding the day of his election.

SOURCES: 1817 art IV § 3; 1832 art V § 3; 1869 art V § 3.

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Governor § 2.

CJS. C.J.S. States §§ 171-174, 240-243.

§ 118. Salary of Governor

The Governor shall receive for his services such compensation as may be fixed by law, which shall neither be increased nor diminished during his term of office.

SOURCES: 1817 art IV § 4; 1832 art V § 4; 1869 art V § 4.

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Governor § 3.

CJS. C.J.S. States §§ 171-174, 240-243.

§ 119. Commander-in-chief of military

The Governor shall be Commander-in-Chief of the army and navy of the State, and of the militia, except when they shall be called into the service of the United States.

SOURCES: 1817 art IV § 5; 1832 art V § 5; 1869 art V § 5.

Cross References — Military powers of Governor, see Miss. Const. Art. 9, § 217 and Code § 33-3-1 et seq.

JUDICIAL DECISIONS

1. In general.

National guardsmen, acting under an executive order of the governor, and a search warrant issued by the county judge and directed to any officer of the county, had authority to make a search of the accused's premises wherein a slot machine was found. Brady v. State, 229 Miss. 677, 91 So. 2d 751 (1957).

Where the recitals in the executive order, empowering the adjutant general to order out national guardsmen for the purpose of seeing that the laws were faithfully executed in Jones County, made out a prima facie case justifying the governor's actions, the duty of showing that there was not such breakdown of law enforcement conditions as to justify this action was upon the accused, who was complaining of the search of his premises wherein a slot machine was found. Brady v. State, 229 Miss. 677, 91 So. 2d 751 (1957).

This section does not empower the governor to institute a suit for and in the name of the state. Henry v. State, 87 Miss. 1, 39 So. 856 (1906).

RESEARCH REFERENCES

ALR. Power to declare martial law apart from military operations. 24 A.L.R. 1183.

Am Jur. 53 Am. Jur. 2d, Military, and Civil Defense §§ 31, 32.

CJS. C.J.S. Armed Services §§ 341, 342.

§ 120. Report from officers of executive department

The Governor may require information in writing from the officers in the executive departments of the State on any subject relating to the duties of their respective offices.

SOURCES: 1817 art IV § 6; 1832 art V § 6; 1869 art V § 6.

RESEARCH REFERENCES

CJS. C.J.S. States § 229.

§ 121. Convening of Legislature in extraordinary session

The Governor shall have power to convene the Legislature in extraordinary session whenever, in his judgment, the public interest requires it. Should the Governor deem it necessary to convene the Legislature he shall do so by public proclamation, in which he shall state the subjects and matters to be considered by the Legislature, when so convened; and the Legislature, when so convened as aforesaid, shall have no power to consider or act upon subjects or matters other than those designated in the proclamation of the Governor by which the session is called, except impeachments and examination into the accounts of state officers. The Legislature, when so convened, may also act on and consider such other matters as the Governor may in writing submit to them while in session. The Governor may convene the Legislature at the seat of government, or at a different place if that shall become dangerous from an enemy or from disease; and in case of a disagreement between the two Houses with respect to time of adjournment, adjourn them to such time as he shall think proper, not beyond the day of the next stated meeting of the Legislature.

SOURCES: 1817 art IV § 7; 1832 art V § 7; 1869 art V § 7.

Cross References — Regular sessions of legislature, see MS Const Art. 4, § 36.

JUDICIAL DECISIONS

1. In general.

It is the duty of the courts to accept as valid legislative enactments, all acts duly authenticated and appearing regular and to have been passed in the prescribed mode. Adams v. Noble, 103 Miss. 393, 60 So. 561 (1912); Beard v. Stanley, 218 Miss. 192, 67 So. 2d 263 (1953).

ATTORNEY GENERAL OPINIONS

Where the proclamation of the governor for a special session of the legislature limited it to consideration of matters relating to "healthcare for all Mississippians that is at present seriously jeopardized by the inability of many healthcare providers to obtain or afford medical malpractice insurance," general civil justice reform matters did not fall within the proclamation. Ford, Sept. 11, 2002, A.G. Op. #02-0554.

Because proposed new statutory provisions (§§ 11-1-62 and 11-1-63) appeared to be attempts to address the provision of affordable and accessible healthcare for Mississippians, they were within the scope of the Governors' proclamation calling for a special session. Minor, Sept. 27, 2002, A.G. Op. #02-0568.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 103-107.

§ 122. State of the government; recommending measures

The Governor shall, from time to time, give the Legislature information of the state of the government, and recommend for consideration such measures as may be deemed necessary and expedient.

SOURCES: 1817 art IV § 8; 1832 art V § 8; 1869 art V § 8.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 171-174, 240-242.

§ 123. Faithful execution of laws

The Governor shall see that the laws are faithfully executed.

SOURCES: 1817 art IV § 9; 1832 art V § 9; 1869 art V § 9.

Cross References — Military power of governor, see Miss. Const. Art. 9, § 217.

JUDICIAL DECISIONS

1. Construction and application.
2. Use of militia.

1. Construction and application.

Motion to intervene filed by the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund could not be set aside for a perceived lack of statutory or legal authority because: (1) the Governor unquestionably had not only the statutory but also the constitutional authority to intervene since the Governor was under a solemn duty to act in order to assure faithful execution of Mississippi's laws; (2) the division had a compelling interest to see that the annual payments of $20 million were placed in the Mississippi Health Care Trust Fund because the suit was initially brought to recoup monies expended by the division; (3) the Mississippi Health Care Trust Fund was authorized to recoup funds paid to a partnership, a non-profit organization created to reduce under age smoking; and (4) the Mississippi Attorney General declined to take action. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790 (Miss. 2007).

Requirement that Governor shall see that the laws are executed means that laws shall be carried into effect, and not arbitrary enforcement by the executive of what he considers law. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

What Governor does in execution of the laws, and acts of militia under his authority, must be as civil officers, and in strict subordination to the general law of the land. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Power to enforce the laws is not left as a matter of finality in local authorities or local inhabitants, but in the head of the executive department to act, in case of need, for the whole state. State v.

McPhail, 182 Miss. 360, 180 So. 387 (1938).

Governor as the executive officer in every county may set enforcement machinery in motion and thereby determine to whom civil process may be directed for execution where there is failure, neglect, or inability of local officers to act. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

The power of the governor to institute a suit in the name of the state and for its benefit is not deducible from this section. Henry v. State, 87 Miss. 1, 39 So. 856 (1906).

This section did not give the Governor authority to call in bonds issued under a statute reserving in the state the option to call them in before maturity, the discretion reserved to the state in this regard being a legislative and not an executive discretion. Colbert v. State, 86 Miss. 769, 39 So. 65 (1905).

2. Use of militia.

Evidence obtained by the National Guardsmen under a search warrant issued by a county judge was admissible in prosecution for contempt for violation of temporary injunction where wide-spread violation of liquor nuisance justified the calling of the National Guard by the Governor. McBride v. State, 221 Miss. 508, 73 So. 2d 154 (1954).

Where Governor unsuccessfully seeks law enforcement through local officers for length of time which makes it clearly apparent that no dependence can be placed in local officers, then, duty arises to send militia, not to supersede but to enforce law. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Proclamation of Governor ordering out militia need not contain any particular recitals. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Governor's decision as to whether exigency justifies calling out militia is subject to judicial review. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Member of militia who by rank has any executive authority may receive, and as lawful officer execute search warrant, or have it done under his supervision, and make return upon it as sheriff or constable. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Evidence procured under search warrant issued by justice of the peace and executed by officer of militia, is admissible in prosecution to abate liquor nuisance. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 171-174, 240-243.

§ 124. Reprieves and pardons

In all criminal and penal cases, excepting those of treason and impeachment, the Governor shall have power to grant reprieves and pardons, to remit fines, and in cases of forfeiture, to stay the collection until the end of the next session of the Legislature, and by and with the consent of the senate to remit forfeitures. In cases of treason he shall have power to grant reprieves, and by and with consent of the senate, but may respite the sentence until the end of the next session of the Legislature; but no pardon shall be granted before conviction; and in cases of felony, after conviction no pardon shall be granted until the applicant therefor shall have published for thirty days, in some newspaper in the county where the crime was committed, and in case there be no newspaper published in said county, then in an adjoining county, his petition for pardon, setting forth therein the reasons why such pardon should be granted.

SOURCES: 1832 art V § 10; 1869 art V § 10.

Cross References — Forfeiture of corporate franchise, see Miss. Const. Art. 7, § 179.

Probation and parole, generally, see §§ 47-7-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Pardon—In general.
3. Exercise of pardoning power.
4. Absence or disability of Governor, pardon.
5. Effect of pardon.
6. Reprieve.
7. Remission of fines.
8. Suspension of sentence.
9. Good time.

1. Construction and application.

The power given to the governor by this section is not limited by any other provision of the state constitution, nor can the same be limited or restricted by either of the other two principal departments of the state government in the actions of constitutional amendments so authorizing. Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913 (1954).

This section of the Constitution relates to violation of state laws only. Allen v. McGuire, 100 Miss. 781, 57 So. 217, Am. Ann. Cas. 1914A,483 (1912).

2. Pardon—In general.

A pardon is an act of grace proceeding from the power entrusted with the execution of the laws and a pardon relieves the person named from legal consequences of a specific crime, while a commutation of sentence is the change of the punishment to which a person is sentenced to less severe punishment. Whittington v. Stevens, 221 Miss. 598, 73 So. 2d 137 (1954).

The governor may pardon for contempt of court. Ex parte Hickey, 12 Miss. (4 S. & M.) 751 (1845).

3. Exercise of pardoning power.

Under the Constitution the governor is vested with the exclusive power to pardon with the sole exception that the Legislature may provide for the commutation of sentence of convicts for good behavior and that the power to pardon includes the power to commute sentences in criminal cases and this power may not be infringed upon by legislative enactment. Whittington v. Stevens, 221 Miss. 598, 73 So. 2d 137 (1954).

Statutes which authorize the board of supervisors to commute one-half of the term of imprisonment of a prisoner who is crippled or incapacitated are unconstitutional as an infringement upon the pardoning power vested in the governor. Whittington v. Stevens, 221 Miss. 598, 73 So. 2d 137 (1954).

Statutes (Code 1942, §§ 2541, 2543) empowering circuit judges to impose suspended sentences and to vacate them upon violation of conditions are not unconstitutional as an intrusion upon the pardoning power of the governor. Gabriel v. Brame, 200 Miss. 767, 28 So. 2d 581 (1947).

Provision relating to liberation of one committed to jail for vagrancy, if invasion of pardoning power, was separable from provisions fixing penalty. Runnels v. State, 154 Miss. 621, 122 So. 769 (1929).

The board of supervisors cannot be authorized to discharge a convict from jail if unable to labor. State v. Kirby, 96 Miss. 629, 51 So. 811 (1910).

4. Absence or disability of Governor, pardon.

When the governor leaves the confines of the state his powers as governor cease until his return, and while he is absent from the state the lieutenant governor is clothed with all the functions of the governor's office and may grant pardons. Montgomery v. Cleveland, 134 Miss. 132, 98 So. 111, 32 A.L.R. 1151 (1923).

5. Effect of pardon.

Full pardon absolves party from all legal consequences of crime and conviction, direct and collateral, including punishment. Ex parte Crisler, 159 Miss. 247, 132 So. 103 (1931).

Full pardon to attorney, after conviction and sentence which included disbarment, absolved attorney from all consequences of order of disbarment, entitling him to reinstatement. Ex parte Crisler, 159 Miss. 247, 132 So. 103 (1931).

A pardon restores the right to vote. Jones v. Board of Registrars, 56 Miss. 766, 31 Am. R. 385 (1879); see § 253 hereof.

6. Reprieve.

The governor can respite the sentence of one convicted for a capital offense and fix a later day for execution. Ex parte Fleming, 60 Miss. 910 (1883).

7. Remission of fines.

The charter of a municipality empowering the mayor, with the consent of the board of aldermen, to remit fines and annual penalties does not interfere with the power of the governor. Allen v. McGuire, 100 Miss. 781, 57 So. 217, Am. Ann. Cas. 1914A,483 (1912).

8. Suspension of sentence.

There is no limitation or restriction contained in the constitution that would preclude the governor from granting suspended sentences on conditions that may be both advisable and expedient in his opinion as to the proper exercise of executive clemency. Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913 (1954).

Even if a petitioner for habeas corpus, had been entitled to successfully challenge the authority of the governor to revoke his suspension of sentence without notice and a hearing, the burden of proof was upon him to show that his behavior subsequent to the granting of his indefinite suspension of sentence has been good and that therefore the governor had no reason that should have been deemed sufficient by him to justify a revocation of the sentence. Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913 (1954).

9. Good time.

Executive earned time was a reduction or release granted by the governor under Miss. Const. Art. 5, § 124 and was not subject to the earned release supervision program in Miss. Code Ann. § 47-5-138(5). Peters v. State, 935 So. 2d 1064 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 400 (Miss. 2006), dismissed by 2009 U.S. Dist. LEXIS 70505 (N.D. Miss. Aug. 12, 2009).

The petitioner was not constitutionally entitled to receive executive good time based upon an executive order issued pursuant to the governor's discretionary power which granted good time to specified inmates based on work performed during an ice storm. Randall v. Roberts, 736 So. 2d 1083 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR. Power of executive to pardon one committed for contempt. 23 A.L.R. 524; 26 A.L.R. 21; 38 A.L.R. 171; 63 A.L.R. 226.

Judicial investigation of pardon by governor. 30 A.L.R. 238, 65 A.L.R. 1471.

Power to pardon or commute sentence as one which devolves upon the lieutenant governor during the absence of disability of the governor. 32 A.L.R. 1162.

Conditional pardon. 60 A.L.R. 1410.

Pardon as restoring public office or license or eligibility therefor. 58 A.L.R.3d 1191.

Revocation of order commuting state criminal sentence. 88 A.L.R.5th 463.

Am Jur. 59 Am. Jur. 2d, Pardon and Parole §§ 18, 19.

CJS. C.J.S. Fines § 5.

C.J.S. Forfeitures § 7.

C.J.S. Pardon and Parole §§ 3-33.

C.J.S. RICO (Racketeer Influenced and Corrupt Organizations) § 32.

§ 125. Suspension of defaulting treasurers and tax collectors

The Governor shall have the power, and it is hereby made his duty, to suspend alleged defaulting state and county treasurers, and defaulting tax-collectors, pending the investigation of their respective accounts, and to make temporary appointments of proper persons to fill the offices while such investigations are being made; and the Legislature shall provide for the enforcement of this provision by appropriate legislation.

Cross References — Appointment of officers, see Miss. Const. Art. 5, § 139.

JUDICIAL DECISIONS

1. In general.

The State Insurance Commissioner is not a tax collector within the meaning of this section. Henry v. State, 130 Miss. 855, 95 So. 67 (1923).

ATTORNEY GENERAL OPINIONS

There is no statutory authority for a board of supervisors to continue to pay a suspended tax collector where no services will be performed and where there is no authority for the suspended tax collector to act and perform any duties in any official capacity. An individual appointed to serve as tax collector on a temporary basis is entitled to the same compensation as the elected tax collector was receiving at the time of suspension. McWilliams, Oct. 24, 2003, A.G. Op. 30-0572.

The governor has authority, upon being satisfied that investigations have been closed, to rescind his prior order suspending a tax collector and thereby reinstate her to office. Straughter, Apr. 26, 2005, A.G. Op. 05-0207.

RESEARCH REFERENCES

CJS. C.J.S. Social Security and Public Welfare §§ 373-375.

C.J.S. States §§ 154-195.

C.J.S. Taxation §§ 984, 1692.

§ 126. Seal of state

There shall be a seal of the state kept by the Governor, and used by him officially, and be called the great seal of the State of Mississippi.

SOURCES: 1817 art IV § 12; 1832 art V § 12; 1869 art V § 11.

Cross References — Sealed commissions, see Miss. Const. Art. 5, § 127.
State Fiscal Officer to use seal prescribed by this section, see § 7-7-61.

RESEARCH REFERENCES

CJS. C.J.S. States § 79.

§ 127. Commissions

All commissions shall be in the name and by the authority of the State of Mississippi, be sealed with the great seal of the state, and be signed by the Governor, and attested by the Secretary of State.

SOURCES: 1817 art IV § 11; 1832 art V § 11; 1869 art V § 12.

JUDICIAL DECISIONS

1. In general.

A commission duly authenticated is prima facie evidence that the person holding it was regularly appointed and confirmed by the senate, in the event such confirmation is required. Witherspoon v. State, 138 Miss. 310, 103 So. 134 (1925).

RESEARCH REFERENCES

CJS. C.J.S. States § 79.

§ 128. Lieutenant Governor; qualifications and term

There shall be a Lieutenant Governor who shall be elected at the same time, in the same manner, and for the same term, and who shall possess the same qualifications as required of the Governor. Any person elected to the office of Lieutenant Governor shall be eligible to succeed himself in office, but no person who has been elected to the office of Lieutenant Governor for two successive terms shall be eligible to hold that office until one term has intervened.

SOURCES: 1817 art IV § 18; 1869 art V § 14; Laws, 1992, ch. 719, eff December 8, 1992.

Editor's Note — The 1992 amendment of Section 128 in Article 5 of the Mississippi Constitution of 1890, was proposed by Laws, 1992, ch. 719 (Senate Concurrent Resolution No. 525), and upon ratification by the electorate on November 3, 1992, was inserted as part of the Constitution by proclamation of the Secretary of State on December 8, 1992.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

Contested election, see Miss. Const. Art. 5, § 132.

Qualifications to hold public office see Miss. Const. Art. 5, § 117, Art. 12, § 250, and Art. 14, § 265.

Provision that a Lieutenant Governor shall be elected in 1995 and every four years thereafter, see 23-15-193.

Nominations for state, district, county, and county district elective offices, see 23-15-291 et seq.

Appointment of members of Business Finance Corporation of Mississippi, Inc., see 57-10-167.

JUDICIAL DECISIONS

1. In general.

The participation of the Lieutenant Governor on the Joint Legislative Budget Committee was not a violation of the constitutional provision for separation of executive and legislative powers. The Lieutenant Governor is constitutionally an officer of both the executive and legislative departments and is eligible as President of the Senate to receive the legislative powers conferred upon him by the legislation creating the Joint Legislative Budget Committee. Neither the statute creating the Joint Legislative Budget Committee nor the Lieutenant Governor's service on the committee constituted a violation of the constitutionally mandated separation of powers. Kirksey v. Dye, 564 So. 2d 1333 (Miss. 1990).

RESEARCH REFERENCES

ALR. Office of lieutenant governor as primarily executive or legislative. 70 A.L.R. 1095.

CJS. C.J.S. States §§ 171-174, 243.

Law Reviews. 1987 Mississippi Supreme Court Review, Civil procedure. 57 Miss. L. J. 443, August, 1987.

§ 129. Lieutenant Governor as president of Senate

The Lieutenant Governor shall, by virtue of his office, be President of the Senate. In committee of the whole he may debate all questions, and where there is an equal division in the senate, or on a joint vote of both houses, he shall give the casting vote.

SOURCES: 1817 art IV § 19; 1869 art V § 16.

JUDICIAL DECISIONS

1. In general.
2. Separation of powers.

1. In general.

Power to control assignment of Senators to standing, select, and conference committees, as well as power to control referral of bills to committees, are not among powers inherent in office of President of Senate. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

2. Separation of powers.

The participation of the Lieutenant Governor on the Joint Legislative Budget Committee was not a violation of the constitutional provision for separation of executive and legislative powers. The Lieutenant Governor is constitutionally an officer of both the executive and legislative departments and is eligible as President of the Senate to receive the legislative powers conferred upon him by the legislation creating the Joint Legislative Budget Committee. Neither the statute creating the Joint Legislative Budget Committee nor the Lieutenant Governor's service on the committee constituted a violation of the constitutionally mandated separation of powers. Kirksey v. Dye, 564 So. 2d 1333 (Miss. 1990).

Sections 129-132 inescapably provide exception to separation of powers mandate by vesting in Lieutenant Governor some authority in Executive Department and other authority in Legislative Department, thus making him officer of both departments. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

Senate possesses power to make rules regarding the exercise of legislative powers that inhere in it, and it may confer these powers upon one or more of its members, one of which is Lieutenant Governor by virtue of § 129 of Constitution; therefore, separation of powers doctrine is not violated by Lieutenant Governor's exercising power in Senate pursuant to Senate rules. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 171-174, 243.

Law Reviews. 1987 Mississippi Supreme Court Review, Civil procedure. 57 Miss. L. J. 443, August, 1987.

§ 130. Salary of Lieutenant Governor

The Lieutenant Governor shall receive for his services the same compensation as the speaker of the House of Representatives.

SOURCES: 1869 art V § 16.

JUDICIAL DECISIONS

1. In general.
Sections 129-132 inescapably provide exception to separation of powers mandate by vesting in Lieutenant Governor some authority in Executive Department and other authority in Legislative Department, thus making him officer of both departments. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 171-174, 243.

§ 131. Vacancy in office of Governor

When the office of Governor shall become vacant, by death or otherwise, the Lieutenant Governor shall possess the powers and discharge the duties of the office. When the Governor shall be absent from the State, or unable, from protracted illness, to perform the duties of the office, the Lieutenant Governor shall discharge the duties of said office until the Governor be able to resume his duties; but if, from disability or otherwise, the Lieutenant Governor shall be incapable of performing said duties, or if he be absent from the State, the President of the Senate Pro Tempore shall act in his stead; but if there be no such President, or if he be disqualified by like disability, or be absent from the state, then the Speaker of the House of Representatives shall assume the office of Governor and perform the duties; and in case of the inability of the foregoing officers to discharge the duties of Governor, the Secretary of State shall convene the Senate to elect a President Pro Tempore. The officer discharging the duties of Governor shall receive as compensation while performing such duties, the compensation to which he is regularly entitled by law for service in the position to which he was elected and, in addition thereto, an amount equal to the difference between such regular compensation and the compensation of the Governor. Should a doubt arise as to whether a vacancy has occurred in the office of Governor or as to whether any one of the disabilities mentioned in this section exists or shall have ended, then the Secretary of State shall submit the question in doubt to the judges of the Supreme Court, who, or a majority of whom, shall investigate and determine the question and shall furnish to the Secretary of State an opinion, in writing, determining the question submitted to them, which opinion, when rendered as aforesaid, shall be final and conclusive.

SOURCES: 1817 art IV §§ 20, 21, 22; 1832 art V §§ 17, 18; 1869 art V § 17; Laws, 1992, ch. 721, eff December 8, 1992.

Editor's Note — The 1992 amendment of Section 131 in Article 5 of the Mississippi Constitution of 1890, was proposed by Laws, 1992, ch. 721 (Senate Concurrent Resolution No. 527), and upon ratification by the electorate on November 3, 1992, was inserted as part of the Constitution by proclamation of the Secretary of State on December 8, 1992.

JUDICIAL DECISIONS

1. Separation of powers.
2. Absence of Governor.
3. Functions of Supreme Court.

1. Separation of powers.

The participation of the Lieutenant Governor on the Joint Legislative Budget Committee was not a violation of the constitutional provision for separation of executive and legislative powers. The Lieutenant Governor is constitutionally an officer of both the executive and legislative departments and is eligible as President of the Senate to receive the legislative powers conferred upon him by the legislation creating the Joint Legislative Budget Committee. Neither the statute creating the Joint Legislative Budget Committee nor the Lieutenant Governor's service on the committee constituted a violation of the constitutionally mandated separation of powers. Kirksey v. Dye, 564 So. 2d 1333 (Miss. 1990).

Sections 129-132 inescapably provide exception to separation of powers mandate by vesting in Lieutenant Governor some authority in Executive Department and other authority in Legislative Department, thus making him officer of both departments. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

2. Absence of Governor.

When the governor leaves the confines of the state his powers as governor cease until he returns thereto, and while he is absent from the state the lieutenant-governor is clothed with all the functions of the governor's office and may grant pardons. Montgomery v. Cleveland, 134 Miss. 132, 98 So. 111, 32 A.L.R. 1151 (1923).

3. Functions of Supreme Court.

Constitutional provision authorized court to answer only questions relating to discharge of duties of governor's office. In re Justices, 148 Miss. 427, 114 So. 887 (1927).

RESEARCH REFERENCES

ALR. Power to pardon or commute sentence as one which devolves upon the lieutenant governor during the absence or disability of the governor. 32 A.L.R. 1162.

Death or disability of one elected to office before qualifying as creating a vacancy. 74 A.L.R. 486.

Devolution, in absence of governor, of veto and approval power, upon lieutenant governor or other officer. 136 A.L.R. 1053.

Am Jur. 38 Am. Jur. 2d, Governor §§ 11-13.

CJS. C.J.S. States §§ 171-174, 240-243.

Law Reviews. 1987 Mississippi Supreme Court Review, Civil procedure. 57 Miss. L. J. 443, August, 1987.

§ 132. Contested election for Lieutenant Governor

In case the election for Lieutenant Governor shall be contested, the contest shall be tried and determined in the same manner as a contest for the office of Governor.

SOURCES: 1869 art V § 18.

Cross References — Qualifications, see Miss. Const. Art. 5, § 117 and Art. 5, § 128.
Election of Governor, see Miss. Const. Art. 5, § 140.

JUDICIAL DECISIONS

1. In general.

Sections 129-132 inescapably provide exception to separation of powers mandate by vesting in Lieutenant Governor some authority in Executive Department and other authority in Legislative Department, thus making him officer of both departments. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 171-174, 243.

§ 133. Secretary of State

There shall be a Secretary of State, who shall be elected as herein provided. He shall be at least twenty-five years of age, a citizen of the state five years next preceding the day of his election, and he shall continue in office during the term of four years, and shall be keeper of the capitol; he shall keep a correct register of all official acts and proceedings of the Governor; and shall, when required, lay the same, and all papers, minutes, and vouchers relative thereto, before the Legislature, and he shall perform such other duties as may be required of him by law. He shall receive such compensation as shall be prescribed.

SOURCES: 1817 art IV § 14; 1832 art V § 14; 1869 art V § 19.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.
Qualifications, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.
Statutory duties of Secretary of State, see §§ 7-3-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 142 et seq., 249.

§ 134. State Treasurer; Auditor of Public Accounts

A State Treasurer and an Auditor of Public Accounts shall be elected as herein provided, who shall hold their office for the term of four (4) years, and shall possess the same qualifications as required for the Secretary of State. They shall receive such compensation as may be provided by law.

SOURCES: 1817 art IV § 25; 1832 art V § 20; 1869 art V § 20; Laws, 1966, ch 692; Laws, 1986, ch. 634, eff November 20, 1986.

Editor's Note — The 1966 amendment to Section 134 of the Constitution by Laws, 1966, Chapter 692, which eliminated the prohibition against the treasurer and the auditor of public accounts immediately succeeding each other in office, and the prohibition against the auditor of public accounts immediately succeeding himself in that office, was proposed by House Concurrent Resolution No. 38, adopted at the 1966 regular session of the Legislature, and upon ratification by the electorate on November 8, 1966, was inserted by proclamation of the Secretary of State on November 23, 1966, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

The 1986 amendment to Section 134 of Article 5 of the Mississippi Constitution of 1890 was proposed by Chapter 634, Laws, 1986 (Senate Concurrent Resolution No. 513), and upon ratification by the electorate on November 4, 1986, was inserted as part of the Constitution by proclamation of the Secretary of State on November 20, 1986.

Section 7-7-2 provides that the words "State Auditor of Public Accounts," "State Auditor," and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer.

Section 27-104-6 provides that whenever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration".

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

Auditor's statement, see Miss. Const. Art. 4, § 113.

Suspension of treasurers, see Miss. Const. Art. 5, § 125.

Qualifications, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

Auditor of Public Accounts, generally, see § 7-7-1 et seq.

Statutory duties of state treasurer, see § 7-9-1 et seq.

JUDICIAL DECISIONS

1. In general.

The Legislature may impose a duty on the State Treasurer in addition to the duties imposed by the State Constitution. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

The section of the State Constitution providing for semiannual statements showing the condition of the treasury refers to funds properly and legally confided to the State Treasurer, and neither that section nor a preceding section providing for the office of Treasurer is violated by the Unemployment Compensation Law providing for a trust fund to be placed by the Treasurer in proper depositories and disbursed by him in the manner authorized. Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (1938).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 142 et seq., 249.

§ 135. County officers

Effective January 1, 1964, there shall be a sheriff, coroner, assessor, tax collector and surveyor for each county to be selected as elsewhere provided herein, who shall hold their office for four years and who shall be eligible to immediately succeed themselves in office, provided, however, if the offices of sheriff and tax collector are combined the holder thereof shall not be eligible to immediately succeed himself in office. The Legislature may combine any one or more of said offices in any county or counties and shall fix their compensation. The duties heretofore imposed on the county treasurer shall be discharged by some person or persons selected as required by law.

SOURCES: 1869 art V § 21; Laws, 1924 ch 142; Laws, 1962, ch 683, eff June 22, 1962.

Editor's Note — The 1962 amendment to Section 135 of the Constitution was proposed by ch. 683 (Senate Concurrent Resolution No. 109) of the 1962 Regular Session of the Legislature, and, upon ratification by the electorate on June 5, 1962, was inserted by proclamation of the Secretary of State on June 22, 1962, by virtue of the authority vested in him by Section 273 of the Constitution.

Cross References — Impeachment of civil officers, see Miss. Const. Art. 4, § 50 et seq.

Time of election of state officers, see Miss. Const. Art. 5, § 143.

Qualifications for holding public office, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

Office of coroner generally, see § 19-21-101 et seq.

Office of sheriff generally, see § 19-25-1 et seq.

County surveyor, generally, see § 19-27-1 et seq.

Assessors and county tax collectors, see § 27-1-1 et seq.

Applicability of provisions regulating engineers, land surveyors and county surveyors, see § 73-13-97.

JUDICIAL DECISIONS

1. In general.
2. Validity of statutes.
3. Tax collector.
4. Sheriff.
5. Assessor.
6. Abolition of office—In general.
7. County treasurer, abolition of office.

1. In general.

The implied requirement of this section that taxes be assessed by an assessor and collected by the sheriff had no application to privilege taxes. Enochs v. State, 133 Miss. 107, 97 So. 534 (1923); State ex rel. Knox v. Gulf, M. & N.R.R., 138 Miss. 70, 104 So. 689 (1925).

2. Validity of statutes.

Sections 3799 and 3804, Code of 1892 (§§ 4312 and 4320, Code 1906), the one authorizing the board of supervisors to increase assessments to cover improvements placed on land, and the other empowering the tax collector to make additional assessments, are constitutional. Board of Supvrs. v. Tate, 78 Miss. 294, 29 So. 74 (1901) To the same effect as to § 3804 Code of 1892 (§ 4320, Code of 1906). See Powell v. McKee, 81 Miss. 229, 32 So. 919 (1902); Powell v. McKee, 81 Miss. 229, 32 So. 919 (1902).

3. Tax collector.

The full time allowed to the county tax collector to pursue and complete the means furnished him by the law for the full collection of state and county ad valorem taxes on land does not expire until the time for the making of the sales of land, such period not being one of finality until after the completion of the sales begun on the third Monday in September. Gully v. Lincoln County, 184 Miss. 784, 185 So. 795 (1939), error overruled, 184 Miss. 804, 186 So. 830 (1939).

4. Sheriff.

There is an implied requirement in this section that ad valorem state and county taxes should be collected by the sheriff. Gully v. Lincoln County, 184 Miss. 784, 185 So. 795 (1939), error overruled, 184 Miss. 804, 186 So. 830 (1939).

Since it is the primary duty of the sheriff as county tax collector to collect ad valorem state and county taxes, no other officer can be allowed to intervene in such collection until the lapse of the full time allowed by law to the sheriff as county tax collector to collect such taxes. Gully v. Lincoln County, 184 Miss. 784, 185 So. 795 (1939), error overruled, 184 Miss. 804, 186 So. 830 (1939).

Since the functions of the sheriff are confined to his own county, except in the case of the pursuit of an escaping offender, there can be no recovery on a sheriff's bond for the alleged unlawful treatment of one accused of crime apprehended in another state where such treatment and the events complained of occurred in such other state. McLean v. Mississippi ex rel. Roy, 96 F.2d 741, 119 A.L.R. 670 (5th Cir.

1938), cert. denied, 305 U.S. 623, 59 S. Ct. 84, 83 L. Ed. 399 (1938).

The inhibition against a sheriff succeeding himself does not apply to a sheriff who has served only a part of a full term. Nunnery v. Ford, 92 Miss. 263, 45 So. 722 (1908).

5. Assessor.

The mere fact that the state constitution requires each county to have a tax assessor does not prevent the legislature from authorizing the board of supervisors, in its discretion, to employ competent persons to make a survey and an appraisal of property, and to pay for this service out of the general fund of the county. Sigalas v. Board of Supvrs., 185 So. 2d 420 (Miss. 1966), overruled on other grounds, White v. Gautier Util. Dist., 465 So. 2d 1003 (Miss. 1985).

Where legislature has not provided special mode of dealing with property, situated in more than one county, for tax purposes, board of supervisors and county assessor may determine value of property assessable under general statutory scheme. Teche Lines v. Board of Supvrs., 165 Miss. 617, 143 So. 486 (1932), rev'd, 165 Miss. 594, 142 So. 24 (1932).

Legislature has power to authorize county tax assessor to back-assess property escaping taxation in former years. Reed v. Norman-Breaux Lumber Co., 149 Miss. 395, 115 So. 724 (1928), appeal dismissed, 278 U.S. 556, 49 S. Ct. 14, 73 L. Ed. 503 (1928).

A statute (Laws 1888, p 24) dividing the counties into classes, and the lands therein into sub-classes, fixing, according to quality, a maximum and minimum value for taxation on the lands in the several classes, and confining the assessor to the limits so fixed, violated Art 5, § 21, Constitution 1869, providing for an assessor in each county, and Art 12, § 20, same requiring property to be taxed according to value. Hawkins v. Mangrum, 78 Miss. 97, 28 So. 872 (1900).

6. Abolition of office—In general.

By constitutional provision the people may abolish any office at any time, as an office holder has no vested right or contract to hold office. Luckett v. Madison County, 137 Miss. 1, 101 So. 851, 37 A.L.R. 814 (1924).

While the legislature cannot practically abolish an office created by the Constitution by preventing the incumbent from discharging the duties thereof, it may within certain limits prescribe and restrict his duties. Montgomery v. State, 97 Miss. 292, 52 So. 357 (1910); Fidelity & Deposit Co. v. Wilkinson County, 109 Miss. 879, 69 So. 865 (1915).

7. County treasurer, abolition of office.

The County Depository Statute was authorized by the Constitutional Amendment abolishing the office of county treasurer; and depositories of county funds, though not public officers in constitutional sense, are quasi public officers and, in a very large measure take the place of the county treasurers and perform the duties theretofore performed by them. Miller v. Batson, 160 Miss. 642, 134 So. 567 (1931).

The original § 135 of the Constitution 1890 was amended in 1924, see c 142, Laws 1924, and the amendment abolished the office of County Treasurer and took effect when inserted into the Constitution, and all county treasurers then holding office ceased to be treasurers. Luckett v. Madison County, 137 Miss. 1, 101 So. 851, 37 A.L.R. 814 (1924).

In a case decided prior to the amendment of 1924, it was held that a statute establishing drainage district depositories and providing for deposit therein of county moneys by county treasurers, did not violate this section as in effect abolishing the office of county treasurer. Magee v. Brister, 109 Miss. 183, 68 So. 77 (1915).

RESEARCH REFERENCES

CJS. C.J.S. Boundaries §§ 3, 13, 15, 100 to 102.

C.J.S. Coroners and Medical Examiners § 2.

C.J.S. Counties § 97.

C.J.S. Sheriffs and Constables § 1.

C.J.S. Social Security and Public Welfare §§ 373-375.

C.J.S. Taxation §§ 459-461, 984, 1692.

§ 136. Continuation in office

All officers named in this article shall hold their offices during the term for which they were selected, unless removed, and until their successors shall be duly qualified to enter on the discharge of their respective duties.

SOURCES: 1869 art V § 22.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

Removal of officers, see Miss. Const. Art. 5, § 139 and Art. 6, § 175.

JUDICIAL DECISIONS

1. In general.
2. Right to hold over.

1. In general.

The section applies only to officers elected under the provision of the Constitution. Andrews v. State, 69 Miss. 740, 13 So. 853 (1892).

2. Right to hold over.

Under this section, a member of the board of supervisors, who in several elections during 1940 received a majority of the votes for such office but failed to provide bond and take the oath of office, had a right to hold over during the year 1940 until his successor should be elected and make the required bond and take the oath of office. Alford v. State, 200 So. 722 (Miss. 1941).

RESEARCH REFERENCES

ALR. Power to abolish or discontinue office. 4 A.L.R. 205, 172 A.L.R. 1366.

Power of legislature to extend term of public office. 97 A.L.R. 1428.

Power of legislature to prescribe qualifications for or conditions of eligibility to constitutional office. 34 A.L.R.2d 155.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 115, 117, 120, 121, 137, 139-144, 146-151, 153-189, 191-193, 195-197, 199-207, 209, 210, 212-216, 218-222, 427-429, 431, 432, 441, 442, 445, 446.

43 Am. Jur. (1st ed), Public Officers §§ 149-246.

CJS. C.J.S. Officers and Public Employees §§ 44, 53, 62, 86-109, 134.

C.J.S. States §§ 88, 89, 151-153, 169, 170.

§ 137. Repealed

Repealed by Laws, 1990, ch. 695, eff December 19, 1990.

Editor's Note — Former Section 137 required that the State Treasurer publish in a newspaper located at the seat of government, within ten days of the first of January and July of each year, a statement of the condition of the treasury including the balance on hand and information concerning the nature of the funds. The former section also required verification by inspection and certification of the count by the Governor.

The 1990 repeal of Section 137 of Article 5 of the Mississippi Constitution of 1890, was proposed by Laws, 1990, Ch. 695 (Senate Concurrent Resolution No. 562), and upon ratification by the electorate on November 6, 1990, was deleted from the Constitution by proclamation of the Secretary of State on December 19, 1990.

§ 138. Selection of county officers

The sheriff, coroner, assessor, surveyor, clerks of courts, and members of the board of supervisors of the several counties, and all other officers exercising local jurisdiction therein, shall be selected in the manner provided by law for each county.

SOURCES: 1817 art IV § 24; 1832 art V § 19.

Cross References — Establishment of offices, see Miss. Const. Art. 5, § 135.
Election of clerk of Supreme Court, see Miss. Const. Art. 6, § 168.
Qualifications to hold public office, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.
Office of coroner generally, see § 19-21-101 et seq.
Office of sheriff generally, see § 19-25-1 et seq.
County surveyor, generally, see § 19-27-1 et seq.
Assessors and county tax collectors, see § 27-1-1 et seq.

JUDICIAL DECISIONS

1. Validity of statutes.
2. Sheriff or tax collector.
3. Assessor.
4. Others.

1. Validity of statutes.

The statute providing for the establishment of county and drainage district depositories is not violative of this section. Fidelity & Deposit Co. v. Wilkinson County, 109 Miss. 879, 69 So. 865 (1915).

2. Sheriff or tax collector.

Since the functions of the sheriff are confined to his own county, except in the case of the pursuit of an escaping offender, there can be no recovery on a sheriff's bond for the alleged unlawful treatment of one accused of crime apprehended in another state where such treatment and the events complained of occurred in such other state. McLean v. Mississippi ex rel. Roy, 96 F.2d 741, 119 A.L.R. 670 (5th Cir. 1938), cert. denied, 305 U.S. 623, 59 S. Ct. 84, 83 L. Ed. 399 (1938).

The legislature may authorize a tax collector to assess such persons and personal property as he may fine unassessed, as was done by § 3804 of the Code of 1892 (Code 1906, § 4320). Powell v. McKee, 81 Miss. 229, 32 So. 919 (1902).

The term "sheriff ex vi termini" in this state implies "tax collector." Byrne v. State, 50 Miss. 688 (1874); French v. State, 52 Miss. 759 (1876).

3. Assessor.

The drainage act of 1912 which conferred power to make assessments for local improvements upon drainage commissioners, instead of the assessor, does not violate this section. Jones v. Belzoni Drainage Dist., 102 Miss. 796, 59 So. 921 (1912).

The section, taken in connection with § 112, contemplates that assessments shall be made by the assessor. Adams v. Tonella, 70 Miss. 701, 14 So. 17 (1893).

4. Others.

In a case in which defendant, a former county circuit clerk, was convicted of embezzlement, in violation of 18 U.S.C.S. § 666(a)(1), his reliance on the Phillips decision (United States v. Phillips, 219 F.3d 404 (5th Cir. 2000)), a Louisiana case, was misplaced. In the Phillips case, defendant, a former tax assessor of a parish, was not an agent of the parish under 18 U.S.C.S. § § 666(d)(1), because Louisiana law completely separated the tax assessor's office from the parish government; however, in Mississippi, circuit clerks were not completely separated from county governments in Mississippi, and the Phillips decision was not applicable in the present case. United States v. Harris, 2008 U.S. App. LEXIS 22020 (5th Cir. Oct. 21, 2008).

RESEARCH REFERENCES

CJS. C.J.S. Boundaries §§ 3, 13, 15, 100 to 102.

C.J.S. Coroners and Medical Examiners §§ 3, 5.

C.J.S. Counties § 98.

C.J.S. Sheriffs and Constables § 2.

C.J.S. Social Security and Public Welfare §§ 373-375.

C.J.S. Taxation §§ 459-461, 984, 1692.

§ 139. Removal and appointment of county and municipal officers

The Legislature may empower the Governor to remove and appoint officers, in any county or counties or municipal corporations, under such regulations as may be prescribed by law.

Cross References — Suspension of officers, see Miss. Const. Art. 5, § 125.

Removals from office, see § 25-5-1 et seq.

JUDICIAL DECISIONS

1. Appointments.
2. Removal of officers.

1. Appointments.

The appointment of a revenue agent to assess and collect municipal taxes by the legislature is valid. Adams v. Kuykendall, 83 Miss. 571, 35 So. 830 (1904).

2. Removal of officers.

Chapter 188, Laws of 1959 (Code 1942 §§ 4054.01 et seq.) providing for the removal of county officers by the Governor pursuant to an election for the purpose, is constitutional. State ex rel. Patterson v. Board of Supvrs., 234 Miss. 26, 105 So. 2d 154 (1958).

RESEARCH REFERENCES

CJS. C.J.S. Counties §§ 104 to 106.

C.J.S. Municipal Corporations §§ 420, 421.

§ 140. Election of Governor

The Governor of the state shall be chosen in the following manner: On the first Tuesday after the first Monday of November of A.D. 1895, and on the first Tuesday after the first Monday of November in every fourth year thereafter, until the day shall be changed by law, an election shall be held in the several counties and districts created for the election of members of the House of Representatives in this state, for Governor, and the person receiving in any county or such legislative district the highest number of votes cast therein, for said office, shall be holden to have received as many votes as such county or district is entitled to members in the House of Representatives, which last named votes are hereby designated “electoral votes”. In all cases where a representative is apportioned to two (2) or more counties or districts, the electoral vote based on such representative, shall be equally divided among such counties or districts. The returns of said election shall be certified by the election commissioners, or the majority of them, of the several counties and transmitted, sealed, to the seat of government, directed to the Secretary of State, and shall be by him safely kept and delivered to the Speaker of the House of Representatives on the first day of the next ensuing session of the Legislature.

The Speaker shall, on the same day he shall have received said returns, open and publish them in the presence of the House of Representatives, and said House shall ascertain and count the vote of each county and legislative district and decide any contest that may be made concerning the same, and said decision shall be made by a majority of the whole number of members of the House of Representatives concurring therein by a viva voce vote, which shall be recorded in its journal; provided, in case the two (2) highest candidates have an equal number of votes in any county or legislative district, the electoral vote of such county or legislative district shall be considered as equally divided between them. The person found to have received a majority of all the electoral votes, and also a majority of the popular vote, shall be declared elected.

SOURCES: 1817 art IV § 2; 1832 art V § 2; 1869 art V § 2; Laws, 1982, ch. 621, eff January 28, 1983.

Editor's Note — The 1982 amendment to Section 140 of Article 5 of the Constitution of 1890 was proposed by Laws, 1982, ch. 621, being Senate Concurrent Resolution No. 517 of the 1982 regular session of the Legislature and, upon ratification by the electorate on November 2, 1982, was inserted as a part of the Constitution by proclamation of the Secretary of State on January 28, 1983.

Cross References — Time of election of state officers, generally, see Miss. Const. Art. 4, § 102.

Term of office, see Miss. Const. Art. 12, § 252.

Office of Governor, generally, see § 7-1-1 et seq.

JUDICIAL DECISIONS

1. In general.

If highway commissioners are not de jure officers because not elected at time required by Constitution, they are nevertheless de facto officers whose acts are valid so long as not challenged in legal manner. Trahan v. State Hwy. Comm'n, 169 Miss. 732, 151 So. 178 (1933).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 171-174, 240-242.

§ 141. Choosing Governor in absence of electoral and popular vote majorities

If no person shall receive such majorities, then the house of representatives shall proceed to choose a governor from the two persons who shall have received the highest number of popular votes. The election shall be by viva voce vote, which shall be recorded in the journal, in such manner as to show for whom each member voted.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 171-174, 240-243.

§ 142. Ineligibility of Legislators to receive certain appointments

In case of an election of Governor or any state officer by the House of representatives, no member of that House shall be eligible to receive any appointment from the Governor or other state officer so elected, during the term for which he shall be elected.

Cross References — Ineligibility of Senator or Representative to office of profit created during term, see Miss. Const. Art. 4, § 45.

RESEARCH REFERENCES

CJS. C.J.S. States §§ 88, 89, 147, 148.

§ 143. Election of other state officers

All other state officers shall be elected at the same time, and in the same manner as provided for election of Governor.

Cross References — Election of Governor, see Miss. Const. Art. 5, § 140.
General elections, see Miss. Const. Art. 12, § 252.

JUDICIAL DECISIONS

1. In general.

If highway commissioners are not de jure officers because not elected at time required by Constitution, they are de facto officers whose acts are valid so long as not challenged in legal manner. Trahan v. State Hwy. Comm'n, 169 Miss. 732, 151 So. 178 (1933).

RESEARCH REFERENCES

CJS. C.J.S. States §§ 88, 89. 158-165, 195.

ARTICLE 6.

JUDICIARY.

Sec.

144. Judicial power of state
145. Composition of Supreme Court
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168. Clerks of court
169. Style of process
170. County districts; board of supervisors
171. Justice court judges; jurisdiction
172. Establishment and abolishment of inferior courts
172A. Court order for tax levy or tax increase prohibited
173. Attorney General
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175. Liability and punishment of public officers
176. Qualifications for member of board of supervisors
177. Vacancy in office of judge or chancellor
177A. Commission on Judicial Performance

§ 144. Judicial power of state

The judicial power of the State shall be vested in a Supreme Court and such other courts as are provided for in this Constitution.

SOURCES: 1817 art V § 1; 1832 art IV § 1; 1869 art VI § 1.

Cross References — Court systems, see Miss. Const. Art. 6, §§ 152, 156, 159, 160, 161, 171, 172.

Provisions common to courts, see § 9-1-5 et seq.
Supreme Court generally, see § 9-3-1 et seq.
Chancery courts generally, see § 9-5-1 et seq.
Circuit courts generally, see § 9-7-1 et seq.
County courts generally, see § 9-9-1 et seq.
Justices of the peace generally, see § 9-11-2 et seq.

JUDICIAL DECISIONS

1. Judicial powers and functions — In general.
2. Rules of court, judicial powers and functions.
3. Validity of statutes.
4. Encroachment on judicial powers—In general.
5. Legislative encroachment on judicial powers.
6. Judiciary encroaching upon legislative functions.
7. Federal courts and government, encroachment on judicial power.

1. Judicial powers and functions — In general.

Pursuant to the authority granted to it by Miss. Const. Art. 6, § 144, the state supreme court established the Mississippi Access to Justice Commission to ensure that all persons of the state had equal access to justice within the state without regard to economic status. In re Establishing the Miss. Access to Justice Comm'n, — So. 2d —, 2006 Miss. LEXIS 350 (Miss. June 28, 2006).

Nonjudicial functions cannot constitutionally be conferred upon any of the state courts. Illinois Cent. R.R. v. Mississippi Pub. Serv. Comm'n, 135 F. Supp. 304 (S.D. Miss. 1955).

Although trial court initially determines in forma pauperis status, Supreme Court is in unique position of deciding which inmate, if any, abuses in forma pauperis status, and thus Supreme Court will determine when such abuse is oppressive to judiciary, and by order will apprise trial court to restrict privilege if necessary. Hyde v. State, 666 So. 2d 445 (Miss. 1995).

Based upon the need for an informational system linking the courts and the Supreme Court's constitutional responsibility to assume control of the system's destiny, the planning and implementation of the Mississippi Judicial Informations System is to proceed under the exclusive authority and control of the Supreme Court through the Chief Justice. In re Mississippi Judicial Info. Sys., 533 So. 2d 1110 (Miss. 1988).

The fact that there was no quorum of the bar commissioners present at meeting when disbarment proceedings were directed to be instituted against erring attorney did not invalidate such proceedings, since, apart from, and independent of, the statutes regulating the bar and the conduct of its members, the superior courts of this state have inherent power derived from their constitutional establishment to discipline members of the bar for misconduct. McCulloch v. State, 194 Miss. 851, 13 So. 2d 829 (1943).

In this article it was intended to parcel out to the respective courts created or authorized herein the entire judicial jurisdiction of the state and that none was left undisposed of. Farrar v. State, 191 Miss. 1, 2 So. 2d 146 (1941).

Under this section and § 146, infra, all powers belonging to an appellate court may be conferred upon the supreme court, and there is no limitation in the Constitution on the power of the court to overrule decisions, or change its decision when in the opinion of the court a former decision may be erroneous or wrongful; and such power in the court does not violate the rule of res adjudicata. Brewer v. Browning, 115 Miss. 358, 76 So. 267, Am. Ann. Cas. 1918B,1013 (1917), error overruled, 115 Miss. 395, 76 So. 519, Am. Ann. Cas. 1918B,1013 (1917).

2. Rules of court, judicial powers and functions.

Trial judge is not required, prior to accepting a guilty plea, to inform a defendant of the sex offender registration laws, Miss. Code Ann. §§ 45-33-25 through 31 because Miss. Code Ann. § 45-33-39(1) confers no right on a criminal defendant charged with a sex crime and imposes no duty on trial judges, and judicial rules, such as the rules of evidence, civil procedure, criminal procedure, and professional conduct, neither come from the Legislature nor require legislative approval; the Mississippi legislative branch of government may not, through procedural legislation, control the function of the judiciary, and subservience to legislation that mandates what trial judges must say to a defendant in a courtroom during a plea hearing would be tantamount to both an abdication of judicial duty, as well as tacit approval of legislative usurpation of the judicial prerogative. Magyar v. State, 18 So. 3d 807 (Miss. 2009), writ of certiorari denied by 560 U.S. 903, 130 S. Ct. 3274, 176 L. Ed. 2d 1182, 2010 U.S. LEXIS 3999, 78 U.S.L.W. 3667 (2010).

The inherent power of the Supreme Court to promulgate procedural rules for the efficient disposition of its case load stems from the fundamental constitutional precepts of separation of powers, and the vesting of judicial powers in the courts under § 144 of the State Constitution. Matthews v. State, 288 So. 2d 714 (Miss. 1974).

The Circuit Court has ample power to promulgate rules pertaining to appeals to it from the county court, and when its rules are not complied with the order dismissing the appeal will be affirmed, in the absence of evidence that this act constituted an abuse of the court's discretion. Mississippi State Hwy. Comm'n v. McGrew, 206 So. 2d 334 (Miss. 1968).

3. Validity of statutes.

Sections 9-4-1 through 9-4-17, which establish the Court of Appeals of the State of Mississippi, are constitutional. Marshall v. State, 662 So. 2d 566 (Miss. 1995), on remand, 687 So. 2d 758 (Ct. App. 1996).

The portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) requiring that all claims against the State be governed by case law governing sovereign immunity as it existed immediately prior to the decision in Pruett v. City of Rosedale (Miss. 1982) 421 So. 2d 1046 is unconstitutional as it violates the doctrine of separation of powers and the prohibition against reviving or amending a law by reference to its title only. Presley v. Mississippi State Hwy. Comm'n, 608 So. 2d 1288 (Miss. 1992).

4. Encroachment on judicial powers—In general.

This section and § 2 of Constitution providing that no person belonging to one department shall exercise power properly belonging to either of the others are not violated by Code 1942, § 4073, authorizing Land Commissioner, with written approval of Attorney-General, to strike land from lists of lands sold to State for delinquent taxes, when tax sale was void, since § 4073 does not empower Attorney-General to usurp function of courts or to act judicially, but requires him to perform a constitutional duty of his office by making his legal learning and discretionary opinion available to proper state officer in exercise of state function in a matter of public policy. State v. Southern Pine Co., 205 Miss. 80, 38 So. 2d 442 (1949).

5. Legislative encroachment on judicial powers.

Miss. Code Ann. § 11-51-81's "three-court rule" is unconstitutional because it usurps the Mississippi Supreme Court's constitutional rule-making power and violates the doctrine of separation of powers. Thus, any litigant whose case originates in either justice court or municipal court, and whose case is ultimately decided by the circuit court, whether it be via a trial de novo or on appellate review from a final judgment of the county court conducted by the circuit court under the applicable statute, shall have the right to appeal to the Mississippi Supreme Court. Jones v. City of Ridgeland, 48 So. 3d 530 (Miss. 2010).

The portion of § 11-46-6 [repealed] requiring Mississippi courts in determining sovereign immunity to apply the case law as it existed on November 10, 1982, is unconstitutional and void because it "freezes in time and place the common law as it existed at that particular moment," and does not permit a judge to apply the common law as it exists the moment the judge makes his or her decision; while a court may be told by a statute to apply common law principles in its interpretation, the court cannot also be told that the common law it applies cannot grow or change with the experience of mankind, as such a mandate suffocates the judicial function. Presley v. Mississippi State Hwy. Comm'n, 608 So. 2d 1288 (Miss. 1992).

Statutes, regulating the bar and providing for procedure against members for misconduct, are generally regarded as prescribing a preferential method of procedure, which the court may, and in most cases, ought as a matter of discretion, to require to be followed but which is not exclusive; such statutes are not restrictive of the inherent powers which reside in courts to inquire into the conduct of their own officers, and to discipline them for misconduct. McCulloch v. State, 194 Miss. 851, 13 So. 2d 829 (1943).

It is usurpation of judicial power for legislature to declare suit abated and give permission to others to revive it, though object, reduction of power of officer, be within legislative power if properly exercised. Miller v. Hay, 143 Miss. 471, 109 So. 16 (1926).

Act organizing drainage district and constituting the commissioners a court of record did not violate this section, in view of the fact that the duties of the commissioners were mainly administrative in character and that § 172 of the Constitution empowered the legislature to create inferior courts. Pegram v. West Hatchie & Owl Creek Drainage Dist., 108 Miss. 793, 67 So. 453 (1915).

The legislature cannot invest juries with power to determine issues of law, but questions of law are to be decided by the courts. Natchez & S.R. Co. v. Crawford, 99 Miss. 697, 55 So. 596 (1911).

The legislature is not authorized to declare that a given use of a tract of land is a nuisance. It is the function of a court to declare what is a nuisance. Quintini v. Mayor of Bay St. Louis, 64 Miss. 483, 1 So. 625, 60 Am. R. 62 (1887).

6. Judiciary encroaching upon legislative functions.

A statute directing organization of a water district if the court finds the project feasible from an engineering standpoint and practical, and that its creation will meet a public necessity and be conducive to the public welfare of the state as a whole, is not unconstitutional as conferring on the judiciary authority to answer legislative questions. Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

Power is vested in legislature, and not courts, to shorten periods within which, or methods by which, appeals can be taken to Supreme Court. Gaudet v. Mayor & Bd. of Aldermen, 43 So. 2d 900 (Miss. 1950).

Supreme Court has no right or power to nullify or repeal valid statute or enact new one, as this power is vested in legislature alone. Gaudet v. Mayor & Bd. of Aldermen, 43 So. 2d 900 (Miss. 1950).

7. Federal courts and government, encroachment on judicial power.

In an action to enjoin enforcement of state public service commission order requiring the railroad to continue its passenger service on certain trains, where the Mississippi Chancery Court held that the railroad was not entitled to relief in equity because it had a plain and adequate and complete remedy at law, which it had lost by its failure to appeal to State Circuit Court and where the court dismissed the bill with prejudice, the prejudicial effect of the decree only applied to the issue of state court's jurisdiction in equity, and the railroad could invoke the equity jurisdiction of the federal courts. Illinois Cent. R.R. v. Mississippi Pub. Serv. Comm'n, 135 F. Supp. 304 (S.D. Miss. 1955).

It is not within the power of the federal congress to establish rules for the administration of justice in state courts. Wilson v. State, 80 Miss. 388, 31 So. 787 (1902).

The Act of Congress, January 13, 1898, providing that promissory notes shall not be admissible in evidence until the internal revenue stamp prescribed by it shall be affixed thereto, does not bind the state courts. Wilson v. State, 80 Miss. 388, 31 So. 787 (1902).

RESEARCH REFERENCES

ALR. Power of court to prescribe rules of pleadings, practice, or procedure. 110 A.L.R. 22, 158 A.L.R. 705.

Superintending control over inferior tribunals. 112 A.L.R. 1351.

Power to confer original jurisdiction on courts to revoke or suspend public license. 168 A.L.R. 826.

Constitutionality of statute fixing time within which court or judge shall or shall not act. 168 A.L.R. 1125.

Am Jur. 16A Am. Jur. 2d, Constitutional Law §§ 211-217, 225, 229.

20 Am. Jur. 2d, Courts.

CJS. C.J.S. Constitutional Law §§ 115, 219.

C.J.S. Courts §§ 93 to 102.

Law Reviews. 1981 Mississippi Supreme Court Review: Civil Procedure. 52 Miss. L. J. 399, June 1982.

Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

The Limits of the Mississippi Supreme Court's Rule — Making Authority. 60 Miss. L. J. 359, Fall 1990.

Morton, Rules, rulemaking, and the ruled: the Mississippi Supreme Court as self-proclaimed ruler. 12 Miss. C. L. Rev. 293, Fall, 1991.

§ 145. Composition of Supreme Court

The Supreme Court shall consist of three judges, any two of whom, when convened, shall form a quorum. The Legislature shall divide the state into three Supreme Court districts, and there shall be elected one judge for and from each district by the qualified electors thereof at a time and in the manner provided by law; but the removal of a judge to the state capitol during his term of office shall not render him ineligible as his own successor for the districts from which he has removed. The present incumbents shall be considered as holding their terms of office from the state at large. The adoption of this amendment shall not abridge the terms of any of the present incumbents, but they shall continue to hold their respective offices until the expiration of the terms for which they were respectively appointed.

SOURCES: Laws, 1915, ch 156.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

Provisions increasing number of judges, see Miss. Const. Art. 6, §§ 145A and 145B.

Qualifications to hold public office, generally, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

Statutory provisions relating to Supreme Court generally, see § 9-3-1 et seq.

JUDICIAL DECISIONS

1. Judicial elections.
2. Residency requirement for judges of the Court of Appeals.

1. Judicial elections.

State system of electing judges to Supreme Court, including at-large, multimember features, and east-to-west district lines dividing state into three districts did not dilute black voting strength, and did not violate § 2 of Federal Voting Rights Act of 1965. Magnolia Bar Ass'n v. Lee, 793 F. Supp. 1386 (S.D. Miss. 1992), aff'd, 994 F.2d 1143 (5th Cir. 1993), cert. denied, 510 U.S. 994, 114 S. Ct. 555, 126 L. Ed. 2d 456 (1993).

State judicial elections come within coverage of "results test" provisions of § 2 of Voting Rights Act of 1965 (42 USCS § 1973), as amended in 1982; if term "representatives" limited coverage with respect to judicial elections, limitation would exclude all claims involving judicial elections; better reading of term describes winners of representative, popular elections. Chisom v. Roemer, 501 U.S. 380, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991).

2. Residency requirement for judges of the Court of Appeals.

As a candidate for judge of the Mississippi Court of Appeals must have the same qualifications as a justice of the Mississippi Supreme Court, and as the Mississippi Constitution imposes a residency requirement to run for the office of supreme court justice, a candidate for judge of the court of appeals must reside within the district for the office she seeks. Bryant v. Westbrooks, 99 So. 3d 128 (Miss. Sept. 25, 2012).

RESEARCH REFERENCES

ALR. Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor. 51 A.L.R.5th 747.

CJS. C.J.S. Courts §§ 2, 137.

C.J.S. Judges §§ 20-27.

Law Reviews. Case, In search of an independent judiciary: alternatives to judicial elections in Mississippi. 13 Miss. C. L. Rev. 1, Fall, 1992.

Suppressing Speech in Judicial Elections: How the Canons of Judicial Ethics Abridge the Freedom of Speech of Judges and Candidates for Judicial Office, 21 Miss. C. L. Rev. 267, Spring, 2002.

The Least of Evils for Judicial Selection, 21 Miss. C. L. Rev. 209, Spring, 2002.

Judicial Selection — What is Right for Mississippi?, 21 Miss. C. L. Rev. 199, Spring, 2002.

§ 145A. Addition of judges to Supreme Court

The Supreme Court shall consist of six judges, that is to say, of three judges in addition to the three provided for by Section 145 of this Constitution, any four of whom when convened shall form a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by Section 145 of this Constitution, or any amendments thereto. Their terms of office shall be as provided by Section 149 of this Constitution, or any amendment thereto.

SOURCES: Laws, 1916, ch 154.

Cross References — Provisions dealing with number of Supreme Court judges, see Miss. Const. Art. 6, §§ 145 and 145B.

Statutory provisions relating to Supreme Court generally, see § 9-3-1 et seq.

JUDICIAL DECISIONS

1. Quorum of judges.
2. Reversal of judgments.

1. Quorum of judges.

Constitutional provisions that under certain circumstances cause should be considered and "adjudged" by full Supreme Court or quorum thereof have no bearing on procedure by which Supreme Court functions, except to permit court to act when some of judges are absent, provided a quorum of judges are present; "adjudge" meaning to decide or determine judicially. Dean v. State, 173 Miss. 254, 160 So. 584 (1935), error overruled, 173 Miss. 309, 162 So. 155 (1935).

When Supreme Court is sitting en banc, there must be at least four of its judges present; and no action can be taken by the court unless a majority of the judges present concur in such action. Dean v. State, 173 Miss. 254, 160 So. 584 (1935), error overruled, 173 Miss. 309, 162 So. 155 (1935).

2. Reversal of judgments.

Reversal of a judgment by three judges, with two judges dissenting and one absent, is not unconstitutional, in view of the fact that the same procedure has been consistently followed in not less than a dozen cases over a period of more than a quarter of a century. Slush v. Patterson, 201 Miss. 113, 29 So. 2d 311 (1947).

A decree or judgment may lawfully be reversed by a majority of four members of the Supreme Court present and participating in the absence of the other two members. Slush v. Patterson, 201 Miss. 113, 29 So. 2d 311 (1947).

Judgment of appellate court is rendered after all the judges participating in decision have expressed their views thereon, and if majority believe there is reversible error in record, judgment of reversal is entered, but if only minority of judges believe there is error in record, judgment is affirmed. Dean v. State, 173 Miss. 254, 160 So. 584 (1935), error overruled, 173 Miss. 309, 162 So. 155 (1935).

RESEARCH REFERENCES

CJS. C.J.S. Courts §§ 2, 137.
C.J.S. Judges §§ 20-27.

Law Reviews. Case, In search of an independent judiciary: alternatives to judicial elections in Mississippi. 13 Miss. C. L. Rev. 1, Fall, 1992.

§ 145B. Further addition of judges to Supreme Court

The Supreme Court shall consist of nine judges, that is to say, of three judges in addition to the six provided for by Section 145A of this Constitution, any five of whom when convened shall constitute a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by Section 145A of this Constitution or any amendment thereto. Their terms of office shall be as provided by Section 149 of this Constitution or any amendment thereto.

SOURCES: Laws, 1950, ch 592; Laws, 1952, ch 468.

Cross References — Provisions dealing with number of Supreme Court judges, see Miss. Const. Art. 6, §§ 145 and 145A.

Term of office, see Miss. Const. Art. 6, § 149.

Statutory provisions relating to Supreme Court generally, see § 9-3-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Courts §§ 2, 137.
C.J.S. Judges §§ 20-27.

Law Reviews. Case, In search of an independent judiciary: alternatives to judicial elections in Mississippi. 13 Miss. C. L. Rev. 1, Fall, 1992.

§ 146. Jurisdiction of Supreme Court

The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals and shall exercise no jurisdiction on matters other than those specifically provided by this Constitution or by general law. The Legislature may by general law provide for the Supreme Court to have original and appellate jurisdiction as to any appeal directly from an administrative agency charged by law with the responsibility for approval or disapproval of rates sought to be charged the public by any public utility. The Supreme Court shall consider cases and proceedings for modification of public utility rates in an expeditious manner regardless of their position on the court docket.

SOURCES: 1832 art IV § 4; 1869 art VI § 4; Laws, 1983, ch. 682, eff January 3, 1984.

Editor's Note — The 1983 amendment to Section 146 of Article 6 of the Constitution of 1890 was proposed by Senate Concurrent Resolution No. 514 (Chapter 682, Laws, 1983) of the 1983 regular session of the Legislature and, upon ratification by the electorate on November 8, 1983, was inserted as a part of the Constitution by proclamation of the Secretary of State on January 3, 1984.

Cross References — Statutory provisions relating to supreme court generally, see § 9-3-1 et seq.

JUDICIAL DECISIONS

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1. In general.

Laws 1926, c 131 creating county courts, does not violate this section. State ex rel. Knox v. Speakes, 144 Miss. 125, 109 So. 129 (1926).

A rule announced by the common-law court of England in a decision since the Revolutionary War may be taken by a Mississippi court as a guide in determining the common law. Richardson v. Sims, 118 Miss. 728, 80 So. 4 (1918).

2. Jurisdiction.

The Supreme Court has subject matter jurisdiction to hear an appeal by the State from a dismissal with prejudice for violation of § 99-17-1's 270-day rule under § 99-35-103(a). State v. Harrison, 648 So. 2d 66 (Miss. 1994), overruled on other grounds, Lanier v. State, 684 So. 2d 93 (Miss. 1996).

The Supreme Court, being an appellate court, cannot entertain an appeal where there has ceased to be a controversy. Insured Sav. & Loan Ass'n v. State ex rel. Patterson, 242 Miss. 547, 135 So. 2d 703 (1961).

Unless some property rights are involved, civil courts have no jurisdiction over ecclesiastical controversy and are without jurisdiction to decide who is, or who ought to be, presiding bishop of diocese. Trapani v. State ex rel. Dist. Att'y Maples, 44 So. 2d 52 (Miss. 1950).

Provision in church manual permitting bishops to retain 10% of all monies raised by them in their respective dioceses does not give an ousted bishop such property rights in monies raised by his successor in diocese as to entitle him to invoke jurisdiction of civil courts as to the 10% claimed by him. Trapani v. State ex rel. Dist. Att'y Maples, 44 So. 2d 52 (Miss. 1950).

Under this section the Supreme Court is an appellate court, and not a court of original jurisdiction. White v. State, 159 Miss. 207, 131 So. 96 (1930); State v. Keeton, 176 Miss. 590, 169 So. 760 (1936).

Legislature can give Supreme Court only appellate jurisdiction and other jurisdiction necessary to exercise of its powers. Walker v. State, 129 Miss. 449, 92 So. 580 (1922).

Under this section, which has been construed to mean that the supreme court has only appellate jurisdiction and that while no original jurisdiction can be conferred upon it, there is no limit of the appellate jurisdiction that may be conferred upon it. Brewer v. Browning, 115 Miss. 358, 76 So. 267, Am. Ann. Cas. 1918B,1013 (1917), error overruled, 115 Miss. 395, 76 So. 519, Am. Ann. Cas. 1918B,1013 (1917).

The jurisdiction properly belonging to a court of appeals includes only such as is of a revisory character, which implies that the matter revised must be a judicial decision by a court clothed with judicial power. Yazoo & Miss. V. R. Co. v. Wallace, 90 Miss. 609, 43 So. 469 (1907); Illinois Cent. R.R. v. Dodd, 105 Miss. 23, 61 So. 743 (1913).

The Supreme Court has no original jurisdiction; it may, however, hear and determine all motions and issues necessary to the exercise of its appellate powers and necessary to the enforcement of its orders. Planters' Ins. Co. v. Cramer, 47 Miss. 200 (1872), overruled on other grounds, State v. Maples, 402 So. 2d 350 (Miss. 1981), but see De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992); Brown v. Carraway, 47 Miss. 668 (1873).

3. Powers and functions generally.

The Supreme Court's lack of authority under the Mississippi Uniform Post-Conviction Collateral Relief Act (§ 99-39-1 et seq) to appoint counsel, provide funds for expert assistance, or provide subpoena power did not violate a capital murder defendant's due process and equal protection rights under the Fourteenth Amendment to the United States Constitution or the Supreme Court's inherent powers to control judicial proceedings, since the State is not required to pay for a petitioner's "fishing expeditions" at the collateral relief stage merely because the petitioner is indigent; thus, the defendant's motion for appointment of counsel for his post-conviction procedures and the appropriation of $450.00 for psychiatric testing would be denied. Lockett v. State, 614 So. 2d 888 (Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994).

Without the final judgment in the record an appeal will be dismissed. Headley Lumber Co. v. Cranford & Hood, 38 So. 548 (Miss. 1905).

4. Control over inferior courts.

Although trial court initially determines in forma pauperis status, Supreme Court is in unique position of deciding which inmate, if any, abuses in forma pauperis status, and thus Supreme Court will determine when such abuse is oppressive to judiciary, and by order will apprise trial court to restrict privilege if necessary. Hyde v. State, 666 So. 2d 445 (Miss. 1995).

Supreme Court has jurisdiction only to review judicial action of inferior tribunals and incidental jurisdiction of quasi original character. Brown v. Sutton, 158 Miss. 78, 121 So. 835 (1929).

Supreme Court has no power to alter, amend, or correct records of trial courts. Brown v. Sutton, 158 Miss. 78, 121 So. 835 (1929).

5. Validity of legislation.

Sections 9-4-1 to 9-4-17, which establish the Court of Appeals of the State of Mississippi, are constitutional. Marshall v. State, 662 So. 2d 566 (Miss. 1995), on remand, 687 So. 2d 758 (Ct. App. 1996).

The rule that questions not raised in the lower court will not be reviewed on appeal to the Supreme Court applies to the Supreme Court's review of appeals involving collateral attacks originating in the lower court as well as its review of convictions flowing in the wake of direct appeal, and is particularly true where constitutional questions are involved; thus, a post-conviction relief petitioner, by failing to attack the constitutionality of the Mississippi Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.) in the lower court, waived any error in this regard and could not seek reversal of the trial court's ruling in the Supreme Court. Patterson v. State, 594 So. 2d 606 (Miss. 1992).

If there is a reasonable doubt of the constitutionality of a statute the court will uphold it. Natchez & S.R. Co. v. Crawford, 99 Miss. 697, 55 So. 596 (1911).

If a statute is susceptible of two constructions, the one upholding its validity will be adopted. State v. Louisville & N.R.R., 97 Miss. 35, 51 So. 918, Am. Ann. Cas. 1912C,1150 (1910), error overruled, 97 Miss. 58, 53 So. 454, Am. Ann. Cas. 1912C,1150 (1910).

Unless a statute is in palpable conflict with some constitutional provision it will not be condemned, and such a conflict will not be implied. Hart v. State, 87 Miss. 171, 39 So. 523, 112 Am. St. R. 437 (1905).

Except where they are absolutely necessary to a decision of the case, constitutional questions will not be considered by the Supreme Court. Hallum v. Mobile & O.R. Co., 24 So. 909 (Miss. 1899); Hen-

dricks v. State, 79 Miss. 368, 30 So. 708 (1901); Bell v. Kerr, 80 Miss. 177, 31 So. 708 (1902); Alabama & V. Ry. Co. v. Overstreet, 85 Miss. 78, 37 So. 819 (1904); Native Lumber Co. v. Harrison County, 89 Miss. 171, 42 So. 665 (1906); Flora v. American Express Co., 92 Miss. 66, 45 So. 149 (1907); Ex parte Jones, 112 Miss. 27, 72 So. 845 (1916); Power v. Ratliff, 112 Miss. 88, 72 So. 864, Am. Ann. Cas. 1918E,1446 (1916).

It is not for the courts to define the limits of the legislative discretion, or to declare void an act of the legislature, though morally wrong and unjust, in the absence of a constitutional inhibition. Martin v. Dix, 52 Miss. 53, 24 Am. R. 661 (1876).

6. Construction of legislation.

A court can add nothing to a law written by the legislature. City of Hazlehurst v. Mayes, 96 Miss. 656, 51 So. 890 (1910).

Courts cannot change a statute. Yerger v. State, 91 Miss. 802, 45 So. 849 (1908); Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 56 So. 466 (1911); State v. Traylor, 100 Miss. 544, 56 So. 521 (1911).

The Supreme Court is not authorized to pass on the wisdom or policy of a statute. Daily v. Swope, 47 Miss. 367 (1872); State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152 (1905); Bobo v. Board of Levee Comm'rs, 92 Miss. 792, 46 So. 819 (1908); Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 56 So. 466 (1911); State v. J.J. Newman Lumber Co., 102 Miss. 802, 59 So. 923 (1912), error overruled, 103 Miss. 263, 60 So. 215 (1912) (suggestion of error overruled in 103 M 263, 60 So. 215); Darnell v. Johnston, 109 Miss. 570, 68 So. 780 (1915).

The court alone and not the legislature is authorized to construe laws. McCulloch v. Stone, 64 Miss. 378, 8 So. 236 (1886).

7. Advisory opinions.

It is not within the province of the Supreme Court to render advisory opinions. Gipson v. State, 203 Miss. 434, 35 So. 2d 327 (1948), error overruled, 203 Miss. 439, 36 So. 2d 154 (1948); Sheldon v. Ladner, 205 Miss. 264, 38 So. 2d 718 (1949).

The importance of questions submitted does not give to Supreme Court power to render advisory opinions which it does not have under the Constitution and law. Gipson v. State, 203 Miss. 434, 35 So. 2d 327 (1948), error overruled, 203 Miss. 439, 36 So. 2d 154 (1948).

Motion filed, as a suggestion of error, for advisory opinion which may be of advantage to the administration of justice by clarification of certain matters must be overruled when no action by Supreme Court is sought by way of changing the judgment rendered or otherwise than an advisory opinion. Gipson v. State, 203 Miss. 434, 35 So. 2d 327 (1948), error overruled, 203 Miss. 439, 36 So. 2d 154 (1948).

8. Administrative determinations by state boards or commissions.

Supreme Court has judicial review of any action by the Mississippi Gaming Commission that exceeds its statutory authority. Casino Magic Corp. v. Ladner, 666 So. 2d 452 (Miss. 1995).

The Supreme Court acts as the fact-finder in judicial misconduct proceedings, giving great deference to the findings, based on clear and convincing evidence, and the recommendations of the Mississippi Judicial Performance Commission. However, the Supreme Court is not bound by the recommendations of the Commission and may impose additional sanctions. Mississippi Judicial Performance Comm'n v. Walker, 565 So. 2d 1117 (Miss. 1990).

If a decision of the Workers' Compensation Commission is based on substantial evidence, the circuit court and the Supreme Court are bound by the finding of fact made by the Commission. International Paper Co. v. Kelley, 562 So. 2d 1298 (Miss. 1990).

The review of the decisions of the Workers' Compensation Commission is like the review of any other administrative body which sits as a trier of fact. If the decision of the Commission is based upon substantial evidence and there is no error of law, the decision will be affirmed on appeal. Thus, if there is a quantum of credible evidence which supports the decision of the Commission, no court will reverse the decision. The Supreme Court will not determine where the preponderance of the evidence lies when the evidence is conflicting, the assumption being that the Commission, as the trier of facts, has previously determined which evidence is credible and which is not. This is not to say that the reviewing court will merely "rubber stamp" the Commission's actions; where no evidence or only a scintilla of evidence supports a Workers' Compensation Commission decision, the Supreme Court would not hesitate to reverse. Metal Trims Indus., Inc. v. Stovall, 562 So. 2d 1293 (Miss. 1990).

The Supreme Court's authority to impose sanctions on a judge is not dependant upon the recommendations of the Commission on Judicial Performance. The Supreme Court has full jurisdiction to increase or diminish sanctions based on its review of the record made before the commission. In re Collins, 524 So. 2d 553 (Miss. 1987).

9. Practice of law.

Although the Rules of Discipline for the Mississippi Bar provide for reinstatement through petition, an order of automatic reinstatement is within the scope of the Supreme Court's exclusive and inherent jurisdiction of attorney discipline matters. Broome v. Mississippi Bar, 603 So. 2d 349 (Miss. 1992).

The Supreme Court has the independent authority to reassess the punishment meted out by the Complaint Tribunal and to increase or decrease the punishment as it deems proper; there is no standard as to what punishment for particular misconduct ought to be, and cases are considered on a case by case basis. Mississippi State Bar v. Attorney D, 579 So. 2d 559 (Miss. 1991).

In an attorney disciplinary proceeding, the state supreme court is the supreme trier of fact, and as a matter of law, is not bound by any findings of fact made by the complaint tribunal. However, the state supreme court is not prohibited from giving to findings of fact made by such complaints tribunal such merit as in its judgment they may deserve. The state supreme court has independent authority to reassess the punishment imposed in the disciplinary proceedings and modify the punishment as it deems proper. Goeldner v. Mississippi State Bar Ass'n, 525 So. 2d 403 (Miss. 1988).

10. Bail.

The power of the Supreme Court to grant bail pending an appeal from conviction of a felony is revisory, to be exercised only after presentation of a petition for bail to and action thereon by the trial judge. Ex parte Atkinson, 101 Miss. 744, 58 So. 215 (1911); Ex parte Prewitt, 106 Miss. 62, 63 So. 225 (1913).

11. Garnishment.

Clerk of trial court held without authority to issue writ of garnishment for collection of costs incurred on appeal to Supreme Court. Barnes v. State, 169 So. 760 (Miss. 1936).

12. Coram nobis.

A writ of coram nobis cannot be used on the basis of newly discovered evidence. Wetzel v. State, 225 Miss. 450, 76 So. 2d 846 (1955).

Although the statutory procedure for petition for writ of error coram nobis and the procedure in application for permission to file a petition of writ of coram nobis, are slightly different, the substantive aspects of both are substantially the same. Wetzel v. State, 225 Miss. 450, 76 So. 2d 846 (1955).

Where circuit court declined to pass on application for writ of error coram nobis, Supreme Court was without jurisdiction to review its action; the circuit court cannot abdicate any part of its judicial functions or duties in favor of the Supreme Court, or of any other court. White v. State, 159 Miss. 207, 131 So. 96 (1930).

13. Prohibition.

The circuit court only is authorized to issue a writ of prohibition. De Jean v. State, 108 Miss. 146, 66 So. 411 (1914).

14. Supersedeas.

Supersedeas may be granted by the Supreme Court in aid of its appellate jurisdiction. Wynne v. Illinois Cent. R.R., 108 Miss. 376, 66 So. 410 (1914), overruled in part, State v. Maples, 402 So. 2d 350 (Miss. 1981), superseded by statute as stated in De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992).

15. Scope of judicial review.

Miss. Code Ann. § 23-15-927 did not impermissibly violate separation of powers or Miss. Const. art. 6, § 146; rather, the judicial relief sought under the election code was unique unto itself and established by statute, until the process reached the Mississippi Supreme Court, where procedure was controlled by the Mississippi Rules of Appellate Procedure. Jackson v. Bell, 123 So. 3d 436 (Miss. 2013).

Supreme Court reviewing denial of post-conviction relief in capital murder case lacked authority under state law to reweigh aggravating and mitigating circumstances in order to uphold death sentence after finding that improperly defined aggravating circumstance had been submitted to jury, and also lacked authority to engage in harmless error analysis, where case was tried and affirmed on direct appeal before passage of statute granting such authority. Cole v. State, 666 So. 2d 767 (Miss. 1995).

Supreme Court will not disturb findings of chancellor in action for title to real property unless chancellor is manifestly wrong, clearly erroneous or applied erroneous legal standard. Dew v. Langford, 666 So. 2d 739 (Miss. 1995).

Supreme Court is without authority to disturb conclusions of chancellor in suit claiming title to real property when substantial evidence supports findings, even though Supreme Court may have found otherwise as an original matter. Dew v. Langford, 666 So. 2d 739 (Miss. 1995).

Supreme Court can only review matters on appeal as were considered by lower court. Ditto v. Hinds County, 665 So. 2d 878 (Miss. 1995).

Supreme Court may not act upon or consider matters which do not appear in record and must confine itself to what actually does appear in record. Ditto v. Hinds County, 665 So. 2d 878 (Miss. 1995).

If trial court follows proper procedure in determining whether multi-count indictment warrants severance, Supreme Court will give deference to trial court's findings on review, employing abuse of discretion standard. Hughes v. State, 665 So. 2d 852 (Miss. 1995).

In reviewing a school district's decision not to renew an employee's contract, the Supreme Court's inquiry concerns whether the nonrenewal decision was (1) made for a reason not specifically prohibited by law, (2) made in accordance with the applicable procedural requirements, (3) supported by substantial evidence, and (4) arbitrary or capricious. Harris v. Canton Separate Pub. Sch. Bd. of Educ., 655 So. 2d 898 (Miss. 1995).

Once a judge has exercised his or her discretion and determined that a juror probably could not be impartial, that determination may not be assigned on appeal as error. Coverson v. State, 617 So. 2d 642 (Miss. 1993).

A finding of "good cause" for a continuance under § 99-17-1 is a finding of ultimate fact, and should be treated as any other finding of ultimate fact challenged on appeal, i.e., the finding will be undisturbed only where there is in the record substantial, credible evidence from which it may fairly have been made, and will ordinarily be reversed where there is a complete absence of probative evidence in the record. Folk v. State, 576 So. 2d 1243 (Miss. 1991).

Findings by a trial judge that a confession was admissible are findings of fact, which are treated as any other findings of fact; as long as the trial judge applies the correct legal standards, his or her decision will not be reversed on appeal unless it is manifestly in error or is contrary to the overwhelming weight of the evidence. Berry v. State, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

In the youth court, as elsewhere, requests for continuance are addressed to the sound discretion of the court, except that in youth court more so than almost any other there is an imperative that the Court proceed with the matter as promptly as may fairly be done. The Supreme Court will not reverse the youth court in exercising its discretion in these cases unless the youth court abused its discretion and the Supreme Court is convinced that injustice would result therefrom. In re T.L.C., 566 So. 2d 691 (Miss. 1990).

There are practical and institutional limitations upon the Supreme Court's ability to find facts; consequently, much deference is placed upon the trial judge's full discharge of his or her responsibility to make findings of fact as to the question of whether Miranda rights have been intelligently, knowing and voluntarily waived. However, when the trial judge fails to make specific findings and only makes general findings thereby allowing admissibility of evidence, the Supreme Court's scope of review is considerably broader particularly when the trial judge's findings on the precise points at issue on appeal are not clearly inferable from the findings made. McCarty v. State, 554 So. 2d 909 (Miss. 1989).

On the issue of amount of damages only in a civil action, the Supreme Court has power to grant a new trial. Yazoo & Miss. V. Ry. v. Scott, 108 Miss. 871, 67 So. 491, Am. Ann. Cas. 1917E,880 (1915).

16. De novo determinations.

Supreme Court proceeds de novo in determining claimed errors of law. Ford v. Holly Springs Sch. Dist., 665 So. 2d 840 (Miss. 1995).

Issues of whether notice of nonrenewal of principal's employment was timely and whether superintendent of school district had authority to issue a letter of nonrenewal to principal were questions of law to which de novo standard of review applied on appeal. Ford v. Holly Springs Sch. Dist., 665 So. 2d 840 (Miss. 1995).

The Supreme Court conducts a de novo review in a bar disciplinary matter which necessarily includes a review of the sanctions imposed. Deference is accorded the findings of the complaint tribunal but the Supreme Court "has the non-delegable duty of ultimately satisfying itself as to the facts, and reaching such conclusions and making such judgments as it considers appropriate and just." Mississippi State Bar v. Smith, 577 So. 2d 1249 (Miss. 1991).

17. Changing or overruling prior decisions.

Under this section and § 144, supra, all power belonging to an appellate court may be conferred upon the Supreme Court, and there is no limitation in the Constitution on the power of the court to overrule decisions, or change its decision when in the opinion of the court a former decision may be erroneous or wrongful; and such power in the court does not violate the rule of res adjudicata. Brewer v. Browning, 115 Miss. 358, 76 So. 267, Am. Ann. Cas. 1918B,1013 (1917), error overruled, 115 Miss. 395, 76 So. 519, Am. Ann. Cas. 1918B,1013 (1917).

18. Affirmance and reversal.

Supreme Court will not reverse final order of Mississippi State Department of Health unless agency's decision was arbitrary or capricious. Cain v. Mississippi State Dep't of Health, 666 So. 2d 506 (Miss. 1995).

That Supreme Court will not reverse chancellor's finding where it is supported by substantial credible evidence holds true for contempt matters. Varner v. Varner, 666 So. 2d 493 (Miss. 1995).

Determination of punishment for contempt falls within discretion of chancellor, and Supreme Court will not reverse on appeal absent manifest error or application of erroneous legal standard. Varner v. Varner, 666 So. 2d 493 (Miss. 1995).

The Supreme Court will vacate or modify the Board of Bar Admissions' bar examine grading decision only where it is found to be "arbitrary, capricious or malicious." Mississippi Bd. of Bar Admissions v. Applicant F, 582 So. 2d 377 (Miss. 1991), cert. denied, 502 U.S. 984, 112 S. Ct. 591, 116 L. Ed. 2d 616 (1991).

Where a defendant entered a plea of nolo contendere in municipal court and was found guilty, appealed to the county court and, following a trial de novo, was again convicted and sentenced to pay a fine, and thereafter appealed to the circuit court in which the case was heard and the conviction and sentence affirmed, the defendant's appeal to the Supreme Court would be dismissed on the ground that the defendant had failed to present his "constitutional claims" before the circuit court and had therefore precluded appeal to the Supreme Court. Alt v. City of Biloxi, 397 So. 2d 897 (Miss. 1981).

In view of the distinction between law and equity in this state, and in the absence of a statute authorizing an appeal from a part of a judgment at law in a civil case, the Supreme Court is without the power to reverse a judgment in part. Adams v. Carter, 92 Miss. 579, 47 So. 409, 16 Am. Ann. Cas. 76 (1908) but see Davis v.

Noblitt & Capers Elec. Co., 594 So. 2d 610 (Miss. 1992).

The Supreme Court may affirm a judgment, right in its result, though the affirmance be on grounds not passed on by the lower court. Yazoo & Miss. V. Ry. v. Adams, 81 Miss. 90, 32 So. 937 (1902).

The Supreme Court has inherent power, upon reversal of a judgment, where the facts are shown of record, to award restitution to the party dispossessed under the judgment pending the appeal. Hall v. Wells, 54 Miss. 289 (1877).

19. Remand.

The Supreme Court's remand of a child support case to the chancery court "for such further proceedings and judgments as may be required and as may be consistent with this opinion" did not restrict the chancery court to consideration of the issues litigated in the original proceeding. Harrell v. Duncan, 593 So. 2d 1 (Miss. 1991).

Since the Supreme Court has only revisory jurisdiction it will not decide what was expressly pretermitted in a decision of the chancery court, but will reverse the case and remand it for adjudication. Peirce v. Halsell, 90 Miss. 171, 43 So. 83 (1907).

RESEARCH REFERENCES

ALR. Power to confer original jurisdiction on courts to revoke or suspend public license. 168 A.L.R. 826.

Am Jur. 20 Am. Jur. 2d, Courts §§ 84 et seq.

Law Reviews. 1982 Mississippi Supreme Court Review: Civil Procedure: Judicial Decisions. 53 Miss. L. J. 130, March 1983.

The Limits of the Mississippi Supreme Court's Rule-Making Authority. 60 Miss. L. J. 359, Fall 1990.

§ 147. Reversal of judgment for want of jurisdiction; remand

No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy.

Cross References — Jurisdiction of chancery court, see Miss. Const. Art. 6, § 157 and Code § 9-5-81 et seq.

Jurisdiction of circuit court, see Miss. Const. Art. 6, § 162 and Code § 9-7-81 et seq.

JUDICIAL DECISIONS

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1. In general.

Plain error occurred in addition to the

chancery court's erroneous exercise of jurisdiction over an eviction proceeding because the chancery court granted summary judgment in favor of the lessor when such relief was not requested by the lessor's motion to dismiss anticipated pleadings. Further, the chancery court's entry of a final judgment on the merits without a hearing or trial constituted plain error. Wiggins v. Perry, 989 So. 2d 419 (Miss. Ct. App. 2008).

Because a party did not raise the issue of subject matter jurisdiction until after summary judgment had been granted in favor of the adverse party, the reviewing court could only reverse for lack of subject matter jurisdiction where there was also some other trial court error warranting reversal. Wiggins v. Perry, 989 So. 2d 419 (Miss. Ct. App. 2008).

Under Miss. Const. Art. VI, § 147, the appellate court had to address the beneficiaries' claims besides their right to jury trial argument to determine if there was error other than as to jurisdiction. Winters v. AmSouth Bank, 964 So. 2d 595 (Miss. Ct. App. 2007).

Where appellant filed an appeal of the chancery court's order finding a prescriptive easement across his property for an access road, there was no justifiable basis for appellant's argument that a chancery court did not have jurisdiction over matters involving property; under Miss. Const. Art. 6, § 147, the appellate court could not reverse the chancery court without finding an error in addition to lack of subject matter jurisdiction. Graves v. Dudley Maples, L.P., 950 So. 2d 1017 (Miss. 2007).

Where a chancery court has properly taken jurisdiction on any one ground of equity, it can then properly proceed in the one suit to complete adjudication and settlement of all disputed questions involved in the entire transaction. United States Fid. & Guar. Co. v. Estate of Francis, — So. 2d —, 2001 Miss. LEXIS 186 (Miss. July 26, 2001), opinion withdrawn by, substituted opinion at 825 So. 2d 38, 2002 Miss. LEXIS 274 (Miss. 2002).

While the issue of subject matter jurisdiction may be raised for the first time on appeal, the Supreme Court is prohibited by the Mississippi Constitution from reversing on this issue following a trial on the merits. Burnette v. Hartford Underwriters Ins. Co., 770 So. 2d 948 (Miss. 2000).

On appeal from an adverse decree in suit in equity, a defendant could not successfully contend that plaintiff entitled to recover at law had a complete and adequate remedy at law. Van Zandt v. First Nat'l Bank, 220 Miss. 127, 70 So. 2d 327 (1954).

It was immaterial whether a chancellor was right or wrong in overruling a demurrer to a bill for the recovery of possession of a leased building, its furniture and equipment, and damages for maltreatment of the furniture, in the absence of some other reason for reversal of the chancellor's decree. Claughton v. Ford, 202 Miss. 361, 30 So. 2d 805 (1947), corrected, 202 Miss. 361, 32 So. 2d 751 (1947).

Supreme Court itself will raise question of limitation on its powers to reverse or annul judgment for want of jurisdiction. Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 113 So. 433 (1927).

Under this section a question of jurisdiction must be raised in the trial court. Hawkins v. Scottish Union & Nat'l Ins. Co., 110 Miss. 23, 69 So. 710 (1915); Indianola Compress & Storage Co. v. Southern R. Co., 110 Miss. 602, 70 So. 703 (1915).

This section does not apply where the court below declines to take jurisdiction. Mitchell v. Bank of Indianola, 98 Miss. 658, 54 So. 87 (1910); Lewis v. McCracken, 89 Miss. 229, 42 So. 671 (1906); Murphy v. Meridian, 103 Miss. 110, 60 So. 48 (1912); McClendon v. Mississippi State Hwy. Comm'n, 205 Miss. 71, 38 So. 2d 325 (1949).

A chancery court may rightfully dismiss a cause the jurisdiction of which properly belongs to a court of law. Carbolineum Wood-Preserving & Mfg. Co. v. Meyer, 76 Miss. 586, 25 So. 297 (1899).

2. Interlocutory decrees.

In a breach of contract case in which a Mississippi corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the Mississippi Supreme Court was not prohibited from reversing that determination since no final judgment had been entered in the case. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

Pursuant to Miss. Const. Art. 6, § 147, it was permissible for the Supreme Court of Mississippi to reverse a chancery court's decision regarding the liability of the Mississippi Municipality Liability Plan under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., for lack of subject matter jurisdiction where the case was an interlocutory appeal. Miss. Mun. Liab. Plan v. Jordan, 863 So. 2d 934 (Miss. 2003).

Mississippi Constitution Article VI, § 147, which precludes reversal of a "judgment or decree" of a chancery or circuit court, applies primarily (although not necessarily exclusively) to final judgments or decrees. Reading § 147 to apply only to final judgments, or cases where, by litigation, a party has gained some other substantial advantage, gives maximum life to Mississippi Constitution Article III, § 31, which provides for the right to trial by jury, and Mississippi Constitution Article VI, § 162, which provides that causes "brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court." Tillotson v. Anders, 551 So. 2d 212 (Miss. 1989).

The prohibition of the section is not confined to final judgments or decrees, but applies also to appeals from interlocutory ones where the question of jurisdiction is directly raised. Cazeneuve v. Curell, 70 Miss. 521, 13 So. 32 (1893).

3. Error of jurisdiction as between equity and law—In general.

In a breach of contract action the Supreme Court would not reverse for the sole reason of jurisdiction in a dispute between courts of law and equity, where no other errors existed. Volkswagen of Am., Inc. v. Novak, 418 So. 2d 801 (Miss. 1982).

The Supreme Court would not be justified in reversing a case because of want of jurisdiction in chancery court, if such were the case, on the ground that the complainants may have had an adequate remedy at law to enforce their alleged laborers' lien. Reeck v. Reeck, 74 So. 2d 834 (Miss. 1954).

Constitution providing that no judgment or decree shall be reversed on ground of mistake as to whether case is for equity or common law does not intend that circuit court should retain equitable cases, or that chancery court should retain common-law cases. Dilworth v. Federal Reserve Bank, 170 Miss. 373, 150 So. 821 (1933).

Constitutional prohibition against reversal of judgment or decree on ground of mistake as to whether cause was one in equity or in law applies to county court. Moore v. GMAC, 155 Miss. 818, 125 So. 411 (1930).

Although this section prohibits reversals because the action was brought in the wrong court, the Supreme Court has statutory power to enter the proper judgment on appeal. Grenada Grocery Co. v. Tatum, 113 Miss. 388, 74 So. 286 (1917); Cooley v. Tullos, 115 Miss. 268, 76 So. 263 (1917).

The Supreme Court will never reverse for the sole reason that suit was brought in the wrong court. Southwestern Co. v. Wynnegar, 111 Miss. 412, 71 So. 737 (1916).

The section exempts decrees in chancery and judgments of the circuit court from collateral attack on the ground of want of jurisdiction as between equity and common law. Whitney v. Hanover Nat'l Bank, 71 Miss. 1009, 15 So. 33 (1894).

4. — Chancery court determinations, errors of jurisdiction as between equity and law.

Although the chancellor of a county chancery court determined that the case concerned questions of foreclosure, and therefore jurisdiction was proper, even if jurisdiction had been problematic, pursuant to Miss. Const. Art. 6, § 147, the judgment could not be reversed without finding an error in addition to lack of subject matter jurisdiction. In re Estate of May v. First Fed. Bank, 32 So. 3d 1227 (Miss. Ct. App. 2010).

The defendant was not entitled to relief from a judgment rendered against him after a trial on the merits on the ground that the circuit court improperly transferred a case to the chancery court; his remedy was to file an interlocutory appeal prior to the trial on the merits. Bardwell v.

White, 762 So. 2d 778 (Miss. Ct. App. 2000).

Judgment against defendants was not subject to reversal on ground that suit should have been brought in circuit court rather than chancery court and that defendants' right to jury trial had thereby been denied where action had been litigated over course of several years during which Supreme Court had refused to grant defendants' interlocutory appeal to transfer case. Aetna Cas. & Sur. Co. v. Berry, 669 So. 2d 56 (Miss. 1996).

The assumption of jurisdiction by the chancery court over a minor's tort claim improperly deprived the defendant of his right to a trial by jury; however, absent other error, such improper exercise of jurisdiction over a matter not involving equitable relief was not reversible error. Louisville & N.R. Co. v. Hasty, 360 So. 2d 925 (Miss. 1978), cert. denied, 439 U.S. 1003, 99 S. Ct. 614, 58 L. Ed. 2d 679 (1978).

The chancery court erred in assuming jurisdiction over a personal injury action by two minors arising out of an automobile accident, notwithstanding ordinary chancery court jurisdiction over a minor's business under Constitution 1890 § 159(d), where no equitable relief was involved or required; however, Constitution 1890 § 147 prevents reversal solely on the ground of want of jurisdiction, even though the wrongful assertion of equitable jurisdiction deprives the parties of the right to trial by jury as guaranteed under Constitution 1890 § 31. McLean v. Green, 352 So. 2d 1312 (Miss. 1977).

In the absence of any allegation in the bill of complaint or of proof to sustain an attachment in chancery, a real estate broker's suit for a commission allegedly earned by him should have been dismissed; however, the Supreme Court may not reverse because of error or mistake as to whether a cause is of equity or common law jurisdiction. Minter v. Hart, 208 So. 2d 169 (Miss. 1968).

In litigation growing out of death and injuries sustained in a collision of two automobiles, filed in the chancery court in the county where letters of administration of the decedent's estate were issued, complainants charged that the accident was due to the negligence of a construction company, through its agent, in obstructing the highway, charged negligence in the operation of his automobile on the part of another defendant, who it was alleged was an agent of a nonresident insurance company, and also charged, on information and belief, that another defendant had money and effects of the nonresident insurance company, and prayed for an attachment, where, upon appeal from the decrees in favor of complainants, the Supreme Court found no reversible error in the record, the judgment would not be reversed in view of this section, and while the chancery court might have directed the trial of the case by jury, such was within the chancery court's discretion, so that error could not be predicated upon the refusal of a jury trial. Mathews v. Thompson, 231 Miss. 258, 95 So. 2d 438 (1957).

A boundary dispute is not a subject so foreign to equity jurisdiction as to require the court to raise the question of its own motion. Wroten v. Fenn, 203 Miss. 361, 35 So. 2d 534 (1948).

Under this section the Supreme Court would not be justified in reversing on jurisdictional grounds a case in which a beneficiary under an insurance policy was allowed to proceed with a suit in equity to reinstate the insurance policy by revivor and supplemental bill, even if the case had not been one of purely equitable cognizance. Sovereign Camp, Woodmen of the World v. Durr, 186 Miss. 850, 192 So. 45, 125 A.L.R. 702 (1939).

Chancery court should observe distinctions between law and equity and take jurisdiction of cases only where some ground of equity exists, notwithstanding constitutional provision respecting reversal. Ringold v. Goyer Co., 164 Miss. 261, 144 So. 706 (1932).

Where jurisdiction of law court to remedy official inaction was not wholly of statutory origin, Supreme Court could not reverse decree in equity enjoining officials to make assessment because equity court was without jurisdiction. Anderson v. Robins, 161 Miss. 604, 137 So. 476 (1931).

Chancery court, having assumed jurisdiction of law action, is nevertheless empowered to do all circuit court could properly do. Rankin v. Ford, 160 Miss. 802, 134 So. 178 (1931), overruled on other grounds, Allred v. Nesmith, 245 Miss. 376, 149 So. 2d 29 (1963).

Chancery court, on assuming jurisdiction of action at law, follows ordinary procedure appertaining to chancery court. Rankin v. Ford, 160 Miss. 802, 134 So. 178 (1931), overruled on other grounds, Allred v. Nesmith, 245 Miss. 376, 149 So. 2d 29 (1963).

Chancery court, having assumed jurisdiction of vendee's action at law for damages for breach of contract to convey timber held without jurisdiction, after awarding damages to decree lien on timber. Rankin v. Ford, 160 Miss. 802, 134 So. 178 (1931), overruled on other grounds, Allred v. Nesmith, 245 Miss. 376, 149 So. 2d 29 (1963).

That cause of action set forth in bill is legal and not equitable presents no ground for reversing decree. Carter v. Witherspoon, 156 Miss. 597, 126 So. 388 (1930).

Where injunction to restrain execution on money decree was dissolved, execution could issue against sureties on injunction bond for amount of decree. Russ v. Stockstill, 155 Miss. 368, 124 So. 359 (1929).

Supreme Court may not correct error, if any, in chancery court's assuming jurisdiction of suit to enjoin law action. Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 113 So. 433 (1927).

Right of jury trial in civil causes remains inviolate, except in cases of exclusively law cognizance, where chancery courts erroneously assume jurisdiction. Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 113 So. 433 (1927).

Where a bill presented no cause of action of equitable jurisdiction, a decree overruling a demurrer thereto cannot be reversed although the bill stated a legal cause of action. Engleburg v. Tonkel, 140 Miss. 513, 106 So. 447 (1925).

The Supreme Court will not reverse a chancellor's decree merely because the case should have been started in a law court. W.W. Walley & Son v. L.N. Dantzler Co., 114 Miss. 601, 75 So. 433 (1917); Yazoo Delta Mtg. Co. v. Hutson, 140 Miss. 461, 106 So. 5 (1925).

Although the only relief sought was damages in a bill seeking relief for breach of contract, a decree overruling a demurrer will not be reversed, although the action should have been brought in a court of law. Dinsmore v. Hardison, 111 Miss. 313, 71 So. 567 (1916); Metzger v. Joseph, 111 Miss. 385, 71 So. 645 (1916).

The Supreme Court will not reverse a decree of the chancery court for a penalty imposed in an action for the violation of the anti-trust law. Grenada Lumber Co. v. State, 98 Miss. 536, 54 So. 8 (1910); Dukate v. Adams, 101 Miss. 433, 58 So. 475 (1911).

The Supreme Court under this section cannot reverse a decree overruling a demurrer on the ground that the chancery court had no jurisdiction to try a suit to recover a balance due under an alleged contract. Sturges v. City of Meridian, 95 Miss. 35, 48 So. 620 (1909).

Under this section a personal judgment against the members of a firm for a firm debt rendered in a suit to set aside alleged fraudulent conveyances by them does not constitute reversible error. Holmes Bros. v. Ferguson-McKinney Dry Goods Co., 86 Miss. 782, 39 So. 70 (1905).

The Supreme Court is forbidden by this section to reverse a decree of the chancery court because of any error or mistake as to whether the case was of equity or common-law jurisdiction. Hancock v. Dodge, 85 Miss. 228, 37 So. 711 (1905).

A decree in chancery will not be reversed on the ground merely that there was an adequate remedy at law. Hancock v. Dodge, 85 Miss. 228, 37 So. 711 (1905).

When a court of equity has taken jurisdiction of a proceeding to compel an agent to account for misappropriation of funds, its decree will not be disturbed on appeal on the ground that the complainant had a complete remedy at law. House v. Callicott, 83 Miss. 506, 35 So. 761 (1904).

In action in equity for foreclosure of mortgage and recovery of the debt, fact that there was a defense to the foreclosure action did not preclude court of equity from giving a recovery for the money claimed although based upon a purely legal right. Atkinson v. Felder, 78 Miss. 83, 29 So. 767 (1901).

If a chancery court overrule a demurrer to a cross-bill, the Supreme Court cannot, under the section, reverse the decree because of any error or mistake as to whether the matters therein propounded be of equity or common-law jurisdiction. Irion v. Cole, 78 Miss. 132, 28 So. 803 (1900).

If the chancery court overrule a demurrer to a bill, raising the question of its jurisdiction, to subject specific property to the payment of a judgment at law, the record of which judgment has been destroyed, the Supreme Court cannot, under the section, review such question, there being no other error found in the record. Day v. Hartman, 74 Miss. 489, 21 So. 302 (1897).

Where a chancery entertains jurisdiction of a case the question whether it was or was not equitable in character does not arise, by virtue of the section, in the Supreme Court. Adams v. Capital State Bank, 74 Miss. 307, 20 So. 881 (1896).

If the chancery court erroneously assume jurisdiction of an action of trespass the Supreme Court is powerless to interfere. Cazeneuve v. Curell, 70 Miss. 521, 13 So. 32 (1893).

In action by creditor to set aside fraudulent sale of goods against debtor and purchaser of goods, wherein creditor obtained attachment of purchaser's real estate, under this section no error could be assigned that chancery court was without jurisdiction. Barrett v. Carter, 69 Miss. 593, 13 So. 625 (1891).

5. Law court determinations, errors of jurisdiction as between equity and law.

Supreme Court would not reverse case where circuit court rather than chancery court decided issue of paternity, because wrong court deciding issue is not grounds for reversal. Ivy v. Illinois Cent. Gulf R. Co., 510 So. 2d 520 (Miss. 1987).

Lien created by stipulation in lease that landlord should have lien on after-acquired property held valid equitable lien, which may also be enforced in replevin. Union Indem. Co. v. Shirley, 150 So. 224 (Miss. 1933), error overruled, 170 Miss. 594, 150 So. 825 (1933).

Lessor's lien on property acquired within 12 months after execution of lease held superior to lien of deed of trust executed by lessee, though lessor's lien was intended to cover property to be acquired after expiration of 12 months. Union Indem. Co. v. Shirley, 150 So. 224 (Miss. 1933), error overruled, 170 Miss. 594, 150 So. 825 (1933).

Supreme Court could not reverse judgment as involving action at law, where county court and circuit court treated case as one in equity. New York Life Ins. Co. v. Best, 157 Miss. 571, 128 So. 565 (1930).

Where circuit court affirmed county court and thereby held with county court that case was equity case, Supreme Court could not reverse because case was one of law. Moore v. GMAC, 155 Miss. 818, 125 So. 411 (1930).

The circuit court having entertained jurisdiction of a suit, an action of ejectment, the Supreme Court cannot because of the section reverse its judgment, even if, by § 160, the remedy in the particular case should have been sought in the chancery court. Illinois Cent. R.R. v. Le Blanc, 74 Miss. 650, 21 So. 760 (1897).

A judgment of the circuit court in favor of a claimant will not, under the section, be reversed because his title was only an equitable one. Goyer Cold-Storage Co. v. Wildberger, 71 Miss. 438, 15 So. 235 (1894).

6. Transfer of causes, error of jurisdiction as between equity and law.

A circuit court's transfer of the issue of punitive damages to a chancery court denied plaintiff an opportunity to litigate an important substantive right, which was an error other than as to jurisdiction within the meaning of Miss Const, Art 6, § 147, requiring reversal of the judgment and a remand to the circuit court for trial on the merits. Thompson v. First Miss. Nat'l Bank & Mut. Sav. Life Ins. Co., 427 So. 2d 973 (Miss. 1983), overruled on other grounds, Tideway Oil Programs v. Serio, 431 So. 2d 454 (Miss. 1983).

The fact that an appeal from an order of a board of election commissioners was erroneously transferred from Circuit Court to chancery court, and there heard and decided because of the prohibition against the re-transfer of a cause, chancery court's want of jurisdiction does not constitute reversible error. Childs v. Allied Equip. Co., 175 So. 2d 138 (Miss. 1965).

In view of this provision, error may not be predicated on the denial of a motion to transfer a case from a circuit to a chancery court. Ready-Mix Concrete & Concrete Prods. Co. v. Perry, 239 Miss. 329, 123 So. 2d 241 (1960).

An action by a city against a commissioner, who was also city clerk, and his bondsman, charging general budgetary excesses in form of expenditures, obligations, liabilities and appropriations, as well as a failure to keep proper books and records of the city, which had been instituted in the chancery court, and transferred to the circuit court, from whence an appeal was taken to the Supreme Court, was, upon reversal, remanded to the chancery court. City of Biloxi v. Creel, 232 Miss. 284, 98 So. 2d 774 (1957).

Supreme Court will not reverse case for error of trial court in refusing to transfer cause to chancery court. Bullock v. Hans, 208 Miss. 41, 43 So. 2d 670 (1949).

In suit to recover damages for cutting and conversion of trees, involving boundary dispute, circuit court did not err in refusing to transfer cause to chancery court, since the ascertainment of boundaries alone does not confer jurisdiction as a separate ground of equity. Wroten v. Fenn, 203 Miss. 361, 35 So. 2d 534 (1948).

The Supreme Court accepted an appeal from the decree of a chancellor sustaining a general demurrer based on his finding of complete absence of equitable rights, granting a motion to dissolve an injunction and granting a motion to transfer the cause to circuit court, where refusal of the elements of relief sought would have worked a denial of substantial equitable rights amounting to injustice. Rogers v. State, 29 So. 2d 271 (Miss. 1947).

Where defense to action on note was that defendant was entitled to credit on note to extent of difference between what property securing note sold for and its fair value, refusal to transfer cause to chancery court held not reversible error, since such defense was available in law court, there being no necessity of an accounting. Wheeler v. Cleveland State Bank, 174 Miss. 542, 164 So. 400 (1935).

When motion to transfer cause is overruled, parties must then have formal pleadings setting up all their rights, and, if court retains jurisdiction and administers justice, though case may belong in another forum, judgment will be affirmed. Dilworth v. Federal Reserve Bank, 170 Miss. 373, 150 So. 821 (1933).

Motion to transfer cause to another court must be made in trial court to give court opportunity to transfer. Dilworth v. Federal Reserve Bank, 170 Miss. 373, 150 So. 821 (1933).

Maker of note who was sued by holder in circuit court held entitled to transfer to chancery court, where maker set up valid equitable defenses of right for discovery and right to marshal assets, of which defenses he could not avail himself in circuit court. Dilworth v. Federal Reserve Bank, 170 Miss. 373, 150 So. 821 (1933).

Where decision of chancery court in cause transferred from circuit court on theory that equity had jurisdiction was correct, Supreme Court cannot reverse circuit court for transferring cause. Grice v. McCarty-Holman Co., 161 Miss. 827, 137 So. 741 (1931).

Supreme Court will not reverse case by error in refusing to transfer case to chancery court. Federal Compress & Whse. Co. v. Coleman, 143 Miss. 620, 109 So. 20 (1926).

However, an order of the chancellor sustaining demurrers to a bill and ordering its transfer to the circuit court is appealable, although no judgment or decree can be annulled or reversed under this section for want of jurisdiction in the lower court. Robertson v. F. Goodman Dry Goods Co., 115 Miss. 210, 76 So. 149 (1917).

The Supreme Court cannot transfer a cause from the chancery court to the circuit court on the ground that the cause is not of equitable cognizance where the chancery court assumes jurisdiction. Sturges v. City of Meridian, 95 Miss. 35, 48 So. 620 (1909).

7. Other errors.

An original bill, which cannot be sustained for failure to state sufficient facts showing equity jurisdiction, a cross-bill thereto is also unsustainable, but where the trial court assumes jurisdiction such error is not covered by this section. Scottish Union & Nat'l Ins. Co. v. Warren-Gee Lumber Co., 103 Miss. 816', 60 So. 1010 (1913); Hawkins v. Scottish Union & Nat'l

Ins. Co., 110 Miss. 23, 69 So. 710 (1915); Indianola Compress & Storage Co. v. Southern R. Co., 110 Miss. 602, 70 So. 703 (1915).

Errors in venue are not within the bar of Mississippi Constitution § 147, which provides that no civil judgment or decree shall be reversed for lack of jurisdiction, since venue is a separate and distinct matter having to do with the place the suit was brought rather than the authority of the particular court to hear that type of case at all. Blackledge v. Scott, 530 So. 2d 1363 (Miss. 1988).

This section has no application to a question of jurisdiction of a chancery court to entertain an action for recovery of drainage taxes, raised for the first time by the Attorney General as amicus curiae, since the question of jurisdiction may be raised at any time either by counsel or by the court of its own motion. Waits v. Black Bayou Drainage Dist., 186 Miss. 270, 185 So. 577 (1939).

Where court refuses to transfer cause and correctly decides lawsuit, reviewing court cannot reverse, but can reverse where errors as to nonjurisdictional matters are made and remand cause to proper court, when necessary. Dilworth v. Federal Reserve Bank, 170 Miss. 390, 154 So. 535, 92 A.L.R. 1076 (1934), aff'g, 170 Miss. 373, 150 So. 821 (1933); Galtney Motor Co. v. Federal Reserve Bank, 154 So. 541 (Miss. 1934); Galyean v. Federal Reserve Bank, 154 So. 542 (Miss. 1934).

Where facts developed at trial showed chancery court had no power to grant mandatory injunction requiring power company to restore gas service to consumer, and chancery court was without power to determine company's right to charge state sales tax to consumers, jurisdiction of matter being in law court, the case was not within this section because the chancery court had no right to grant the injunction and there was no relief that could be granted under the bill other than injunction. Mississippi Power & Light Co. v. Ross, 168 Miss. 400, 150 So. 830 (1933).

Where there are causes independent of jurisdiction as to whether case is for equity or common law, and party has been denied legal or equitable right, judgment will be reversed and case sent to court which is best fitted to administer justice. Dilworth v. Federal Reserve Bank, 170 Miss. 373, 150 So. 821 (1933); Galyean Bros. v. Federal Reserve Bank, 150 So. 825 (Miss. 1933); Galtney Motor Co. v. Federal Reserve Bank, 150 So. 825 (Miss. 1933).

Constitutional provision respecting reversal of decision for mistake as to whether cause was of equity or common-law jurisdiction held inapplicable, where court sustained demurrer to cross-bill. Morris & Co. v. Skandinavia Ins. Co., 161 Miss. 411, 137 So. 110 (1931).

In absence of any other error than want of jurisdiction, Supreme Court will affirm judgment. Boyett v. Boyett, 152 Miss. 201, 119 So. 299 (1928); Thompson v. Hill, 152 Miss. 390', 119 So. 320, 13 Am. Bankr. R. (n.s.) 362 (1928).

The question of misjoinder of parties plaintiff and causes of action is not one of whether the cause was of equity or law jurisdiction. Newton Oil & Mfg. Co. v. Sessums, 102 Miss. 181, 59 So. 9 (1912).

The section does not apply to cases in which either the circuit or chancery court entertains a cause, being neither of equity nor common-law jurisdiction, of which it has no jurisdiction. Board of Levee Comm'rs v. Brooks, 76 Miss. 635, 25 So. 358 (1899).

On the reversal of a final decree in a cause of which the chancery court had no jurisdiction, instead of remanding the cause to the court having jurisdiction the Supreme Court will dismiss it, if it appears that the complainant has no cause of action whatever. Griffin v. Byrd, 74 Miss. 32, 19 So. 717 (1896).

The section is not applicable to a decree appointing a receiver, void because made on the Ex parte application of a debtor, such unauthorized proceeding not being a "cause" within its meaning. Whitney v. Hanover Nat'l Bank, 71 Miss. 1009, 15 So. 33 (1894).

The Supreme Court is not precluded by the section from reversing a decree enjoining a number of actions for the destruction of property by fire on the idea of preventing a multiplicity of suits, the question in such case being merely as to the power of any court to join the parties in one suit. Tribbette v. Illinois Cent. R.R., 70 Miss. 182, 12 So. 32, 35 Am. St. R. 642 (1892).

RESEARCH REFERENCES

ALR. Lack of jurisdiction, or jurisdictional error, as rendering federal district court judgment "void" for purposes of relief under Rule 60(b)(4) of Federal Rules of Civil Procedure. 59 A.L.R. Fed. 831.

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1981 Mississippi Supreme Court Review: Civil Procedure. 52 Miss. L. J. 399, June 1982.

1983 Mississippi Supreme Court Review: Section 147 of the Mississippi Constitution. 54 Miss L. J. 84, March 1984.

§ 148. Holding of Supreme Court at seat of government

The Supreme Court shall be held twice in each year at the seat of government at such time as the Legislature may provide.

SOURCES: 1832 art IV § 7; 1869 art VI § 7.

Cross References — Statutory provisions relating to Supreme Court generally, see § 9-3-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Courts §§ 111 to 113, 120, 121.

§ 149. Term of office of Supreme Court judges

The term of office of the judges of the Supreme Court shall be eight (8) years. The Legislature shall provide as near as can be conveniently done that the offices of not more than a majority of the judges of said court shall become vacant at any one time; and if necessary for the accomplishment of that purpose, it shall have power to provide that the terms of office of some of the judges first to be elected shall expire in less than eight years. The adoption of this amendment shall not abridge the terms of any of the present incumbents of the office of judge of the Supreme Court; but they shall continue to hold their respective offices until the expiration of the terms for which they were respectively appointed.

SOURCES: 1869 art IV § 3; Laws, 1916, ch 157.

Cross References — Election and number of Supreme Court judges, see Miss. Const. Art. 6, § 145 et seq.

Qualifications to hold public office, generally, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

Statutory provisions relating to Supreme Court generally, see § 9-3-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Judges §§ 20-27, 54-57.

§ 149A. Divisions of Supreme Court

The Supreme Court shall have power, under such rules and regulations as it may adopt, to sit in two divisions of three judges each, any two of whom when convened shall form a quorum; each division shall have full power to hear and adjudge all cases that may be assigned to it by the court. In event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in event any judge of either division, within a time and in a manner to be fixed by the rules to be adopted by the court, shall certify that in his opinion any decision of any division of the court is in conflict with any prior decision of the court or of any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof.

SOURCES: Laws, 1916, ch 152.

Cross References — Election of Supreme Court judges, see Miss. Const. Art. 6, § 145.

Statutory provisions relating to Supreme Court generally, see § 9-3-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Full court.
3. Division of court.

1. In general.

Judgment not reversed if only minority of appellate judges believe error in record. Dean v. State, 173 Miss. 254, 160 So. 584 (1935), error overruled, 173 Miss. 309, 162 So. 155 (1935).

An affirmance of a case accomplished by an equally divided court is a judicial precedent, until overruled. Robertson v. Mississippi Valley Co., 120 Miss. 159, 81 So. 799 (1919).

2. Full court.

The methods provided in this section for transferring a case to the full court are exclusive, except for transfer on motion of a division itself; transfer is never made on motion of a party litigant, who may only suggest transfer because of disqualification of a judge in a division. Hudson v. Gulf Ref. Co., 202 Miss. 351, 30 So. 2d 421 (1947).

Requirement of statute that appeals from decisions of election contests to Supreme Court shall be "referred to the court en banc" held not binding on Supreme Court, since constitutional amendment providing for separation of court into two divisions delegates to court itself and not to legislature duty of determining which cases shall be heard by division and which by court sitting en banc. Jones v. State, 170 So. 641 (Miss. 1936).

When Supreme Court sitting en banc, there must be at least four of its judges present; and no action taken unless majority of judges present concur. Dean v. State, 173 Miss. 254, 160 So. 584 (1935), error overruled, 173 Miss. 309, 162 So. 155 (1935).

3. Division of court.

Supreme Court rule authorizing the court to sit in three divisions of three judges each, with each division having full power to hear and to judge all cases assigned to it, was not unconstitutional; In Mississippi Constitution § 149A, authorizing two divisions of three judges each, "two" was surplusage as there were only six judges on the court at the time the section was adopted. Russell v. State, 312 So. 2d 422 (Miss. 1975).

The decision of a division of the supreme court is the final judgment of the supreme court and the defendant has no right to require a submission to the entire court. Hays Fin. Co. v. Bailey, 56 So. 2d 806 (Miss. 1952).

Under constitutional provision authorizing Supreme Court to sit in two divisions under such rules and regulations as court might adopt, decision of division of Supreme Court becomes authoritative and binding as to cases thus determined and decided by division of court. Jefferson Std. Life Ins. Co. v. Ham, 178 Miss. 838, 173 So. 672 (1937).

RESEARCH REFERENCES

CJS. C.J.S. Courts § 106.

§ 150. Eligibility requirements for Supreme Court judges

No personal shall be eligible to the office of judge of the Supreme Court who shall not have attained the age of thirty years at the time of his appointment, and who shall not have been a practicing attorney and a citizen of the State for five years immediately preceding such appointment.

SOURCES: 1832 art IV § 6; 1869 art VI § 6.

RESEARCH REFERENCES

CJS. C.J.S. Judges §§ 28-32, 38, 39.

§ 151. Repealed

Repealed.

Editor's Note — This section was eliminated by an amendment adopted November 3, 1914 (see Laws 1916, ch 150). The number is retained to prevent a change in the numbers of the sections. The original section provided for filling vacancies on the Supreme Court under the appointive system.

§ 152. Circuit and chancery court districts

The Legislature shall divide the State into an appropriate number of circuit court districts and chancery court districts.

The Legislature shall, by statute, establish certain criteria by which the number of judges in each district shall be determined, such criteria to be based on population, the number of cases filed and other appropriate data.

Following the 1980 Federal Decennial Census and following each federal decennial census thereafter, the Legislature shall redistrict the circuit and chancery court districts. Should the Legislature fail to redistrict the circuit or chancery court districts by December 31 of the fifth year following the 1980 Federal Decennial Census or by December 31 of the fifth year following any federal decennial census thereafter, the Supreme Court shall, by order, redistrict such circuit or chancery court districts. Any order by the Supreme Court which redistricts the circuit or chancery court districts shall become effective at a date to be set therein and shall, without alteration of the composition of the districts established in such order, be enacted by the next succeeding session of the Legislature.

The circuit and chancery court districts established by the Legislature prior to the approval of this amendment shall remain in force and effect until such time as they are redistricted under the provisions of this amendment.

SOURCES: 1832 art IV § 13; 1869 art VI § 13; Laws, 1981, ch. 708; Laws, 1992, ch. 720, eff December 8, 1992.

Editor's Note — The 1981 amendment to Section 152 of Article 6 of the Constitution of 1890 was proposed by Laws, 1981, ch. 708 (House Concurrent Resolution No. 23 of the 1981 regular session of the Legislature) and, upon ratification by the electorate on November 2, 1982, was inserted as a part of the Constitution by proclamation of the Secretary of State on January 28, 1983.

The 1992 amendment of Section 152 in Article 6 of the Mississippi Constitution of 1890, was proposed by Laws, 1992, ch. 720 (Senate Concurrent Resolution No. 526), and upon ratification by the electorate on November 3, 1992, was inserted as part of the Constitution by proclamation of the Secretary of State on December 8, 1992.

Cross References — Holding of circuit court, see Miss. Const. Art. 6, § 158.

Holding of chancery court, see Miss. Const. Art. 6, § 164.

Chancery court districts, see § 9-5-1 et seq.

Circuit court districts, see § 9-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

"Results test" of Section 2 of Voting Rights Act of 1965 (42 USCS § 1973), as amended in 1982, applies to claims of vote dilution in judicial elections generally, and does not exclude judges by virtue of reference to opportunity to elect "representative"; test particularly applies to election of trial judges, including election of judges at large from districts consisting of one or more entire counties; Act does not automatically exempt such "single member offices" from coverage of § 2. Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419, 111 S. Ct. 2376, 115 L. Ed. 2d 379 (1991), on remand, 986 F.2d 728 (5th Cir. Tex. 1993), reh'g granted (5th Cir. Tex. 1993).

The subject of legislative power to create new counties, divide counties into judicial districts, and remove seats of justice of such districts discussed. Hinton v. Board of Supvrs., 84 Miss. 536, 36 So. 565 (1904).

RESEARCH REFERENCES

CJS. C.J.S. Courts § 105.

§ 153. Election and terms of circuit and chancery court judges

The judges of the circuit and chancery courts shall be elected by the people in a manner and at a time to be provided by the legislature and the judges shall hold their office for a term of four years.

SOURCES: 1869 art VI § 11; Laws, 1912, ch 415.

Editor's Note — Laws, 2002, ch. 713 (Senate Concurrent Resolution No. 543), provides in pertinent part:

"BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, That the following amendment to the Mississippi Constitution of 1890 is proposed to the qualified electors of the state:

"Amend Section 153, Mississippi Constitution of 1890 to read as follows:

"Section 153. The judges of the circuit and chancery courts shall be elected by the people in a manner and at a time to be provided by the Legislature. The judges elected for a term of office beginning from and after January 1, 2003, shall hold their office for a term of six (6) years."

"BE IT FURTHER RESOLVED, That this proposed amendment shall be submitted by the Secretary of State to the qualified electors at an election to be held on the first Tuesday after the first Monday of November 2002, as provided by Section 273 of the Constitution and by general law.

"BE IT FURTHER RESOLVED, That the explanation of this proposed amendment for the ballot shall read as follows: "This proposed constitutional amendment increases the terms of office of circuit and chancery court judges from four to six years beginning January 1, 2003."

"BE IT FURTHER RESOLVED, That the Attorney General of the State of Mississippi shall submit this resolution, immediately upon adoption by the Legislature, to the Attorney General of the United States or to the United States District Court for the District of Columbia, in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended."

The constitutional amendment to § 153 proposed by Laws, 2002, ch. 713, was defeated by the voters on November 5, 2002.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

Chancellors, chancery court districts and terms, see § 9-5-1 et seq.

Circuit court judges, districts and terms, see § 9-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

State judicial elections come within coverage of "results test" provisions of § 2 of Voting Rights Act of 1965 (42 USCS § 1973), as amended in 1982; if term "representatives" limited coverage with respect to judicial elections, limitation would exclude all claims involving judicial elections; better reading of term describes winners of representative, popular elections. Chisom v. Roemer, 501 U.S. 380, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991).

Where the judge is either a de facto or de jure judge the defendant could not object to his qualifications based on his allegedly illegal appointment by the governor in violation of the Constitution making the judges of the several districts elective. Pringle v. State, 108 Miss. 802, 67 So. 455 (1915).

RESEARCH REFERENCES

CJS. C.J.S. Judges §§ 20-24.

Law Reviews. Case, In search of an independent judiciary: alternatives to judicial elections in Mississippi. 13 Miss. C. L. Rev. 1, Fall, 1992.

Judicial Selection — What is Right for Mississippi?, 21 Miss. C. L. Rev. 199, Spring, 2002.

§ 154. Qualifications for circuit or chancery court judges

No person shall be eligible to the office of judge of the circuit court or of the chancery court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this State.

SOURCES: 1832 art IV § 12; 1869 art VI § 12.

Cross References — Qualifications for Attorney General the same as those prescribed for judges of circuit and chancery courts, see Miss. Const., Art. 6, § 173.

Qualifications to hold public office, generally, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

Qualifications of State Bond Attorney the same as those prescribed for the Attorney General, see § 31-13-1.

JUDICIAL DECISIONS

1. In general.

Under constitutional provision describing requirements for chancellor's office, chancellor need not necessarily be citizen of state for 5 years immediately preceding election, but instead, need only have been citizen of state for 5 years prior to election. State ex rel. Holmes v. Griffin, 667 So. 2d 1319 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22 (1996), reh'g denied, 519 U.S. 1022, 117 S. Ct. 541, 136 L. Ed. 2d 425 (1996).

The official acts of a de facto judge are valid. Brady v. Howe, 50 Miss. 607 (1874).

RESEARCH REFERENCES

ALR. Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office. 71 A.L.R.3d 498.

Constitutional restrictions on nonattorney acting as judge in criminal proceeding. 71 A.L.R.3d 562.

CJS. C.J.S. Judges §§ 28-35, 38, 39.

§ 155. Judicial oath of office

The judges of the several courts of this state shall, before they proceed to execute the duties of their respective offices, take the following oath or affirmation, to-wit: "I, ________ , solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ________ according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the State of Mississippi. So help me God."

JUDICIAL DECISIONS

1. In general.

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art. 3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064 (Miss. 2009).

Trial judge who leaves trial during jury deliberations and appoints practicing attorney and youth court referee to act in his stead does not commit reversible error. Sand v. State, 467 So. 2d 907 (Miss. 1985).

The Workmen's Compensation Act does not violate the constitutional provision that judges of the civil courts of the state shall, before they proceed to execute the duties of the respective offices, take specified oath or affirmation. Allen v. R.G. Le Tourneau, Inc., 220 Miss. 520, 71 So. 2d 447 (1954).

Upon taking the oath prescribed by this section, an appointee as special judge accepts appointment and qualifies for the duties of that office. Smith v. State, 200 Miss. 184, 26 So. 2d 543 (1946).

RESEARCH REFERENCES

CJS. C.J.S. Judges §§ 28-39.

§ 156. Jurisdiction of circuit court

The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law.

SOURCES: 1832 art IV § 14; 1869 art VI § 14.

Cross References — Jurisdiction of Supreme Court, see Miss. Const. Art. 6, § 146 and § 9-3-1 et seq.

Jurisdiction of chancery court, see Miss. Const. Art. 6, §§ 159, 160, 161, 171, 172 and § 9-5-1 et seq.

Jurisdiction, powers and authority of circuit court generally, see § 9-7-81 et seq.

JUDICIAL DECISIONS

1. In general.
2. Original jurisdiction.
3. Appellate jurisdiction.
4. Consolidation of actions.
5. Certiorari.
6. Ancillary jurisdiction.
7. Amount in controversy.
8. Court rules.
9. Proposed initiatives.

1. In general.

In a breach of contract case in which two individuals sued a Mississippi corporation in chancery court and the corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the chancery court erred by ordering the case transferred to the circuit court because the chancery court had subject matter jurisdiction. The primary thrust of the individuals' complaint was a request for equitable relief in the form of specific performance of a real estate contract, specific performance was a particularly appropriate remedy for breach of a real estate contract, and claims for specific performance were within the historic equity jurisdiction of the chancery court. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

Where a casino developer sued a partnership in chancery court to enforce the parties' lease agreement, and the partnership sought a declaration in circuit court that the contracts were no longer binding, as the case was filed first in the circuit court, and as the circuit court was a court of competent jurisdiction, the case properly belonged in the circuit court under Miss. Const. Art. VI, 156. RAS Family Partners, LP v. Onman Biloxi, LLC, 968 So. 2d 926 (Miss. 2007).

Because the only claim for equitable relief in a negligence action brought under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, was a request for an accounting, the proper jurisdiction was in a circuit court, and not in chancery court. City of Ridgeland v. Fowler, 846 So. 2d 210 (Miss. 2003).

Mississippi justice courts and the circuit courts shared concurrent jurisdiction in matters in which the amount in controversy exceeded $200 but not $2,500. Arant v. Hubbard, 824 So. 2d 611 (Miss. 2002).

A circuit court did not have subject matter jurisdiction over a dog bite case where the parties were adult, enrolled members of the Mississippi Band of Choctaw Indians and the alleged incident took place on tribal lands, as federal law preempted the exercise of state court jurisdiction. Jones v. Billy, 798 So. 2d 1238 (Miss. 2001).

Section 23-17-13 deals merely with the Legislature's authority to direct venue, not jurisdiction; thus, the statute does not divest the Circuit Court of the First Judicial District of Hinds County of its jurisdiction as set forth in section 156 of the Constitution. In re Proposed Initiative Measure No. 20 v. Mahoney, 774 So. 2d 397 (Miss. 2000).

Mississippi Constitution Article 4 § 38 vests competence of a candidate's qualifications for office-including whether the candidate meets residency qualifications-in the Senate. Thus, the circuit court did not have subject matter jurisdiction of an election contest wherein it was alleged that candidates did not meet the residency requirements for service in the Senate as prescribed in Article 4 § 42 of the Mississippi Constitution. Foster v. Harden, 536 So. 2d 905 (Miss. 1988).

Circuit Court had jurisdiction to decide suit challenging powers being exercised by Lieutenant Governor where there was no exclusive vesting in another court of jurisdiction to hear and decide such claim, and due to nature of relief sought, i.e., that Lieutenant Governor's exercise of certain powers in Senate be declared unconstitutional and he be debarred from exercising such authority, such case was akin to those historically within circuit court jurisdiction, to-wit: quo warranto proceedings. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

The inviolability of the right to a jury trial does not preclude judicial determination of the existence of reasonable, believable evidence to support a verdict. Mississippi State Hwy. Comm'n v. Valentine, 239 Miss. 890, 124 So. 2d 690 (1960).

The jurisdiction conferred upon circuit courts by this section extends to honoring a request of a Canadian court in which an action was pending, that a commissioner be appointed to examine a witness in Mississippi, and upon proper showing to punish the witness for contempt in refusing to testify. Electric Reduction Co. of Canada v. Crane, 239 Miss. 18, 120 So. 2d 765 (1960).

Unless some property rights are involved, civil courts have no jurisdiction over ecclesiastical controversy and are without jurisdiction to decide who is, or who ought to be, presiding bishop of diocese. Trapani v. State ex rel. Dist. Att'y Maples, 44 So. 2d 52 (Miss. 1950).

Provision in church manual permitting bishops to retain 10% of all monies raised by them in their respective dioceses does not give an ousted bishop such property rights in monies raised by his successor in diocese as to entitle him to invoke jurisdiction of civil courts as to the 10% claimed by him. Trapani v. State ex rel. Dist. Att'y Maples, 44 So. 2d 52 (Miss. 1950).

State and federal courts have concurrent jurisdiction of suits of civil nature arising under Constitution and laws of United States, save in exceptional instances where jurisdiction has been restricted by Congress to federal courts. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

Circuit court and chancery court to which suit was transferred were courts of competent jurisdiction to adjudicate litigation against Federal Housing Authority under Contract Settlement Act of 1944, 41 USCS §§ 101 et seq., and Government Corporation Control Act of 1945, 31 USCS § 846; and Federal Public Housing Authority is suable in Mississippi courts. Walsh Constr. Co. v. Davis, 204 Miss. 509, 37 So. 2d 757 (1948).

Where facts developed at trial showed chancery court had no power to grant mandatory injunction requiring power company to restore gas service to consumer, chancery court was without power to determine company's right to charge state sales tax to consumers, jurisdiction of matter being in law court. Mississippi Power & Light Co. v. Ross, 168 Miss. 400, 150 So. 830 (1933).

Under our system of jurisprudence, the chancery courts have only such jurisdiction as was conferred by the Constitution, all other jurisdiction both civil and criminal not vested by the Constitution in some other court is vested in the circuit courts. Barnes v. McLeod, 165 Miss. 437, 140 So. 740 (1932).

Laws 1926 c 131 creating county courts does not violate this section. State ex rel. Knox v. Speakes, 144 Miss. 125, 109 So. 129 (1926).

Where jurisdiction is given to a court by the Constitution, it cannot be conferred exclusively on any other court by the legislature. Montross v. State, 61 Miss. 429 (1883).

Matters "civil" mean of common-law nature. Bell v. City of W. Point, 51 Miss. 262 (1875).

The circuit court has jurisdiction where there is no other legal remedy. Madison County Court v. Alexander, 1 Miss. (1 Walker) 523 (1832); Planters' Ins. Co. v. Cramer, 47 Miss. 200 (1872), overruled on other grounds, State v. Maples, 402 So. 2d 350 (Miss. 1981), but see De La Beckwith v. State, 615 So. 2d 1134 (Miss. 1992).

2. Original jurisdiction.

Circuit court had subject matter jurisdiction under Miss. Const. Art. 6, § 156 to hear a breach of contract case arising from a creditor's failure to rectify an incorrect deed description in a timely manner because it could have heard equitable claims connected to a contractual relationship, despite the jurisdiction of the chancery courts. Indymac Bank, F.S.B. v. Young, 966 So. 2d 1286 (Miss. Ct. App. 2007).

Post-conviction relief was denied based on a claim that a circuit court lacked jurisdiction over a guilty plea based on the alleged price of stolen items in a larceny case because the circuit court had original jurisdiction over all matters civil and criminal; moreover, defendant was unable to litigate her actual guilt on appeal from a denial of post-conviction relief. Jones v. State, 948 So. 2d 499 (Miss. Ct. App. 2007).

In an action relating to waste disposal, a transfer to a chancery court was improper because equitable claims were not added until after the transfer, and the action had been pending in the circuit court for five years before the transfer was requested. Georgia-Pacific Corp. v. Mooney, 909 So. 2d 1081 (Miss. 2005).

Chancery court lacked subject matter jurisdiction to consider the individuals' claims brought pursuant to the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. against the Mississippi Municipality Liability Plan, for injuries suffered as the result of a motor vehicle accident with a city police officer, as Miss. Const. Art. 6, §§ 159 & 161 did not include actions under the MTCA; rather, the circuit court had jurisdiction over the matter pursuant to Miss. Const. Art. 6, § 156. Miss. Mun. Liab. Plan v. Jordan, 863 So. 2d 934 (Miss. 2003).

Dismissal of the insured's action against her insurer in Mississippi for bad faith was improper where there was no personal or subject matter jurisdiction over the insurer, Miss. Const. Art. 6, § 156, Miss Code Ann. § 9-7-81; none of the parties were Mississippi residents, none of the actions creating the dispute occurred in Mississippi, and Mississippi law would not have governed the litigation. Hogrobrooks v. Progressive Direct, 858 So. 2d 913 (Miss. Ct. App. 2003).

Where the non-movant's complaint alleged seven counts at law and one equitable count seeking an accounting, the chancery court erred in refusing to transfer the case to the circuit court; the non-movant failed to allege a true claim for an accounting, as the non-movant sought an accounting of the non-movant rather than an accounting of the movants, and, therefore, the circuit court had jurisdiction pursuant to Miss. Const. Art. VI, § 156 and Miss. Code Ann. § 9-7-81. Briggs & Stratton Corp. v. Smith, 854 So. 2d 1045 (Miss. 2003).

Fraudulent orders of a chancellor may be reviewed in a circuit court criminal trial, notwithstanding the argument that such review is barred by collateral estoppel, immunity of the guardian ad litem, or because a chancery court may have jurisdiction over a civil matter. Farris v. State, 764 So. 2d 411 (Miss. 2000).

While it is true that the constitution vests exclusive jurisdiction of conservatorships in the chancery court, Article 6, § 156 also vests original jurisdiction for criminal matters in the circuit court; thus, the vesting of jurisdiction for conservatorships in chancery court does not preclude circuit court jurisdiction for criminal matters that happen to coincide with civil matters in chancery court, regardless of whether those criminal matters happen to involve a conservator, guardian ad litem, or even a chancellor. To hold otherwise would be to allow chancellors and unethical chancery practitioners insulation under Article 6, § 159, safe in the knowledge that their actions, however corrupt or criminal, could not be reviewed under the circuit court's original jurisdiction of criminal matters in Article 6, § 156. Farris v. State, 764 So. 2d 411 (Miss. 2000).

The circuit court, rather than the chancery court, had jurisdiction over a tort action for intentional infliction of emotional distress. Little v. Collier, 759 So. 2d 454 (Miss. Ct. App. 2000).

The circuit court had subject matter jurisdiction over an action involving allegations that county residents had a right to offer comments on a Capacity Assurance Plan (CAP) before its adoption in accordance with the Administrative Procedures Law, and that the CAP was invalid. Fordice v. Thomas, 649 So. 2d 835 (Miss. 1995), but see USPCI of Miss., Inc. v. State ex rel. McGowan, 688 So. 2d 783 (Miss. 1997).

Only the Mississippi Public Service Commission may initially decide a matter relating to the regulation of intrastate public utility activity; thus, a circuit court had no jurisdiction to decide that a shopping mall had improperly acted as a public utility. Singing River Mall Co. v. Mark Fields, Inc., 599 So. 2d 938 (Miss. 1992).

A chancery clerk was entitled to bring an original action in the circuit court, in the nature of quo warranto, under §§ 11-39-1 and 11-39-5 as supplanted by the rules of civil procedure, for reinstatement by the county board of supervisors to the posts of clerk of the board of supervisors and county auditor. Barlow v. Weathersby, 597 So. 2d 1288 (Miss. 1992).

Section 21-13-19, which gives a municipal court the authority to try misdemeanors and allows municipalities to incorporate all state misdemeanors as municipal violations, does not bar the State from prosecuting misdemeanors committed within municipal boundaries; the effect of § 21-13-19 is to allow more than one governmental entity to prosecute misdemeanors, as the statute simply grants municipalities the authority to make use of the legislature's classifications of misdemeanors; thus, a county circuit court had original jurisdiction over a prosecution for malicious mischief under § 97-17-67, in spite of the defendant's argument that his violation constituted a municipal offense and that the case should have been heard by a municipal court. Collins v. State, 594 So. 2d 29 (Miss. 1992).

Section 21-23-7, which grants a municipal judge the authority to hear cases charging violations of municipal ordinances and state misdemeanor laws made offenses against the municipality, does not deprive a county court of jurisdiction over misdemeanors committed within a municipality that lies within the county; while a municipal court has jurisdiction when a municipality charges a defendant either under an explicit municipal ordinance or an ordinance by incorporation from state misdemeanor law, an act is considered an offense against the municipality only if the municipality brings the action. Collins v. State, 594 So. 2d 29 (Miss. 1992).

Murder is a crime excepted from the jurisdiction of the youth court. Thus, the circuit court had exclusive jurisdiction over a juvenile charged with murder. Boyd v. State, 523 So. 2d 1037 (Miss. 1988).

The Workmen's Compensation Act does not violate constitutional provision that the circuit court shall have original jurisdiction in all matters civil and criminal in the state, not vested by the constitution in some other court. Allen v. R.G. Le Tourneau, Inc., 220 Miss. 520, 71 So. 2d 447 (1954).

The Youth Court Act of 1946 (Code 1942, §§ 7185-01 et seq.) which vests original and exclusive jurisdiction of all proceedings concerning delinquents or neglected children under eighteen years of age in

Youth Court Division of Chancery Court or Youth Court Division of County Court is a reasonable classification, equal in its application to all those within the stated age limit. Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267 (1952).

County court to which circuit court has transferred criminal case for trial has right to proceed with prosecution of father for desertion and failure to support child although chancery court had acquired jurisdiction in matter prior to commencement of prosecution through divorce action brought by mother against father. Williams v. State, 207 Miss. 816, 43 So. 2d 389 (1949), overruled on other grounds, Lenoir v. State, 237 Miss. 620, 115 So. 2d 731 (1959).

One of two courts of concurrent jurisdiction may, by valid order of dismissal, relinquish its exclusive jurisdiction acquired by criminal prosecution being first instituted therein, so that the other court may proceed then with prosecution of same offense. Hegwood v. State, 206 Miss. 160, 39 So. 2d 865 (1949).

Dismissal without prejudice to the State of proceeding against defendant in justice of the peace court for unlawful possession of intoxicating liquor on motion of State, did not prevent the defendant from being indicted for the same offense in the circuit court having concurrent jurisdiction. Hegwood v. State, 206 Miss. 160, 39 So. 2d 865 (1949).

Original jurisdiction to make conclusive and final adjudication of title to land rests alone with circuit and chancery courts, and to a limited extent with the county courts. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

A writ of prohibition can only be issued by a court of original jurisdiction, and power so to do is by the constitution and statutes lodged in the circuit court. De Jean v. State, 108 Miss. 146, 66 So. 411 (1914).

The circuit court has jurisdiction generally of actions in ejectment notwithstanding the powers granted the chancery court under § 160, infra. Illinois Cent. R.R. v. Le Blanc, 74 Miss. 650, 21 So. 760 (1897).

Under this section the circuit court has original jurisdiction "in all matters, civil and criminal, in this state not vested by this Constitution in some other court." Whitney v. Hanover Nat'l Bank, 71 Miss. 1009, 15 So. 33 (1894).

The original jurisdiction of the circuit court can be made by statute to embrace contested election causes. Hall v. Lyon, 59 Miss. 218 (1881).

3. Appellate jurisdiction.

Supreme Court, circuit courts, chancery courts and county courts, when acting on appeal from a special possessory court of a justice or justices of peace, have only such jurisdiction to adjudicate regarding title to land as is vested in special court from which appeal was taken. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Neither justice of peace court, nor circuit court on appeal, in proceeding under § 948, Code 1942, have any jurisdiction to make final and conclusive adjudication of title to property involved. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Circuit Court has jurisdiction of both subject-matter and parties, on appeal with supersedeas, from default judgment by justice of peace, in summary proceeding under § 948, Code 1942, to obtain possession of real property rendered on invalid service of process, although justice of peace had jurisdiction only of subject-matter when default judgment was rendered. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Code 1942, Section 1616, in providing an appeal from county court to chancery court in equity cases, is valid as against contention that an appeal from an inferior court can be taken only to the circuit court by virtue of this section of the Constitution. W. Horace Williams Co. v. Federal Credit Co., 198 Miss. 111, 21 So. 2d 582 (1945).

Statute providing for the regulation, supervision and control of motor carriers is not unconstitutional in providing that in addition to other available remedies, the state, or any party aggrieved by any final finding, order, or judgment of the public service commission, shall have the right, regardless of the amount involved, of appeal to the first judicial district circuit court of Hinds County, Mississippi, since the provision in question merely provided a new method of procedure by which orders of such administrative board might be reviewed by a court, conferring no new judicial power on the court, but simply creating a new procedure by which existing judicial power might be exercised. Dixie Greyhound Lines v. Mississippi Pub. Serv. Comm'n, 190 Miss. 704, 200 So. 579 (1941), error overruled, 190 Miss. 727, 1 So. 2d 489 (1941).

Legislature may authorize circuit court on appeal from tax board of equalization to try case anew. Knox v. L.N. Dantzler Lumber Co., 148 Miss. 834, 114 So. 873 (1927).

This rule does not apply in unlawful entry and detainer cases, since by statute the circuit court on appeal in such cases is not limited in its judgment to the sum of $150.00 as in the case of justices of the peace. Poston v. Mhoon, 49 Miss. 620 (1873).

The circuit court, on an appeal or certiorari from a justice of the peace has such jurisdiction only as the justice had. Glass v. Moss, 2 Miss. (1 Howard) 519 (1837); Crapoo v. Grand Gulf, 17 Miss. (9 S. & M.) 205 (1848); Stier v. Surget, 18 Miss. (10 S. & M.) 154 (1848); Scofield v. Pensons, 26 Miss. 402 (1853), overruled in part, McLendon v. Pass, 66 Miss. 110, 5 So. 234 (1888); Askew v. Askew, 49 Miss. 301 (1873); Bell v. West Point, 51 Miss. 262 (1875).

4. Consolidation of actions.

The jurisdictional question of whether separate and distinct demands may be joined in a single suit so as to make up an amount sufficient to confer original jurisdiction on the circuit court, is controlled by the constitution itself and no statutory device or rule of practice can be invoked to avoid or circumvent the plain provisions of the constitution on the subject. R.H. Green Whsle. Co. v. Hall, 184 Miss. 296, 185 So. 807 (1939).

It is error to consolidate on appeal from a justice of the peace two replevin suits involving the same parties where each suit involves different subject matter and different sureties on defendant's forthcoming bonds, a separate bond being executed in each case. Spratley v. Kitchens, 55 Miss. 578 (1878).

The circuit court may consolidate several cases where the parties are the same on both sides, and a single judgment can settle the rights of all. Ammons v. Whitehead, 31 Miss. 99 (1856); Spratley v. Kitchens, 55 Miss. 578 (1878); McLendon v. Pass, 66 Miss. 110, 5 So. 234 (1888).

5. Certiorari.

The circuit court has power to review by certiorari the decisions of the secretary of state on the sufficiency of initiative and referendum petitions. Power v. Robertson, 130 Miss. 188, 93 So. 769 (1922).

The circuit court has, by the common law, jurisdiction by certiorari to revise the proceedings of inferior tribunals, although there is no statute so providing; and, accordingly, such court has jurisdiction to entertain an appeal from the Mayor's court. Holberg v. Town of Macon, 55 Miss. 112 (1877).

6. Ancillary jurisdiction.

The court may allow a claimant's issue to be made up and tried on appeal, although plaintiff had dismissed his appeal from a judgment against him in a justice's court in an attachment suit. Dreyfus v. Mayer, 69 Miss. 282, 12 So. 267 (1891).

A claimant's issue is not an original suit. Morgan v. Schwartz, 66 Miss. 613, 6 So. 326 (1889).

Under this section it is competent for the legislature to confer upon the circuit court power to issue final process on judgments which had been rendered in the County Court; and, as incidental to that, to issue all writs necessary to obtain satisfaction, such as scire facias, to revive judgments, garnishment, and the like, and to try and decide all issues that might arise thereon. Martin v. Harvey, 54 Miss. 685 (1877).

Garnishment is not an original suit, and the circuit court may issue and render judgment thereon for amounts within justice jurisdiction. Martin v. Harvey, 54 Miss. 685 (1877).

7. Amount in controversy.

The circuit court had no jurisdiction, except on appeal, of an action by three persons jointly for damages resulting from misrepresentation as to the quality of certain seed corn purchased by one of them for himself and the others where the damages of each were separate and distinct from those of the others and such separate demands for damages did not individually exceed the amount denoting the limits of jurisdiction of justices of the peace. R.H. Green Whsle. Co. v. Hall, 184 Miss. 296, 185 So. 807 (1939).

Suit upon note for $230.00 showing credit of $50.00 was properly brought in the circuit court where accrued interest exceeded amount so credited. Harrison v. Garner, 110 Miss. 586, 70 So. 700 (1916).

An action against a railroad for damages in the sum of $190.00 for injuries to a mule, plus penalty in the sum of $25.00 prescribed by statute for failure of railroad to settle claim for damages within prescribed time was properly brought in the circuit court as exceeding the jurisdictional minimum of $200.00. Mobile & O.R. Co. v. Greenwald & Champenois, 104 Miss. 417, 61 So. 426 (1913).

Where after the commencement of an action against two defendants a payment by one reduces the amount to less than $200.00, the circuit court loses jurisdiction. Mobile, J. & K.C.R. Co. v. Hitt & Rutherford, 99 Miss. 679, 55 So. 484 (1911).

In a replevin suit for property valued at $323.00 the circuit court has jurisdiction though the note on which the seizure was based was for only $66.00. Doolittle v. Adams, 43 So. 951 (Miss. 1907).

Where the amount of the judgment of the justice of the peace in another state, including the costs of suit paid by the plaintiff, exceeds $200.00, the circuit court has original jurisdiction of the suit for aggregate amount of judgment and cost. Western Union Tel. Co. v. Pearce, 82 Miss. 487, 34 So. 152 (1903).

Jurisdiction as to the amount in controversy must be determined by the whole amount claimed by the plaintiff, and not by what remains after the exclusion by the court of special damages. Jacobs v. Postal Tel.-Cable Co., 76 Miss. 278, 24 So. 535 (1898).

Where the record shows less than $200.00 sued for and does not show that the case originated in a justice's court, judgment will be reversed and proceedings dismissed for want of jurisdiction on appeal. Berkson v. Coen, 71 Miss. 650, 16 So. 204 (1894).

The pleadings, where honest, fix and determine the amount in controversy. Fenn v. Harrington, 54 Miss. 733 (1877).

The principal of the amount in controversy at the time suit is brought, after deducting credits, if any, is the test of jurisdiction. Martin v. Harden, 52 Miss. 694 (1876).

8. Court rules.

The Circuit Court has ample power to promulgate rules pertaining to appeals to it from the county court, and when its rules are not complied with the order dismissing the appeal will be affirmed, in the absence of evidence that this act constituted an abuse of the court's discretion. Mississippi State Hwy. Comm'n v. McGrew, 206 So. 2d 334 (Miss. 1968).

9. Proposed initiatives.

Sections 23-17-1 et seq. do not divest the Circuit Court of the First Judicial District of Hinds County of its jurisdiction as set forth in this section of the Constitution and, as such, this circuit court is the proper venue and has jurisdiction to review the facial constitutionality of proposed initiatives. Stoner v. Mahoney (In re Proposed Initiative Measure No. 20), 2000 Miss. LEXIS 205 (Miss. Sept. 7, 2000), opinion withdrawn by, substituted opinion at 774 So. 2d 397, 2000 Miss. LEXIS 268 (Miss. 2000).

RESEARCH REFERENCES

ALR. Criterion of jurisdictional amount where several claimants are interested. 72 A.L.R. 193.

Power to confer original jurisdiction on courts to revoke or suspend public license. 168 A.L.R. 826.

Am Jur. 20 Am. Jur. 2d, Courts §§ 84 et seq.

§ 157. Exclusive jurisdiction of chancery court; transfer

All causes that may be brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court.

Cross References — Effect on appeal of rendition of decree or judgment by wrong court, see Miss. Const. Art. 6, § 147.

Transfer of causes, see Miss. Const. Art. 6, § 162.

JUDICIAL DECISIONS

1. In general.
2. Jurisdiction of chancery court.
3. Jurisdiction of circuit court.

1. In general.

The institution of a suit in an improper court is not sufficient grounds to deny recovery and the court in such a case should transfer the cause; moreover the opposing attorney should ask for such a transfer. Griffin v. Maryland Cas. Co., 213 Miss. 624, 57 So. 2d 486 (1952).

This constitutional provision is mandatory and applies to appeals from county court. W. Horace Williams Co. v. Federal Credit Co., 198 Miss. 111, 21 So. 2d 582 (1945).

A court of equity will not lend its aid to the Grand Lodge by enforcing a forfeiture of the charter of a local lodge for alleged misconduct. Vicksburg Lodge No. 26 v. Grand Lodge of Free & Accepted Masons, 116 Miss. 214, 76 So. 572 (1917), cert. denied, 246 U.S. 668, 38 S. Ct. 336, 62 L. Ed. 930 (1918).

2. Jurisdiction of chancery court.

In a breach of contract case in which two individuals sued a Mississippi corporation in chancery court and the corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the chancery court erred by ordering the case transferred to the circuit court because the chancery court had subject matter jurisdiction. The primary thrust of the individuals' complaint was a request for equitable relief in the form of specific performance of a real estate contract, specific performance was a particularly appropriate remedy for breach of a real estate contract, and claims for specific performance were within the historic equity jurisdiction of the chancery court. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

Beneficiaries' complaint focused on the administration of the trust, and they had labeled their claims as negligence, breach of contract, breach of fiduciary duty, and gross negligence; however, the bank's actions or inactions that were at issue arose solely from its capacity as trustee and any duty it might have had arose from its appointment as trustee, such that because the action sought to interpret the trustee's obligations under the terms of the trust, the trust was under the exclusive jurisdiction of the Warren County Chancery Court and had been since its inception. Trustmark Nat'l Bank v. Johnson, 865 So. 2d 1148 (Miss. 2004).

Where appeal from county court in equity case was erroneously taken to the circuit court instead of the chancery court as required by Code 1942 § 1616, and it was too late to appeal anew, circuit court should have transferred case to chancery court as required by this section, and that court erred in overruling a motion therefor and dismissing the appeal. W. Horace Williams Co. v. Federal Credit Co., 198 Miss. 111, 21 So. 2d 582 (1945).

Chapter 195, Laws of 1912 as amended by c 269, Laws of 1914 conferring jurisdiction on the chancery court in cases wherein the proposed district is embraced in territory lying in more than one county, is not unconstitutional. Union Cotton Oil Co. v. Patterson, 116 Miss. 802, 77 So. 795 (1918).

The chancery court has no jurisdiction of an action to collect rent, and should dismiss such a suit, on its own motion. Grenada Grocery Co. v. Tatum, 113 Miss. 388, 74 So. 286 (1917), but see § 162, infra.

3. Jurisdiction of circuit court.

In suit to recover damages for cutting and conversion of trees, involving boundary dispute, circuit court did not err in refusing to transfer cause to chancery court, since the ascertainment of boundaries alone does not confer jurisdiction as a separate ground of equity. Wroten v. Fenn, 203 Miss. 361, 35 So. 2d 534 (1948).

RESEARCH REFERENCES

CJS. C.J.S. Trial §§ 63-70.

Law Reviews. 1981 Mississippi Supreme Court Review: Civil Procedure. 52 Miss. L. J. 399, June 1982.

1989 Mississippi Supreme Court Review: Discovery Sanctions. 59 Miss. L. J. 803, Winter, 1989.

§ 158. Holding of circuit court

A circuit court shall be held in each county at least twice in each year, and the judges of said courts may interchange circuits with each other in such manner as may be provided by law.

SOURCES: 1832 art IV § 15; 1869 art VI § 15.

Cross References — Court districts, see Miss. Const. Art. 6, § 152 and Code § 9-7-1 et seq.

JUDICIAL DECISIONS

1. Terms of court.
2. Place of trial.
3. Assignment or interchange of judges.

1. Terms of court.

There has been a vast expansion by statutory enactment of the times within which circuit judges are lawfully empowered to conduct court affairs. Although the Mississippi Constitution contemplates circuit courts being held at fixed, stated terms provided by statute, and the circuit courts of this State have had fixed terms, the legislature by various enactments-§§ 11-1-7 [repealed], 11-1-16, 11-7-131 through 183, and 9-7-3-has granted circuit courts wide latitude in taking official actions in vacation. Griffin v. State, 565 So. 2d 545 (Miss. 1990).

Where circuit judge pretermitted court term without authority, but later rescinded order, and accused was tried at regular term, court was held as provided by law. Ivey v. State, 154 Miss. 60, 119 So. 507 (1928).

Legislature may provide for more than two terms of court in county in year. Walton v. State, 147 Miss. 851, 112 So. 790 (1927).

2. Place of trial.

Error, if any, in permitting the jury to view premises, and taking testimony thereat, in a county other than that in which trial was in progress for recovery of damages resulting from a railroad's digging a ditch along its right of way and causing overflow on the lands of an adjoining owner, was not prejudicial where there was no evidence that the work done by the railroad could have been accomplished by another method, equally safe, convenient and inexpensive without damage to the adjoining landowner. Miller v. Ervin, 192 Miss. 712, 6 So. 2d 910 (1942).

3. Assignment or interchange of judges.

Notwithstanding the provisions of this section authorizing the legislature to provide for the interchange of circuit judges, and notwithstanding the further fact that no similar constitutional provision respecting chancellors exists, § 261 (Code 1892 § 458); Code 1906 § 505 is constitutional. First Nat'l Bank v. Abe Block & Co., 82 Miss. 197, 33 So. 849 (1903).

This section does not preclude the assignment of several judges to the same district. Price v. Anderson, 65 Miss. 410, 4 So. 96 (1888).

RESEARCH REFERENCES

CJS. C.J.S. Courts §§ 111 to 121.

§ 159. Jurisdiction of chancery court

The chancery court shall have full jurisdiction in the following matters and cases, viz.:

(a) All matters in equity;

(b) Divorce and alimony;

(c) Matters testamentary and of administration;

(d) Minor's business;

(e) Cases of idiocy, lunacy, and persons of unsound mind;

(f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation.

SOURCES: 1832 third amendment; 1869 art VI § 16.

Cross References — Jurisdiction, powers and authority of chancery courts generally, see § 9-5-81 et seq.

JUDICIAL DECISIONS

1. In general.
2. Powers of Legislature.
3. Full jurisdiction.
4. Concurrent federal jurisdiction.
5. All matters in equity—In general.
6. Injunctive relief, all matters in equity.
7. Divorce and alimony.
8. Custody of children.
9. Bastardy proceedings.
10. Testamentary and administration matters.
11. Minor's business—In general.
12. Appointment and removal of guardians, minor's business.
13. Removal of disabilities of minority, minor's business.
14. Mental incompetents.
15. Other matters as to which chancery courts had jurisdiction at adoption of Constitution.

1. In general.

Alleged violation of the Mississippi Canons of Judicial Conduct is not cognizable as a cause of action before the Mississippi trial courts, but rather must be pursued through the Mississippi Commission on Judicial Performance or the Mississippi Special Committee on Judicial Election Campaign Intervention; therefore, a temporary restraining order was dissolved where it was based on a judicial candidate allegedly making false statements during a campaign because a chancery court had no jurisdiction to hear such. In re Bell, 962 So. 2d 537 (Miss. 2007).

Only remedy provided in Miss. Code Ann. § 23-15-977.1 for offering false information in a pledge or oath is a criminal action for perjury, and it provides no civil claim or cause of action for the failure of a candidate to fulfill the pledge or oath; therefore, a chancery court had no jurisdiction to hear such a claim in an election dispute because it was unable to hear criminal matters. In re Bell, 962 So. 2d 537 (Miss. 2007).

Temporary restraining order prohibiting a judicial candidate from making allegedly false statements was dissolved because a chancery court lacked jurisdiction to hear such disputes since its power was limited to the system of justice administered by England's high court of chancery. In re Bell, 962 So. 2d 537 (Miss. 2007).

Finding in favor of the grower in an action involving a breach of contract was inappropriate because having the claims adjudicated in chancery court would have deprived the furnisher of the right to a jury trial, and thus the chancellor erred in failing to transfer the matter to circuit court; further, the supreme court had held that breach of contract issues were best heard in the circuit court. Tyson Breeders, Inc. v. Harrison, 940 So. 2d 230 (Miss. 2006), remanded en banc by 91 So. 3d 41, 2011 Miss. App. LEXIS 395 (Miss. Ct. App. 2011).

Order for the Department of Human Services (MDHS) to return funds garnished from the father for child support was improper pursuant to Miss. Const. art. 6, § 159(b) because chancery courts had continuous and exclusive jurisdiction over custody proceedings. The MDHS collected the father's wages pursuant to a valid order and the youth court had no authority pursuant to Miss. Code Ann. § 43-21-151 to terminate the father's child support obligations. Dep't of Human Servs. v. Blount, 913 So. 2d 326 (Miss. Ct. App. 2005).

Appeals of state board and agency decisions under Miss. Code Ann. § 37-9-113 generally fell under the constitutional purview of "matters in equity;" review of board and agency decisions (and, in particular, school board decisions) fell under the scope of those matters in equity which Miss. Const. art. 6, § 159 permitted chancery courts to hear; the chancellor erred in concluding otherwise. Lawrence County Sch. Dist. v. Bowden, 912 So. 2d 898 (Miss. 2005).

Chancellor erred in denying a motion to transfer a case to the circuit court because the action in the chancery court sounded in contract instead of equity, the same parties and issues were involved in a previously filed action that was then pending in the circuit court, and the equity action should have been filed as a counterclaim in the circuit court action. Copiah Med. Assocs. v. Miss. Baptist Health Sys., 898 So. 2d 656 (Miss. 2005).

Clearly, this breach of contract case should have been brought in the circuit court rather than chancery court and an interlocutory appeal was the proper procedure for resolving the jurisdictional issue. Copiah Med. Assocs. v. Miss. Baptist Health Sys., — So. 2d —, 2004 Miss. LEXIS 463 (Miss. May 6, 2004), opinion withdrawn by, substituted opinion at, remanded by 898 So. 2d 656, 2005 Miss. LEXIS 259 (Miss. 2005).

Beneficiaries' complaint focused on the administration of the trust, and they had labeled their claims as negligence, breach of contract, breach of fiduciary duty, and gross negligence; however, the bank's actions or inactions that were at issue arose solely from its capacity as trustee and any duty it might have had arose from its appointment as trustee, such that because the action sought to interpret the trustee's obligations under the terms of the trust, the trust was under the exclusive jurisdiction of the Warren County Chancery Court and had been since its inception. Trustmark Nat'l Bank v. Johnson, 865 So. 2d 1148 (Miss. 2004).

Chancery court lacked subject matter jurisdiction to consider the individuals' claims brought pursuant to the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. against the Mississippi Municipality Liability Plan, for injuries suffered as the result of a motor vehicle accident with a city police officer, as Miss. Const. Art. 6, §§ 159 & 161 did not include actions under the MTCA; rather, the circuit court had jurisdiction over the matter pursuant to Miss. Const. Art. 6, § 156. Miss. Mun. Liab. Plan v. Jordan, 863 So. 2d 934 (Miss. 2003).

Chancery courts were courts of limited jurisdiction and circuit courts were courts of general jurisdiction, having original jurisdiction in all matters civil and criminal in the state not vested in another court. Lawrence County Sch. Dist. v. Brister, 823 So. 2d 459 (Miss. 2001).

The circuit court, rather than the chancery court, had jurisdiction over a tort action for intentional infliction of emotional distress. Little v. Collier, 759 So. 2d 454 (Miss. Ct. App. 2000).

A personal injury action arising out of an automobile accident was outside the subject matter jurisdiction of the chancery court although it was alleged that full, adequate and expeditious relief could not be granted by a circuit court and the expenses for discovery required in circuit court would be exorbitant, time consuming and inadequate. Blackledge v. Scott, 530 So. 2d 1363 (Miss. 1988).

The Chancery Court had jurisdiction to hear an adoption action even though the Youth Court had previously assumed jurisdiction of the minors involved as neglected children; although the Youth Court's jurisdiction continued for the offense and for the purpose of the "neglected or abused" subject matter, the jurisdiction did not act to exclude the adoption proceeding in the Chancery Court, since it constituted a different subject matter. Prante v. Beggiani, 519 So. 2d 1208 (Miss. 1988).

Unless some property rights are involved, civil courts have no jurisdiction over ecclesiastical controversy and are without jurisdiction to decide who is, or who ought to be, presiding bishop of diocese. Trapani v. State ex rel. Dist. Att'y Maples, 44 So. 2d 52 (Miss. 1950).

Provision in church manual permitting bishops to retain 10% of all monies raised by them in their respective dioceses does not give an ousted bishop such property rights in monies raised by his successor in diocese as to entitle him to invoke jurisdiction of civil courts as to the 10% claimed by him. Trapani v. State ex rel. Dist. Att'y Maples, 44 So. 2d 52 (Miss. 1950).

Landowners, joining in equity suit to abate common nuisance and for damages, have right to have their controversy adjudicated in court of competent jurisdiction, and chancery court in which suit was brought has jurisdiction to proceed, after settlement of suit on abatement of nuisance issue, to full and complete determination of all remaining issues, even though they may cover only legal rights and require granting of none but legal remedies. McClendon v. Mississippi State Hwy. Comm'n, 205 Miss. 71, 38 So. 2d 325 (1949).

The Constitution vests in the chancery court whole and complete jurisdiction of all matters named in this section, among which are matters testamentary and of administration, minors' business, and all matters in equity, and indicate that where a court takes hold of the subject, it should dispose of it fully and finally. Newsom v. Federal Land Bank, 184 Miss. 318, 185 So. 595 (1939).

Under our system of jurisprudence, the chancery courts have only such jurisdiction as was conferred by the Constitution, all other jurisdiction both civil and criminal not vested by the Constitution in some other court is vested in the circuit courts. Barnes v. McLeod, 165 Miss. 437, 140 So. 740 (1932).

2. Powers of Legislature.

The statutes which give the state a power to enjoin operation of gaming devices and also give the state power to abate by injunction the sale of liquor are not invalid and unconstitutional because they constitute an attempt to confer upon the chancery court criminal jurisdiction. Brooks v. State ex rel. Alexander, 219 Miss. 262, 68 So. 2d 461 (1953).

The legislature may add new equity powers to those established by the Constitution, but it cannot by statute subtract from such constitutional powers. Davis v. Davis, 194 Miss. 343, 12 So. 2d 435 (1943).

The legislature may confer on the chancery court jurisdiction of legal matters in aid of its authority over the principal matter of an equitable nature. Bank of Miss. v. Duncan, 52 Miss. 740 (1876); Buie v. Pollock, 55 Miss. 309 (1877).

3. Full jurisdiction.

Land company sought declaratory and injunctive relief against a county; the county alleged that it was entitled to damages because the land company violated ordinances. Jurisdiction was proper in the chancery court; if an ordinance applied to the land company, the issue of damages could be decided by the chancellor. Issaquena Warren Counties Land Co., LLC v. Warren County, 996 So. 2d 747 (Miss. 2008).

"Full jurisdiction" indicates that where a court takes hold of a subject it ought to dispose of it fully and finally. Bank of Miss. v. Duncan, 52 Miss. 740 (1876); Georgia P.R. Co. v. Brooks, 66 Miss. 583, 6 So. 467 (1889); Eyrich v. Capital State Bank, 67 Miss. 60, 6 So. 615 (1889).

4. Concurrent federal jurisdiction.

A chancery court abused its discretion in overruling taxpayers' motion for leave to amend their complaint to assert a 42 USCS § 1983 equal protection claim since state courts have concurrent jurisdiction with the federal courts over claims brought under § 1983 for violations of rights secured by the Constitution and laws of the United States, the federal judiciary had declared that it had no subject matter jurisdiction, and justice demanded that the taxpayers' justiciable claim be heard and decided on its merits. Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

State and federal courts have concurrent jurisdiction of suits of civil nature arising under Constitution and laws of United States, save in exceptional instances where jurisdiction has been restricted by Congress to federal courts. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

Circuit court and chancery court to which suit was transferred were courts of competent jurisdiction to adjudicate litigation against Federal Housing Authority under Contract Settlement Act of 1944, 41 USCS §§ 101 et seq., and Government Corporation Control Act of 1945, 31 USCS § 846, and Federal Public Housing Authority is suable in Mississippi courts. Walsh Constr. Co. v. Davis, 204 Miss. 509, 37 So. 2d 757 (1948).

5. All matters in equity—In general.

Circuit court had subject matter jurisdiction under Miss. Const. Art. 6, § 156 to hear a breach of contract case arising from a creditor's failure to rectify an incorrect deed description in a timely manner because it could have heard equitable claims connected to a contractual relationship, despite the jurisdiction of the chancery courts. Indymac Bank, F.S.B. v. Young, 966 So. 2d 1286 (Miss. Ct. App. 2007).

In an action relating to waste disposal, a transfer to a chancery court was improper because equitable claims were not added until after the transfer, and the action had been pending in the circuit court for five years before the transfer was requested. Georgia-Pacific Corp. v. Mooney, 909 So. 2d 1081 (Miss. 2005).

Jurisdiction of the chancery court is limited to specific areas; the chancellor should have transferred the insureds' case to the circuit court because it arose from the sale and alleged breach of an insurance contract, and would have been more appropriately heard in a circuit court than in chancery court. Union Nat'l Life Ins. Co. v. Crosby, 870 So. 2d 1175 (Miss. 2004).

Because the only claim for equitable relief in a negligence action brought under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23, was a request for an accounting, the proper jurisdiction was in a circuit court, and not in chancery court. City of Ridgeland v. Fowler, 846 So. 2d 210 (Miss. 2003).

Where a nursing professor established a fiduciary relationship with a former employer, and the former employer had control of all the financial information involved in the relationship, a chancery court could properly order an accounting. Univ. Nursing Assocs., PLLC v. Phillips, 842 So. 2d 1270 (Miss. 2003).

A lawsuit alleging that the defendant breached a contract to sell a mobile home to the plaintiffs and then improperly refused to return the plaintiffs' down payment, in which the plaintiffs sought $10,000.00 in actual damages and $100,000.00 in punitive damages, was essentially a breach of contract claim which should have been heard in circuit court, rather than in chancery court. Southern Leisure Homes, Inc. v. Hardin, 742 So. 2d 1088 (Miss. 1999).

Section 65-7-201's procedure for establishing a private right-of-way is not a complete and adequate alternative remedy to the recognition and enforcement of an easement of way by necessity; thus, § 65-7-201 was not a bar to the chancery court's granting of equitable relief in establishing an easement by necessity. Broadhead v. Terpening, 611 So. 2d 949 (Miss. 1992).

While partnership assets may be tangible property, the partnership interest being litigated upon dissolution of the partnership constitutes intangible personal property and, therefore, an action to dissolve a partnership is an action over personal property; thus, a chancery court may properly hear a case for the dissolution and accounting of a partnership. Crowe v. Smith, 603 So. 2d 301 (Miss. 1992).

A claim for specific performance of contract of employment plus attendant injunctive relief is within the jurisdiction of the county court on its equity side, and is also within the jurisdiction of the chancery court. Lee v. Coahoma Opportunities, Inc., 485 So. 2d 293 (Miss. 1986).

The Workmen's Compensation Commission is without jurisdiction to order the reformation of an insurance policy, with a view to bringing a claimant within its coverage. Herrin v. Alan Wetzel Lumber Co., 244 Miss. 673, 145 So. 2d 690 (1962).

There is no limitation on the power of the chancery court in equity matters except that the rights enforced or to be protected must come within the province and policy of remedial justice, and be a matter involving civil rights or property. Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1955), error overruled, 224 Miss. 558, 81 So. 2d 695 (1955).

Jurisdiction of court of equity to relieve against fraud and its legal equivalent with respect to judgments and decrees is as ample as that respecting contracts, dominant requirements being that facts constituting fraud, accident, mistake or surprise must have been controlling factors in effectuation of original decree, without which original decree would not have been made as it was made; facts justifying relief must be clearly and positively alleged as facts and must be clearly and convincingly proved; facts must not have been known to injured party at time of original decree, and his ignorance at time must not have been result of want of reasonable care and diligence. Van Norman v. Van Norman, 205 Miss. 114, 38 So. 2d 452 (1949).

Chancery court having taken jurisdiction on any ground of equity will administer full relief, although ground of equity fails under proof and remaining issues present legal subjects only and decree will cover only legal rights and grant legal remedies. McClendon v. Mississippi State Hwy. Comm'n, 205 Miss. 71, 38 So. 2d 325 (1949).

In suit to recover damages for cutting and conversion of trees, involving boundary dispute, circuit court did not err in refusing to transfer cause to chancery court, since the ascertainment of boundaries alone does not confer jurisdiction as a separate ground of equity. Wroten v. Fenn, 203 Miss. 361, 35 So. 2d 534 (1948).

County courts may exercise equity jurisdiction as an inferior court of equity under § 172 of the Constitution, notwithstanding that § 159 of the Constitution confers full jurisdiction in equity matters on chancery courts. W. Horace Williams Co. v. Federal Credit Co., 198 Miss. 111, 21 So. 2d 582 (1945).

Where realty of nonresident defendant was not seized, court was without jurisdiction of suit against defendant for breach of contract to sell realty. Aldridge v. First Nat'l Bank, 165 Miss. 1, 144 So. 469 (1932).

Equity is defined to be that system of justice which was administered by the high court of chancery in England. Smith v. Everett, 50 Miss. 575 (1874).

As a matter of necessity, in order to ascertain the boundaries of the jurisdiction of the courts, reference must be had to the system of jurisprudence prevalent at the time the Constitution was adopted, and to the legislation of the state, with a view to which the framers of the Constitution must be understood to have acted. Servis v. Beatty, 32 Miss. 52 (1856).

6. Injunctive relief, all matters in equity.

The chancery court has the power and authority to enjoin parties for violations of zoning ordinances and subdivision ordinances. Johnson v. Hinds County, 524 So. 2d 947 (Miss. 1988).

State of Mississippi, through its courts by injunctive process, can protect persons and properties in this state from damage by violence and from fear through threats and intimidation. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

Right to injunctive relief is basic ground of jurisdiction of court of equity, particularly when it comes to enjoining repeated and continuing trespass to property, where actions at law would entail multiplicity of suits and where damages would be irreparable. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

State chancery court has jurisdiction to issue injunction on behalf of bus company engaged in interstate and intrastate commerce against labor union and its members to enjoin use of violence, force, intimidation, and coercion during labor dispute. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

Jurisdiction of court of equity may be invoked by one being picketed for injunctive relief against mass picketing, which is use of large number of pickets, and is not peaceable picketing, and is illegal. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

Equity has jurisdiction, on grounds of injunctive relief and to prevent multiplicity of suits, of suit filed by a number of landowners against State Highway Commission for injunction to restrain continuation by defendant of common nuisance caused by obstruction of watercourse through respective lands of plaintiffs and for damages done to their crops and lands. McClendon v. Mississippi State Hwy. Comm'n, 205 Miss. 71, 38 So. 2d 325 (1949).

7. Divorce and alimony.

As a wife's conversion claim against her husband was really a request for a award of marital assets that ordinarily would be distributed in the divorce action, the circuit court erred in denying the husband's motion to transfer that claim to the parties' divorce action which was pending in chancery court. Germany v. Germany, 123 So. 3d 423 (Miss. 2013).

Wife's claims against her husband which she brought in circuit court that were more closely related to the parties' marital relationship and financial affairs had to be decided in chancery court; her claims against him for intentional and negligent infliction of emotional distress, along with her alienation of affection claims against his alleged paramour, were purely legal and were properly before the circuit court. Germany v. Germany, 123 So. 3d 423 (Miss. 2013).

Circuit court erred in denying a husband's motion to transfer his wife's claim for unjust enrichment to the parties' divorce action which was pending in chancery court, because 1) it was an equitable claim, and 2) to allow her to pursue that claim in circuit court could lead to a double recovery if she was awarded alimony by the chancery court. Germany v. Germany, 123 So. 3d 423 (Miss. 2013).

As the substance of a wife's breach-of-contract and fraud claims against her husband was related to divorce and alimony, the circuit court erred in denying the husband's motion to transfer those claims to the parties' divorce action which was pending in chancery court. Germany v. Germany, 123 So. 3d 423 (Miss. 2013).

A chancery court abused its discretion in exercising jurisdiction over a divorce action brought by the wife where a divorce had been granted by a Maine court in an action filed by the husband; the wife was estopped from asserting the invalidity of the Maine decree since she remarried soon after the decree became final, thereby indicating her reliance on its validity. Scribner v. Scribner, 556 So. 2d 350 (Miss. 1990).

The chancery court in which a divorce decree was entered and under which the defendant was required to give bond to secure his performance of the child support provision of the decree has jurisdiction to render judgment against the sureties on the bond upon breach of condition by the defendant. Box v. McKnight, 215 So. 2d 409 (Miss. 1968).

A proceeding for the enforcement of a performance bond for child support could be heard by the chancellor in vacation in chambers outside the county in which the divorce decree requiring the bond was entered, but within the same chancery court district. Box v. McKnight, 215 So. 2d 409 (Miss. 1968).

On taking jurisdiction of a divorce action in which one of the parties is a mentally incompetent wife confined to an institution, the chancery court is acting in a dual constitutional capacity, as trier of the action for divorce, and as superior guardian of a person of unsound mind.

Klumb v. Klumb, 194 So. 2d 221 (Miss. 1967).

When acting in the dual constitutional capacity of trier of divorce actions and as superior guardian of persons of unsound mind, it is the duty and responsibility of the chancellor to see that a mentally incompetent wife is supported and maintained during the remainder of her natural life. Klumb v. Klumb, 194 So. 2d 221 (Miss. 1967).

The chancery court of the proper county may, in a proceeding by a mother having custody of a minor child, award judgment against the father for the child's support and education, notwithstanding the parents are divorced and the divorce decree made no provision for such allowance. Hill v. Briggs, 236 Miss. 43, 109 So. 2d 349 (1959).

County court to which circuit court has transferred criminal case for trial has right to proceed with prosecution of father for desertion and failure to support child although chancery court had acquired jurisdiction in matter prior to commencement of prosecution through divorce action brought by mother against father. Williams v. State, 207 Miss. 816, 43 So. 2d 389 (1949), overruled on other grounds, Lenoir v. State, 237 Miss. 620, 115 So. 2d 731 (1959).

Chancery court is court of general jurisdiction with jurisdiction of divorce proceedings. Kirby v. Kent, 172 Miss. 457, 160 So. 569, 99 A.L.R. 1303 (1935).

Suit by divorced wife against husband to recover moneys expended for maintenance, etc., of son was one of equitable cognizance. Schneider v. Schneider, 155 Miss. 621, 125 So. 91 (1929).

Chancery court may enforce another state's decree for alimony by contempt proceedings and other legal methods. Fanchier v. Gammill, 155 Miss. 316, 124 So. 365 (1929).

8. Custody of children.

Father's failure to provide information as required by the Uniform Child Custody Jurisdiction and Enforcement Act, Miss. Code Ann. § 93-27-209, did not deprive the chancery court of jurisdiction over a modification of custody action because the issue was not jurisdictional and was within the sound discretion of the chancellor; the chancery court's jurisdiction is set by the Mississippi Constitution, Miss. Const. Art. VI, § 159, and cannot be diminished by statute, and the plain language of § 93-27-209(2) provides that, in the event the required disclosures are not filed, the court "may" stay the proceeding. White v. White, 26 So. 3d 342 (Miss. 2010).

County youth court did not err in transferring what was a child custody case to the county chancery court, as the mother's allegation that her 10-month-old child was in need of supervision was insufficient to show the child was in need of supervision under the relevant statute, Miss. Code Ann. § 43-21-105(k), which required a child in need of supervision to have at least reached his seventh birthday; since there were also no allegations of abuse or neglect of the child, the case was a child custody case that fell under the jurisdiction of the county chancery court. In re L.D.M, 910 So. 2d 522 (Miss. 2005).

Where the family court had entered an order on paternity, child support, and custody, but the family court was abolished in 1999, and the father later sought to modify the order, the appellate court held the original paternity action could not have been brought in youth court. No allegations of abuse, neglect, or delinquency had been asserted, thus the matter was not one for which the youth court had been granted jurisdiction, and the matter was remanded for transfer to the chancery court. Helmert v. Biffany, 842 So. 2d 1287 (Miss. 2003).

The youth court had exclusive jurisdiction to determine custody and visitation rights with respect to an abused child even though the youth court order was in direct conflict with a chancery court order in the parents' divorce proceedings which were being conducted concurrently with the youth court proceedings. DeLee v. Wilkinson County, 606 So. 2d 1125 (Miss. 1992).

Continuing and exclusive nature of chancery court jurisdiction over issues involving child custody precludes Youth Court from having exclusive original jurisdiction over proceedings involving abused child, where allegations of abuse are raised in context of custody proceeding over which chancery court already exercises jurisdiction. Rights of minor child suspected of having been sexually abused by parent, to access to court, were not impaired by chancery court's considering allegations of sexual abuse without referring matter to Youth Court; minor was not deprived of procedural due process by alleged failure of officials to follow investigatory procedures set forth in Mississippi Youth Court Law, because of assertion of jurisdiction by chancery court; and even though Youth Court statute provided for exercise of exclusive jurisdiction over child abuse cases, such provision was not applicable to charges raised in case over which chancery court had already assumed and was exercising jurisdiction. Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare, 780 F. Supp. 1104 (S.D. Miss. 1991), aff'd in part, rev'd on other grounds, 995 F.2d 595 (5th Cir. 1993), reh'g denied, 3 F.3d 441 (5th Cir. 1993), cert. denied, 510 U.S. 1214, 114 S. Ct. 1336, 127 L. Ed. 2d 684 (1994).

Chancery court has exclusive and continuing jurisdiction over custody proceedings, and may issue subsequent modifications to one of its decrees as material change in circumstances may warrant. Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare, 780 F. Supp. 1104 (S.D. Miss. 1991), aff'd in part, rev'd on other grounds, 995 F.2d 595 (5th Cir. 1993), reh'g denied, 3 F.3d 441 (5th Cir. 1993), cert. denied, 510 U.S. 1214, 114 S. Ct. 1336, 127 L. Ed. 2d 684 (1994).

While the general rule is that in order for a decree or judgment awarding the custody of children to be valid, the child or children must be within the territorial jurisdiction of the court, their removal from the jurisdiction prior to decree after the court has once acquired jurisdiction of such children does not deprive the court of jurisdiction to fix their custody. Cole v. Cole, 194 Miss. 292, 12 So. 2d 425 (1943), infra, this section.

9. Bastardy proceedings.

Chancery Courts have general jurisdiction over bastardy proceedings, for the main purposes of such proceedings are to provide support and education for bastard children, to prevent such children from becoming public charges, and to provide the mother assistance in discharging her duty to support and educate such children. Sturdivant v. Henderson, 186 So. 2d 478 (Miss. 1966).

The reasonableness of any fee paid to the mother's attorney in a bastardy proceeding would be a matter for the sound discretion of the chancellor, should such question be properly raised. Sturdivant v. Henderson, 186 So. 2d 478 (Miss. 1966).

10. Testamentary and administration matters.

Forum county pursuant to Miss. Const. Art. VI, § 159 had full jurisdiction over admission of the testator's will to probate. Indeed, under that constitutional provision it had full jurisdiction over matters testamentary and of administration, and the forum county under Miss. Code Ann. § 91-7-1 was the proper location to hear probate matters concerning the testator's estate because the testator at the time of his death had a fixed residence in the forum county. Ellzey v. McCormick, 17 So. 3d 583 (Miss. Ct. App. 2009).

As decedent's will was not a foreign will, but a domestic will, sounding in Mississippi law, executed by the decedent in Mississippi where he had resided in a residential care facility for 25 years, and where he died, the trial court properly determined that it had subject matter jurisdiction to probate the will under Miss. Code Ann. § 91-7-1. Estate of Kelly v. Cuevas, 951 So. 2d 543 (Miss. 2007).

Chancery court had full jurisdiction over probate of the will of nondomiciliary where decedent, after living in a Mississippi county for more than 30 years, had at least acquired some clothing or other personal property in the county in which he died. In re Estate of Kelly v. Cuevas, 951 So. 2d 564 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

Fraudulent orders of a chancellor may be reviewed in a circuit court criminal trial, notwithstanding the argument that such review is barred by collateral estoppel, immunity of the guardian ad litem, or because a chancery court may have jurisdiction over a civil matter. Farris v. State, 764 So. 2d 411 (Miss. 2000).

While it is true that the constitution vests exclusive jurisdiction of conservatorships in the chancery court, Article 6, § 156 also vests original jurisdiction for criminal matters in the circuit court; thus, the vesting of jurisdiction for conservatorships in chancery court does not preclude circuit court jurisdiction for criminal matters that happen to coincide with civil matters in chancery court, regardless of whether those criminal matters happen to involve a conservator, guardian ad litem, or even a chancellor. To hold otherwise would be to allow chancellors and unethical chancery practitioners insulation under Article 6, § 159, safe in the knowledge that their actions, however corrupt or criminal, could not be reviewed under the circuit court's original jurisdiction of criminal matters in Article 6, § 156. Farris v. State, 764 So. 2d 411 (Miss. 2000).

Although Constitution 1890 §§ 159(a), 159(c) vest chancery court with jurisdiction in all matters of equity and matters testamentary and of administration, implementation of such constitutional provision by statutory enactment for jury trials does not lessen or contravene constitutional grant of equity jurisdiction. Fowler v. Fisher, 353 So. 2d 497 (Miss. 1977).

The fixing of the amount of the widow's allowance by the appraisers is not final, but is subject to approval or disapproval of the chancery court. Beckett v. Howorth, 237 Miss. 394, 115 So. 2d 48 (1959).

Under this provision the chancellor is vested with full authority to allow a fee to the attorney for beneficiaries of a residuary trust created by a will. Beckett v. Howorth, 237 Miss. 394, 115 So. 2d 48 (1959).

A bond may be required of the trustee of a testamentary trust by the court although by the terms of the will the same person served as executor without bond. Beckett v. Howorth, 237 Miss. 394, 115 So. 2d 48 (1959).

Where a will was admitted to probate in the county where the testatrix had had her residence and citizenship, and where the executor of the will was appointed and qualified, the chancery court thereof had jurisdiction and venue of an action to construe the will even though it involved title to real property located in another county. Hutton v. Hutton, 233 Miss. 458, 102 So. 2d 424 (1958).

Chancery court has power under § 520, Code 1942, to continue widow of deceased testator as administratrix for purpose of sale of land to pay debts in absence of sufficient personalty therefor, and failure of the court, after the existence of the will became known, to change the letters of administration granted to widow and sole heir at law to letters as temporary administratrix pending a will contest, did not render the action of the court absolutely void in ordering the land sold by her, but only voidable at most, since the court had constitutional jurisdiction of the subject-matter and jurisdiction of all the parties in interest. Gill v. Johnson, 206 Miss. 707, 40 So. 2d 600 (1949).

The chancery court has full jurisdiction of proceedings against administrators, executors or guardians and sureties, on their bonds, to enforce claims or other liabilities against them. Newsom v. Federal Land Bank, 184 Miss. 318, 185 So. 595 (1939).

The chancery court, in the administration of estates and guardianships, may supervise and inquire into the management thereof. The court need not personally conduct the inquiry, or consult witnesses and prepare the papers necessary to such supervision, but may appoint such assistants as may be required for the proper development and conduct of such cases, under his supervision. Newsom v. Federal Land Bank, 184 Miss. 318, 185 So. 595 (1939).

Making of year's allowance for support of deceased's widow is part of jurisdiction of chancery court, which cannot be taken away nor impaired by legislature, so that authority in appraisers to set aside year's support does not deprive chancellor of authority. Prentiss v. Turner, 170 Miss. 496, 155 So. 214 (1934).

Statute authorizing appraisers to set aside year's support for widow and children of decedent should be construed in light of constitutional provision conferring on chancery courts full jurisdiction of matters testamentary and of administration. Prentiss v. Turner, 170 Miss. 496, 155 So. 214 (1934).

Chancery court, in which administration of decedent's estate was pending, had jurisdiction of action filed therein to collect on a joint and several promissory note against such decedent's estate and another, without regard to the character of the demand asserted against the estate, as one due by the intestate alone or by him jointly with another, the jurisdiction of the court to settle the rights of all parties, in the absence of objection to improper joinder, including a set-off in favor of the estate, being auxiliary and incidental to the administration of the estate. Eyrich v. Capital State Bank, 67 Miss. 60, 6 So. 615 (1889).

11. Minor's business—In general.

The federal Employment Retirement Income Security Act (ERISA) does not preempt state law requiring court approval for contracts affecting a minor's estate with regard to subrogation rights of the ERISA plan to insurance proceeds due the child, since the state law neither directly nor indirectly relates to pension plans, and it addresses an area traditionally regulated by the states; the subject of minors' estates is a matter within the field of domestic relations not governed by ERISA, and state courts have traditionally regulated minors' business pursuant to Article 6, § 159 of the Mississippi Constitution. Cooper Tire & Rubber Co. v. Striplin ex rel. Striplin, 652 So. 2d 1102 (Miss. 1995).

Section 97-5-3 is not an unconstitutional infringement upon chancery court jurisdiction, nor is it imprisonment for debt. The State has a legitimate interest in criminally prosecuting financially able parents who willfully desert or fail to support their children when in destitute or necessitous circumstances. Bryant v. State, 567 So. 2d 234 (Miss. 1990).

The youth court system does not unconstitutionally usurp jurisdiction committed exclusively to the chancery court by permitting the Supreme Court to hear a direct appeal without appeal to the chancery court, even though the Mississippi Constitution provides that the chancery court shall have full jurisdiction over "minor's business." Youth courts are neither superior, equal, or inferior to other "inferior" courts; they are special courts due to the special nature of their function. Thus, the legislature had authority to vest in the youth courts "exclusive original jurisdiction in all proceedings concerning...an abused child," and the social imperative for prompt disposition of matters affecting children is sufficiently within the police power that the legislature may streamline the appellate process. In re T.L.C., 566 So. 2d 691 (Miss. 1990).

The assumption of jurisdiction by the chancery court over a minor's tort claim improperly deprived the defendant of his right to a trial by jury; however, absent other error, such improper exercise of jurisdiction over a matter not involving equitable relief was not reversible error. Louisville & N.R. Co. v. Hasty, 360 So. 2d 925 (Miss. 1978), cert. denied, 439 U.S. 1003, 99 S. Ct. 614, 58 L. Ed. 2d 679 (1978).

The chancery court erred in assuming jurisdiction over a personal injury action by two minors arising out of an automobile accident, notwithstanding ordinary chancery court jurisdiction over a minor's business under Constitution 1890 § 159(d), where no equitable relief was involved or required; however, Constitution 1890 § 147 prevents reversal solely on the ground of want of jurisdiction, even though the wrongful assertion of equitable jurisdiction deprives the parties of the right to trial by jury as guaranteed under Constitution 1890 § 31. McLean v. Green, 352 So. 2d 1312 (Miss. 1977).

The chancery courts in exercising jurisdiction over guardianships of minors and incompetents and their business have general and constitutional jurisdiction, and all facts necessary to sustain the jurisdiction or decrees of such courts are presumed to exist until the contrary appears in the record. Majors v. Purnell's Pride, Inc., 360 F. Supp. 328 (N.D. Miss. 1973).

Where chancellor had jurisdiction of minor heirs and subject-matter in administratrix's petition for leave to sell, any defects in process and insufficiency of time held not to prevent application of two years' limitations. Neely v. Craig, 162 Miss. 712, 139 So. 835 (1932).

Chancery court has full power to sell property for reinvestment for infant owners. Neely v. Craig, 162 Miss. 712, 139 So. 835 (1932).

Although jurisdiction of minor's business is by this section conferred on the chancery court, it still pertains to the legislature as parens patriae to prescribe rules and regulations for the management, superintendence, and disposition of the property of those under disability. Louisville, N.O. & T. Ry. v. Blythe, 69 Miss. 939, 11 So. 111, 30 Am. St. R. 599 (1892).

The jurisdiction of the chancery court extends to the allowance of an attorney's fee out of an infant's estate for services rendered in the recovery of the estate. Epperson v. Nugent, 57 Miss. 45, 34 Am. R. 434 (1879).

A court of chancery has jurisdiction to decree an account for profits and rents of land against a disseizor, where the complainants, or some of them, are infants. Carmichael v. Hunter, 5 Miss. (4 Howard) 308 (1840); Wathen v. Glass, 54 Miss. 382, 1877.

12. Appointment and removal of guardians, minor's business.

Chancery court has full jurisdiction in matters of appointment and removal of guardians. Coglan v. Coglan, 196 Miss. 492, 18 So. 2d 149 (1944).

Chancery court in exercising its jurisdiction over guardianships and minors has general and constitutional jurisdiction, and all facts necessary to sustain jurisdiction or decrees of the chancery court are presumed to exist until the contrary appears in the record. Coglan v. Coglan, 196 Miss. 492, 18 So. 2d 149 (1944).

When chancery court has appointed a guardian over a minor, the latter becomes the ward of the court and thereafter no other tribunal has any original jurisdiction to interfere with the custody covered by the decree. Coglan v. Coglan, 196 Miss. 492, 18 So. 2d 149 (1944).

A guardian of the person of a minor may be appointed under some circumstances even when the minor has a living parent. Coglan v. Coglan, 196 Miss. 492, 18 So. 2d 149 (1944).

Chancery court which appointed a guardian of minors has exclusive original jurisdiction to determine whether the appointing decree should have been made or whether there has been a change of circumstances to justify removal of the guardian and award custody to the mother, and circuit court has no jurisdiction to entertain mother's petition in habeas corpus to obtain custody of the minors. Coglan v. Coglan, 196 Miss. 492, 18 So. 2d 149 (1944).

13. Removal of disabilities of minority, minor's business.

Chancery court, in proceeding to remove disabilities of minority, acts as court of special and limited jurisdiction, and all jurisdictional facts must appear of record. Dyer v. Russell, 204 Miss. 719, 38 So. 2d 104 (1948).

Decree of chancery court, in proceeding to remove disabilities of minority, is valid though failure to recite jurisdictional facts when allegations of petition show basis of jurisdiction of court to act, as petition on which judicial court acts as part of record of that proceeding. Dyer v. Russell, 204 Miss. 719, 38 So. 2d 104 (1948).

Question of whether chancery court has full or general jurisdiction of proceedings to remove disabilities of minority under § 159(f), Constitution of 1890, because chancery court was invested with jurisdiction for removal of disabilities of minority when Constitution became effective will not be passed on by Supreme Court when another decisive question will dispose of case. Dyer v. Russell, 204 Miss. 719, 38 So. 2d 104 (1948).

14. Mental incompetents.

On taking jurisdiction of a divorce action in which one of the parties is a mentally incompetent wife confined to an institution, the chancery court is acting in a dual constitutional capacity, as trier of the action for divorce, and as superior guardian of a person of unsound mind. Klumb v. Klumb, 194 So. 2d 221 (Miss. 1967).

When acting in the dual constitutional capacity of trier of divorce actions and as superior guardian of persons of unsound mind, it is the duty and responsibility of the chancellor to see that a mentally incompetent wife is supported and maintained during the remainder of her natural life. Klumb v. Klumb, 194 So. 2d 221 (Miss. 1967).

The chancellor has full authority to direct the guardian of an incompetent adult war veteran to change the beneficiary in a National Service Life Insurance policy. United States v. Tighe, 229 F. Supp. 680 (S.D. Miss. 1964).

This provision does not preclude the legislature from prescribing the conditions under which matters in equity and the business of incompetent persons may be administered. Jones' Estate v. Culley, 242 Miss. 822, 134 So. 2d 723 (1961).

A court of chancery has jurisdiction on behalf of a person non compos mentis to entertain a suit to recover rents and profits of his land against a disseizor. Kiernan v. Cameron, 66 Miss. 442, 6 So. 206 (1889).

15. Other matters as to which chancery courts had jurisdiction at adoption of Constitution.

In view of paragraph (f) hereunder, and § 160 of the Constitution, infra, and the fact that by force of statute when the Constitution became operative, chancery courts had jurisdiction to cancel clouds upon title to land whether the complainant was in or out of possession, and whether the instrument assailed was in the form of a legal or equitable title, a complainant who has appealed from a decree denying his right to cancel his adversary's title to the land may, although his legal title has not been established by action, enjoin his adversary, in possession and claiming adversely, if insolvent, from cutting timber thereon, the timber constituting its chief value. Woods v. Riley, 72 Miss. 73, 18 So. 384 (1894).

This provision of this section confirmed in the chancery court jurisdiction of bills by creditors without judgments to vacate fraudulent conveyances or set aside other devices designed to hinder, delay and defraud creditors conferred under § 1843, Code 1880; and such jurisdiction is not affected by § 31 of the Constitution, supra. McBride v. Adams, 70 Miss. 716, 12 So. 699 (1893).

RESEARCH REFERENCES

ALR. Power to confer original jurisdiction on courts to revoke or suspend public license. 168 A.L.R. 826.

Jurisdiction of equity to protect personal rights; modern view. 175 A.L.R. 438.

Validity and construction of statutory provision relating to jurisdiction of court for purpose of divorce for servicemen. 73 A.L.R.3d 431.

Am Jur. 27 Am. Jur. 2d, Equity §§ 70, 83 et seq.

CJS. C.J.S. Children Out-of-Wedlock §§ 47, 83.

C.J.S. Courts § 249.

C.J.S. Divorce §§ 223 to 225.

C.J.S. Equity §§ 2 to 16, 35 to 92.

C.J.S. Infants §§ 24, 25, 46-48, 319.

C.J.S. Wills §§ 524-528.

Law Reviews. 1981 Mississippi Supreme Court Review: Civil Procedure. 52 Miss. L. J. 399, June 1982.

Comment: Changing Jurisdiction in Chancery Court, 25 Miss. C. L. Rev. 109, Fall, 2005.

§ 160. Additional jurisdiction of chancery court

And in addition to the jurisdiction heretofore exercised by the chancery court in suits to try title and to cancel deeds and other clouds upon title to real estate, it shall have jurisdiction in such cases to decree possession, and to displace possession; to decree rents and compensation for improvements and taxes; and in all cases where said court heretofore exercised jurisdiction, auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by a suit at law.

Cross References — Jurisdiction, powers and authority of chancery courts generally, see § 9-5-81 et seq.

Practice and procedure in chancery court generally, see § 11-5-1 et seq.

JUDICIAL DECISIONS

1. In general.
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1. In general.

Where appellant filed an appeal of the chancery court's order finding a prescriptive easement across his property for an access road, there was no justifiable basis for appellant's argument that a chancery court did not have jurisdiction over matters involving property; such authority was conferred by Miss. Const. Art. 6, § 160, history, and precedent. Graves v. Dudley Maples, L.P., 950 So. 2d 1017 (Miss. 2007).

Although statutory mechanisms for establishing public roads are provided for in the Mississippi Code, they do not impinge on equitable remedies available in our chancery courts, such as ways of necessity and prescriptive easements. Rogers v. Marlin, 754 So. 2d 1267 (Miss. Ct. App. 1999).

Where the value of real property subject to future interests of remaindermen was appreciating, it would be improper for the chancery court to order sale of the entire property except for the home site on which the life tenant lived to relieve the economic distress of the life tenant, in that such sale would cause great financial loss to the remaindermen, but the chancery court would have continuing jurisdiction to order a sale of part of the land and the investment of the proceeds to provide for the reasonable needs of the life tenant, such sale to be made only in the event the parties could not unite to hypothecate the land for sufficient funds to meet the reasonable needs of the life tenant. Baker v. Weedon, 262 So. 2d 641 (Miss. 1972).

The chancery court did not err in cancelling a deed executed by a 77-year-old widow, enfeebled by cerebral insufficiency, whereby she conveyed real property, reserving to herself a life estate, of the value of $35,000 to her late husband's nephew for a consideration of $10 and some past favors not shown to be of particular monetary value. Kemp v. Kemp, 254 So. 2d 876 (Miss. 1971).

The chancery courts have only such jurisdiction as was conferred by the Constitution, all other jurisdiction both civil and criminal not vested by the Constitution in some other court is vested in the circuit courts. Barnes v. McLeod, 165 Miss. 437, 140 So. 740 (1932).

Suit to enjoin county election commissioners from placing Democratic nominee for county office on official ballots for general election because of fraud in primary election is not within jurisdiction of chancery court. Barnes v. McLeod, 165 Miss. 437, 140 So. 740 (1932).

The circuit court having entertained jurisdiction of a case the remedy in which should have been sought, under the section, in the chancery court, its judgment will not be reversed because of § 147 by the Supreme Court. Illinois Cent. R.R. v. Le Blanc, 74 Miss. 650, 21 So. 760 (1897).

The section dispenses with the necessity for exhausting legal remedies before invoking the jurisdiction of equity. Whitney v. Hanover Nat'l Bank, 71 Miss. 1009, 15 So. 33 (1894).

2. Pendent jurisdiction.

If any aspect of a case is within its subject matter jurisdiction, the chancery court has authority to hear and adjudge any non-chancery pure law claims via pendent jurisdiction. Johnson v. Hinds County, 524 So. 2d 947 (Miss. 1988).

3. Actions to cancel title and remove clouds—In general.

In an action for cancellation of an instrument conveying real estate, the fact that the affected land was in another state may make the law of that state controlling but did not, of itself, defeat the subject matter jurisdiction of the Mississippi courts. Anderson v. Sonat Exploration Co., 523 So. 2d 1024 (Miss. 1988).

Chancery Court has jurisdiction to hear and adjudicate controversy involving validity and effect of power of attorney, which has not been acknowledged and recorded in manner of conveyance of land, with respect to conveyance of real property situated in Republic of Greece where all parties reside in Mississippi and have been effectively subjected to in personam jurisdiction of Chancery Court; court may enter personal judgment, even though controlling substantive law is that of Greece; final adjudication would effectively bind parties in Mississippi and presumably in all other states even though adjudication may not be enforceable in Greece as matter of right and maybe not even as matter of comity. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Chancery court is without jurisdiction of bill by owners of land seeking cancellation of claim of State to lands by reason of pretended tax sales as cloud on complainants' title after Land Commissioner, with written approval of Attorney General, acting under § 4073, Code 1942, providing for cancellation of claim of state to lands under tax sales when sales are void, has stricken lands from lists of lands sold to state for delinquent taxes because sales were void, since adjudication sought is, in effect, merely ratification of legal action of a State official, lawfully empowered to act, and statute does not provide for ratification by court. State v. Southern Pine Co., 205 Miss. 80, 38 So. 2d 442 (1949).

Original jurisdiction to make conclusive and final adjudication of title to land rests alone with circuit and chancery courts, and to a limited extent with the county courts. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Supreme Court, circuit courts, chancery courts and county courts, when acting on appeal from a special possessory court of a justice or justices of peace, have only such jurisdiction to adjudicate regarding title to land as is vested in special court from which appeal was taken. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Purchasers from a county cannot defend a suit by the county to cancel their deed, by setting up a defense that the county had no power to acquire the property at the time it purchased it. Jefferson County v. Grafton, 74 Miss. 435, 21 So. 247, 60 Am. St. R. 516 (1897).

Before the expiration of the particular estate, clouds may be removed from the reversionary interest in land by the real owner thereof. Fox v. Coon, 64 Miss. 465, 1 So. 629 (1887).

4. Title, actions to cancel title and remove clouds.

One who seeks cancelation of a cloud upon his title must shown that he is the owner of the land in controversy. People's Bank v. West, 67 Miss. 729, 7 So. 513 (1890).

Complainant must show as perfect a title as would enable him to recover in an action of ejectment. Chiles v. Gallagher, 67 Miss. 413, 7 So. 208 (1889); Wilkinson v. Hiller, 71 Miss. 678, 14 So. 442 (1893).

Where both parties claim under a common source of title, and there is an admission by each that the title was in that source, this is sufficient to uphold the right to the relief of cancelation in that party who proves that he obtained that title, notwithstanding that the other party might have tried the validity of such title in an action of ejectment. People's Bank v. West, 67 Miss. 729, 7 So. 513 (1890).

Complainant must show himself to be the owner in law or in equity of the subject matter in dispute. Hart v. Bloomfield, 66 Miss. 100, 5 So. 620 (1889).

The real owner can file a bill to cancel a paper title, or a bill for protection against a pretense of title. Cook v. Friley, 61 Miss. 1 (1883).

A person holding an equitable title may cancel the legal title in a person estopped to assert it. Shivers v. Simmons, 54 Miss. 520, 28 Am. R. 372 (1877).

A sale of real estate under legal process will be enjoined where the only effect of the sale would be to cast a cloud upon the complainant's title. Irwin v. Lewis, 50 Miss. 363 (1874).

Complainant must show a perfect legal or equitable title, independent of defects in defendant's title, before he can recover. Boyd v. Thornton, 21 Miss. (13 S. & M.) 338 (1850); Toulmin v. Heidelberg, 32 Miss. 268 (1856); Jayne v. Boisgerard, 39 Miss. 796 (1861); Huntington v. Allen, 44 Miss. 654 (1870); Handy v. Noonan, 51 Miss. 166 (1875); Griffin v. Harrison, 52 Miss. 824 (1876); Chiles v. Champenois, 69 Miss. 603, 13 So. 840 (1891); Jones v. Rogers, 85 Miss. 802, 38 So. 742 (1905) (writ of error dismissed in 214 U.S. 196, 53 L. Ed. 965, 29 S. Ct. 635).

5. Possession, actions to cancel title and remove clouds.

Chancery Court is proper forum to hear ejectment proceeding in which sole defense is equitable defense of "fraudulent means." Hudson v. Bank of Edwards, 469 So. 2d 1234 (Miss. 1985).

In view of this section and paragraph (f) of Section 159 of the Constitution, supra, and the fact that by force of statute when the Constitution became operative, chancery courts had jurisdiction to cancel clouds upon title to land whether the complainant was in or out of possession, and whether the instrument assailed was in the form of a legal or equitable title, a complainant who has appealed from a decree denying his right to cancel his adversary's title to the land may, although his legal title has not been established by action, enjoin his adversary, in possession and claiming adversely, if insolvent, from cutting timber thereon, the timber constituting its chief value. Woods v. Riley, 72 Miss. 73, 18 So. 384 (1894).

Chancery court will entertain a bill by the real owner, out of possession, against a person in possession, to cancel a void tax deed and a title bond from one who never had title. Wofford v. Bailey, 57 Miss. 239 (1879).

6. Parties, actions to cancel title and remove clouds.

A mortgagor having no interest in the land is neither a necessary nor proper party to a bill to remove clouds. Illinois Cent. R.R. v. Le Blanc, 74 Miss. 626, 21 So. 748 (1897).

7. Pleading and practice, actions to cancel title and remove clouds.

Defendant in ejectment suit was entitled to maintain a bill to restrain the prosecution of such ejectment suit, although he had legal and equitable defenses thereto, and to have all matters in the controversy adjudicated in order to prevent multiplicity of actions. Hitt v. Terry, 92 Miss. 671, 46 So. 829 (1908), overruled on other grounds, Davion v. Williams, 352 So. 2d 804 (Miss. 1977).

A suit to remove clouds from titles to land filed in the chancery court of the state may be removed into the Federal court, if the citizenship of the parties justifies it. Day v. Oatis, 85 Miss. 128, 37 So. 559 (1904).

Defects in defendant's claim need not be shown by the bill, although it shows the instrument under which he claims. Wildberger v. Puckett, 78 Miss. 650, 29 So. 393 (1901).

Where a bill to quiet title calls for a discovery as to the muniments of defendant's alleged title, the discovery must be made under oath, and defendant's unsworn answer was not evidence. National Bank of Republic v. Louisville, N.O. & T. Ry., 72 Miss. 447, 17 So. 7 (1895).

The particulars of defendant's title need not be set out in the bill which seeks to cancel it. Wright v. Lauderdale County Supvrs., 71 Miss. 800, 15 So. 116 (1894).

Under a contract to convey to himself, a purchaser in possession cannot maintain a bill to cancel the claim of the vendor upon the ground that the statute of limitations has barred recovery of the land, or its price, unless he offers to pay the purchase money and interest due the vendor. Nolan v. Snodgrass, 70 Miss. 794, 12 So. 583 (1893).

Where complainant's title was put in issue by the pleadings in an action to remove clouds, decree on final hearing dismissing the bill because of defect in proof, was conclusive as to subsequent suit involving the same parties and title to the same land. Chiles v. Champenois, 69 Miss. 603, 13 So. 840 (1891).

Allegations in bill were sufficient to show an equitable title entitling complainant to sue to remove a cloud on her title. Williamson v. Louisville, N.O. & T. Ry., 6 So. 205 (Miss. 1889).

The mere allegation that the complainant is the true and equitable owner by purchase from a designated person, whose title is not set out, is insufficient. Harrill v. Robinson, 61 Miss. 153 (1883).

If the object be to cancel a particular evidence of title possessed by defendant, it should be as fully described as known to the pleader. Cook v. Friley, 61 Miss. 1 (1883).

8. Bills of discovery, actions to cancel title and remove clouds.

Bills of discovery are cognizable in equity courts under this section. Callender v. Lamar Life Ins. Co., 182 Miss. 609, 182 So. 119 (1938).

Fact that under statute a party may demand and receive papers and documents from his adversary without necessity of bill of discovery does not deprive the chancery court of jurisdiction of pure bills of discovery. Callender v. Lamar Life Ins. Co., 182 Miss. 609, 182 So. 119 (1938).

Decree rendered on bill of discovery which sought only discovery of life policy was not res judicata on issue of insurer's liability in subsequent suit on policy, which insurer wrongfully claimed to be void. Callender v. Lamar Life Ins. Co., 182 Miss. 609, 182 So. 119 (1938).

The remedy afforded by § 1003, Code 1906 (§ 723, Hemingway's Code) relating to production of evidence by a party litigant is not exclusive but merely cumulative or additional to the remedy of discovery given by law and this section of the Constitution; and the auxiliary jurisdiction of the chancery court to courts of law, as provided by this section, is not repealed by such statute. Citizens' Bank v. Tracy, 120 Miss. 413, 82 So. 307 (1919).

The chancery court having jurisdiction of a bill against a lessee and others to discover the amount of timber wasted and cut by each defendant, can continue its jurisdiction by awarding damages for the timber wasted, though plaintiff could have sued at law therefor. Bomer Bros. v. Warren County, 103 Miss. 343, 60 So. 328 (1913).

A chancery court which has taken jurisdiction for purposes of discovery may grant full relief in the case by authority of this section of the Constitution. Keystone Lumber Yard v. Yazoo & Miss. V.R. Co., 96 Miss. 116, 50 So. 445 (1909); Citizens' Bank v. Tracy, 120 Miss. 413, 82 So. 307 (1919).

9. Accounting, actions to cancel title and remove clouds.

Equity has jurisdiction to compel accounting of the perquisites and emoluments of the sheriff's office at a suit of the rightful claimant, although the title to the office must necessarily be determined in the proceeding, and notwithstanding that quo warranto is ordinarily the proper method to try title to office, since such suit is primarily one for an accounting. Baker v. Nichols, 111 Miss. 673, 72 So. 1 (1916).

RESEARCH REFERENCES

CJS. C.J.S. Cancellation of Instruments.

C.J.S. Rescission § 67.

C.J.S. Quieting Title §§ 57, 90-93.

C.J.S. Venue § 35.

§ 161. Concurrent jurisdiction of chancery and circuit court

And the chancery court shall have jurisdiction, concurrent with the circuit court, of suits on bonds of fiduciaries and public officers for failure to account for money or property received, or wasted or lost by neglect or failure to collect, and of suits involving inquiry into matters of mutual accounts; but if the plaintiff brings his suit in the circuit court, that court may, on application of the defendant, transfer the cause to the chancery court, if it appear that the accounts to be investigated are mutual and complicated.

Cross References — Governor's power of appointment and removal, see Miss. Const. Art. 5, §§ 125 and 139.

Jurisdiction of chancery court generally, see § 9-5-81 et seq.

Jurisdiction of circuit court generally, see § 9-7-81 et seq.

Practice and procedure in chancery court generally, see § 11-5-1 et seq.

Practice and procedure in circuit court generally, see § 11-7-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Bonds of fiduciaries and public officials.
3. Mutual and complicated accounts.

1. In general.

Chancery court lacked subject matter jurisdiction to consider the individuals' claims brought pursuant to the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. against the Mississippi Municipality Liability Plan, for injuries suffered as the result of a motor vehicle accident with a city police officer, as Miss. Const. Art. 6, §§ 159 & 161 did not include actions under the MTCA; rather, the circuit court had jurisdiction over the matter pursuant to Miss. Const. art. 6, § 156. Miss. Mun. Liab. Plan v. Jordan, 863 So. 2d 934 (Miss. 2003).

Chancery court had jurisdiction under this section of suit by district attorney on behalf of county or district thereof against member of board of supervisors of the district and his surety to recover loss resulting from unauthorized use of construction equipment for benefit of private individuals. Moreover, additional basis for chancery jurisdiction, even apart from this constitutional section, existed in prayer for discovery as to the loss, expenses and outlays incurred by rendition of the unauthorized services to the some fourteen named citizens of the county. Shumpert v. Lee County, 197 Miss. 513, 20 So. 2d 82 (1944).

The chancery courts have only such jurisdiction as was conferred by the Constitution, all other jurisdiction both civil and criminal not vested by the Constitution in some other court is vested in the circuit courts. Barnes v. McLeod, 165 Miss. 437, 140 So. 740 (1932).

Suit to enjoin county election commissioners from placing Democratic nominee for county office on official ballots for general election because of fraud in primary election is not within the jurisdiction of chancery court. Barnes v. McLeod, 165 Miss. 437, 140 So. 740 (1932).

2. Bonds of fiduciaries and public officials.

The chancery court has jurisdiction of a suit on the bond of the secretary and treasurer of the Board of Levee Commissioners. Adams v. Williams, 97 Miss. 113, 52 So. 865, Am. Ann. Cas. 1912C,1129 (1910).

The section embraces only fiduciaries of technical trusts, where a bond is required by law, and does not include those engaged in the execution of trusts springing from contract. George D. Barnard & Co. v. Sykes, 72 Miss. 297, 18 So. 450 (1895).

The section does not confer jurisdiction on the chancery court of a suit on the bond of a sheriff to recover damages for an oppressive and grossly excessive levy under an attachment. Cazeneuve v. Curell, 70 Miss. 521, 13 So. 32 (1893).

A chancery court has jurisdiction of a bill to have the bond of a county treasurer reformed so as to make the sureties liable for the proper disbursement of the school funds, where the bond executed was intended by all the parties, including the sureties, as security for all moneys to be received by the officer. Hall v. State, 69 Miss. 529, 13 So. 38 (1891).

3. Mutual and complicated accounts.

Circuit court erred in denying a husband's motion to transfer his wife's claim for an accounting to the parties' divorce action which was pending in chancery court, because the chancery court had concurrent jurisdiction over that claim and was in a better position to address it; Germany v. Germany, 123 So. 3d 423 (Miss. 2013).

Chancery court had concurrent jurisdiction over a suit by the client of a real estate agency seeking damages and other relief at law based on an alleged failure to properly supervise an employee because the client also made a proper request for an equitable accounting; transfer of the action to a circuit court so that the realtors could try the case to a jury trial was not required because the relators did not have an absolute right to a jury trial in a civil action. RE/Max Real Estate Partners., Inc. v. Lindsley, 840 So. 2d 709 (Miss. 2003).

A court of equity will entertain a suit and enforce double liability of stockholders of insolvent bank in course of liquidation and involving an inquiry into mutual accounts. Abbey v. Delta Bank & Trust Co., 139 Miss. 36, 103 So. 801 (1925).

This section does not authorize a suit for damages caused by the laying of a sidewalk and a change of grade of the street to be brought in the chancery court, where the case does not involve mutual and complicated accounts. Murphy v. City of Meridian, 103 Miss. 110, 60 So. 48 (1912).

An account, though long, consisting merely of debits and credits as between a corporation and its traveling salesman, is not a mutual account within the purview of this section. George D. Barnard & Co. v. Sykes, 72 Miss. 297, 18 So. 450 (1895).

RESEARCH REFERENCES

Am Jur. 22 Am. Jur. Proof of Facts 2d 513, Mutual Account.

CJS. C.J.S. Courts §§ 186 to 187, 193 to 195.

C.J.S. Municipal Corporations § 359.

C.J.S. States §§ 88, 89, 147-150.

Law Reviews. 1981 Mississippi Supreme Court Review: Civil Procedure. 52 Miss. L. J. 399, June 1982.

§ 162. Transfer to circuit court

All causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court.

Cross References — Jurisdiction of circuit court over transferred cases, see § 9-7-83.

JUDICIAL DECISIONS

1. Construction and application.
2. Transfer of causes—In general.
3. — — Duty to transfer causes.
4. — — Erroneous transfer of causes.
5. — — Appeal, transfer of causes.

1. Construction and application.

Causes erroneously brought in chancery court have to be transferred to the appropriate circuit court. Lawrence County Sch. Dist. v. Brister, 823 So. 2d 459 (Miss. 2001).

Mississippi Constitution Article VI, § 147, which precludes reversal of a "judgment or decree" of a chancery or circuit court, applies primarily (although not necessarily exclusively) to final judgments or decrees. Reading § 147 to apply only to final judgments, or cases where, by litigation, a party has gained some other substantial advantage, gives maximum life to Mississippi Constitution Article III, § 31, which provides for the right to trial by jury, and Mississippi Constitution Article VI, § 162, which provides that causes "brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court." Tillotson v. Anders, 551 So. 2d 212 (Miss. 1989).

This constitutional provision is mandatory and applies to appeals from county court. W. Horace Williams Co. v. Federal Credit Co., 198 Miss. 111, 21 So. 2d 582 (1945).

This section is mandatory and the chancery court, in suits of which the circuit court has exclusive jurisdiction, is not authorized to dismiss such suits, but must transfer them. Murphy v. Meridian, 103 Miss. 110, 60 So. 48 (1912); Robertson v. F. Goodman Dry Goods Co., 115 Miss. 210, 76 So. 149 (1917); Grenada Grocery Co. v. Tatum, 113 Miss. 388, 74 So. 286 (1917).

2. Transfer of causes—In general.

Chancellor erred in denying a motion to transfer a case to the circuit court because the suit in the chancery court sounded in contract instead of equity, the same parties and issues were involved in a previously filed action that was then pending in the circuit court, and the equity action should have been filed as a counterclaim in the circuit court action. Copiah Med. Assocs. v. Miss. Baptist Health Sys., 898 So. 2d 656 (Miss. 2005).

Clearly, this breach of contract case should have been brought in the circuit court rather than chancery court and an interlocutory appeal was the proper procedure for resolving the jurisdictional issue. Copiah Med. Assocs. v. Miss. Baptist Health Sys., — So. 2d —, 2004 Miss. LEXIS 463 (Miss. May 6, 2004), opinion withdrawn by, substituted opinion at, remanded by 898 So. 2d 656, 2005 Miss. LEXIS 259 (Miss. 2005).

Jurisdiction of the chancery court is limited to specific areas; the chancellor should have transferred the insureds' case to the circuit court because it arose from the sale and alleged breach of an insurance contract, and would have been more appropriately heard in a circuit court than in chancery court. Union Nat'l Life Ins. Co. v. Crosby, 870 So. 2d 1175 (Miss. 2004).

Because the only claim for equitable relief in a negligence action brought under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23, was a request for an accounting, the proper jurisdiction was in a circuit court, and not in chancery court. City of Ridgeland v. Fowler, 846 So. 2d 210 (Miss. 2003).

Chancellor's action in dismissing case over which it lacked subject matter jurisdiction was manifestly erroneous, and proper remedy would have been to transfer case to Circuit Court which had jurisdiction. Benedict v. City of Hattiesburg, 693 So. 2d 377 (Miss. 1997).

In suit to recover damages for cutting and conversion of trees, involving boundary dispute, circuit court did not err in refusing to transfer cause to chancery court, since the ascertainment of boundaries alone does not confer jurisdiction as a separate ground of equity. Wroten v. Fenn, 203 Miss. 361, 35 So. 2d 534 (1948).

Chancery court in suit wherein injunctive relief was sole relief sought, could not transfer cause to circuit court. Barnes v. McLeod, 165 Miss. 437, 140 So. 740 (1932).

Amendment to original bill in chancery should be permitted, though presenting nothing requiring intervention of court of equity, since, if litigant had so requested, the case should have been transferred to the circuit court. Eagle Lumber & Supply Co. v. Peyton, 145 Miss. 482, 111 So. 141 (1927).

Where complainant, by his bill, made a case of which the circuit court had exclusive jurisdiction, and chancery court decided to decline jurisdiction, this section made it mandatory upon the chancery court to transfer the cause to the circuit court, and it was reversible error for such court to dismiss the cause. Murphy v. City of Meridian, 103 Miss. 110, 60 So. 48 (1912).

3. — — Duty to transfer causes.

Where the chancellor properly sustained a demurrer to the bill of complaint on the ground that jurisdiction of the cause was in the circuit court, the cause should have been transferred to the circuit court, and the chancellor erred in dismissing the cause. Spivey Co. v. Ingram, 317 So. 2d 919 (Miss. 1975).

Bill praying for return of property sold under retention of title contract should not have been dismissed even if chancery court had no jurisdiction, since court had duty to transfer case to proper court. Layne Cent. Co. v. Gulf Coast Ice Co., 171 Miss. 94, 157 So. 84 (1934).

Where cause of which circuit court has exclusive jurisdiction was brought in chancery court, latter court has positive constitutional duty to transfer case to circuit court of its own motion. Bradley v. Howell, 161 Miss. 346, 134 So. 843 (1931).

Litigant, challenging right of chancery court to entertain jurisdiction on ground law court has sole jurisdiction, has duty of moving for transfer; judgment of chancery court without motion to transfer will be upheld on appeal, regardless of whether it was cognizable at law or in equity. Boyett v. Boyett, 152 Miss. 201, 119 So. 299 (1928).

4. — — Erroneous transfer of causes.

In a breach of contract case in which two individuals sued a Mississippi corporation in chancery court and the corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the chancery court erred by ordering the case transferred to the circuit court because the chancery court had subject matter jurisdiction. The primary thrust of the individuals' complaint was a request for equitable relief in the form of specific performance of a real estate contract, specific performance was a particularly appropriate remedy for breach of a real estate contract, and claims for specific performance were within the historic equity jurisdiction of the chancery court. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

Land company sought declaratory and injunctive relief against a county; the county alleged that it was entitled to damages because the land company violated ordinances. Jurisdiction was proper in the chancery court; if an ordinance applied to the land company, the issue of damages could be decided by the chancellor. Issaquena Warren Counties Land Co., LLC v. Warren County, 996 So. 2d 747 (Miss. 2008).

Finding in favor of the grower in an action involving a breach of contract was inappropriate because having the claims adjudicated in chancery court would have deprived the furnisher of the right to a jury trial, and thus the chancellor erred in failing to transfer the matter to circuit court; further, the supreme court had held that breach of contract issues were best heard in the circuit court. Tyson Breeders, Inc. v. Harrison, 940 So. 2d 230 (Miss. 2006), remanded en banc by 91 So. 3d 41, 2011 Miss. App. LEXIS 395 (Miss. Ct. App. 2011).

It was never contemplated by this section that a suit commenced by a bill of complaint stating grounds for equitable relief made obtainable only in the chancery court by the express provisions of a statute, as in the case of an action to recover penalties for unlawful possession of intoxicating liquors and for the abatement of a nuisance, should be transferred to the circuit court. Hartford Accident & Indem. Co. v. Hewes, 190 Miss. 241, 199 So. 772 (1941).

The transfer from chancery court to the circuit court of an action by the state tax collector to recover the penalty for unlawful sale of intoxicating liquors, wherein the bill contained a prayer for general equitable relief, although there was no specific prayer for abatement of the alleged nuisance nor for an injunction restraining the alleged violator of the law, was erroneous, since under such prayer for general relief the court would extend to the complainant such remedies as would be agreeable to the cause made out by the bill of complaint, whether specifically prayed for or not. Hartford Accident & Indem. Co. v. Hewes, 190 Miss. 241, 199 So. 772 (1941).

In the case of an erroneous transfer of an action by the state tax collector to recover the penalty for the unlawful sale of intoxicating liquors and for the abatement of a nuisance from the chancery to the circuit court, the circuit court should and must proceed with the case, since there is no appeal from such erroneous transfer and no provision made for its correction. Hartford Accident & Indem. Co. v. Hewes, 190 Miss. 241, 199 So. 772 (1941).

Where an action by the state tax collector for the recovery of penalties for the unlawful sale of intoxicating liquors and for general equitable relief was erroneously transferred from the chancery court to the circuit court, and it did not appear that any substantial right of the complainant was affected by the erroneous transfer, the only course open to the circuit court was to dismiss the action upon complainant's refusal to proceed. Hartford Accident & Indem. Co. v. Hewes, 190 Miss. 241, 199 So. 772 (1941).

5. — — Appeal, transfer of causes.

In a breach of contract case in which a Mississippi corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the Mississippi Supreme Court was not prohibited from reversing that determination since no final judgment had been entered in the case. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

In view of the provisions of Code 1942 § 360, actions brought in the chancery court to enforce laborer's and materialmens' liens were properly transferred by the chancellor to the Circuit Court, and an interlocutory appeal from the order of transfer should not have been granted. Morgan v. Nelson, 216 So. 2d 174 (Miss. 1968), cert. denied, 395 U.S. 911, 89 S. Ct. 1744, 23 L. Ed. 2d 224 (1969), reh'g denied, 395 U.S. 987, 89 S. Ct. 2128, 23 L. Ed. 2d 776 (1969).

Where an appeal from county court in equity case was erroneously taken to the circuit court instead of the chancery court as required by § 1616, Code 1942, and it was too late to appeal anew, circuit court should have transferred case to chancery court under § 157 of the Constitution, and that court erred in overruling a motion therefor and dismissing the appeal. W. Horace Williams Co. v. Federal Credit Co., 198 Miss. 111, 21 So. 2d 582 (1945).

RESEARCH REFERENCES

CJS. C.J.S. Trial §§ 63-70.

Law Reviews. 1981 Mississippi Supreme Court Review: Civil Procedure. 52 Miss. L. J. 399, June 1982.

§ 163. Certification of transferred causes

The Legislature shall provide by law for the due certification of all causes that may be transferred to or from any chancery court or circuit court, for such reformation of the pleadings therein as may be necessary, and the adjudication of the costs of such transfer.

RESEARCH REFERENCES

CJS. C.J.S. Costs §§ 28, 29.
C.J.S. Pleading §§ 377-386.

§ 164. Holding of chancery court

A chancery court shall be held in each county at least twice in each year.

SOURCES: 1869 art VI § 17 and third amendment.

Cross References — Practice and procedure provisions common to courts, see § 11-1-1 et seq.

Practice and procedure in chancery courts generally, see § 11-5-1 et seq.

Practice and procedure in circuit courts generally, see § 11-7-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Courts §§ 111 to 113, 120, 121.

§ 165. Disqualification of judges

No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. Whenever any judge of the Supreme Court or the judge or chancellor of any district in this State shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the Governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified.

SOURCES: 1832 art IV § 9; Laws, 1916, ch 155.

Cross References — Appointment of judicial office to fill vacancy, see § 9-1-105.

JUDICIAL DECISIONS

1. In general.
2. Grounds of disqualification—In general.
3. — — Reasonable person standard, grounds for disqualification.
4. — — Bias or prejudice, grounds for disqualification.
5. — — Prior knowledge or experience, grounds for disqualification.
6. Affinity or consanguinity, grounds for disqualification.
7. Interest in litigation, grounds for disqualification.
8. Waiver.
9. Determination of disqualification—In general.
10. Presumptions and burden of proof, determination of disqualification.
11. Review, determination of disqualification.
12. Special and substitute judges.

1. In general.

In a murder prosecution, the fact that the trial judge's former law firm represented the codefendant's father in a matter having no relation to the trial at issue, and that the prosecutor practiced law with the judge for several years, did not oblige the judge to recuse himself based on these coincidences. Jones v. State, 841 So. 2d 115 (Miss. 2003).

The Constitution specifies what constitutes disqualification, and a judge cannot be disqualified from presiding at any trial unless he is disqualified within such provisions. Garrett v. State, 187 Miss. 441, 193 So. 452 (1940).

2. Grounds of disqualification—In general.

Where defense counsel revealed to a trial judge in an ex parte conference that a defendant had confessed to the murder and was intent on falsely testifying, the trial judge did not allow counsel to withdraw from the case and did not commit manifest error in failing to recuse herself; the judge was not the ultimate trier of fact because it was a jury trial. Scott v. State, 8 So. 3d 855 (Miss. 2008), writ of certiorari denied by 559 U.S. 941, 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205, 78 U.S.L.W. 3480 (2010).

Trial court did not abuse its discretion in denying a mother's motion for recusal as the appellate record did not identify any evidence under Miss. Const. Art. 6, § 165 or Miss. Code. Ann. § 9-1-11 that would disqualify the trial judge. J.N.W.E. v. W.D.W., 922 So. 2d 12 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 129 (Miss. 2006).

Trial judge was not required to disqualify himself under Miss. Const. art. VI, § 165, Miss. Code Ann. § 9-1-11, or Miss. Unif. Cir. & County Ct. Prac. R. 1.15

where there was no evidence that the trial judge was connected with the parties through marriage or blood and there was no evidence that the judge may have had an interest in the outcome of the proceeding, or that he was otherwise precluded by the statute; it was only in causes wherein the judge may have been of counsel that provided for disqualification. Hathcock v. S. Farm Bureau Cas. Ins. Co., 912 So. 2d 844 (Miss. 2005).

In a contest of the primary election for the office of county supervisor, an attorney who certified the petition was not disqualified by the fact that he served as attorney for the county board of supervisors at a time that the petitioner was a member of the board of supervisors. Upton v. McKenzie, 761 So. 2d 167 (Miss. 2000).

It is not contemplated that a judge should be disqualified from presiding merely because he knows the facts of the case, or that he is more friendly with one of the litigants than with the other. Garrett v. State, 187 Miss. 441, 193 So. 452 (1940).

3. — — Reasonable person standard, grounds for disqualification.

Defendant was denied his right to a fair trial because the trial judge, sitting as finder of fact on defendant's motion to suppress, was informed by defense counsel that defendant had confessed to counsel that he committed the crime and that he intended to offer perjured testimony at trial, and therefore, the trial judge should have recused herself from hearing the motion to suppress, and her failure to do so deprived defendant of his right to due process. Scott v. State, 8 So. 3d 871 (Miss. Ct. App. 2008), reversed by 8 So. 3d 855, 2008 Miss. LEXIS 589 (Miss. 2008).

Judge is required to disqualify himself or herself if reasonable person, knowing all circumstances, would harbor doubts about his or her impartiality. Hunter v. State, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

Judge must disqualify himself or herself if reasonable person, knowing all the circumstances, would harbor doubts about his or her impartiality. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubt about his impartiality. Rutland v. Pridgen, 493 So. 2d 952 (Miss. 1986).

4. — — Bias or prejudice, grounds for disqualification.

Trial judge was not required to recuse herself, absent some showing of bias; defense counsel was not deficient in not making a request that properly could have been denied, and there was no prejudice or bias on the judge's part. Williams v. State, 971 So. 2d 581 (Miss. 2007).

In a case alleging tortious interference with business relations, there was no error based on a trial judge's failure to recuse himself under Miss. Unif. Cir. & Cty. R. 1.15 because the owners failed to raise the issue of alleged impartiality at the trial court level; the owners' website showed that they knew of a grounds for recusal at the time of trial, and even if the owners had not been able to raise this issue before the trial judge, a reversal would still not have been granted because the judge was not connected to the objectors by affinity or consanguinity, and he had no interest in the outcome of the case based on vague allegations that the judge had eaten at the owners' lodge. Bateman v. Gray, 963 So. 2d 1284 (Miss. Ct. App. 2007).

Defendant in capital murder trial was not prejudiced by trial judge's denial of his motion for recusal, though trial judge's former law firm had represented victim in divorce action, trial judge's nephew who was member of same law firm represented victim's estate and victim's daughter, and victim's daughter was witness against defendant at trial; there was nothing in manner trial judge presided over trial which indicated prejudice to defendant, and there was no evidence of any financial arrangements between trial judge and his former law firm. Hunter v. State, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

A special chancellor in a divorce proceeding should have recused himself where both the chancellor and the husband had law offices in the same town, they had played golf together on several occasions and had had lunch together on one occasion, although, standing alone, the chancellor's failure to recuse himself was not reversible error. Robinson v. Irwin, 546 So. 2d 683 (Miss. 1989).

In an appeal from the defendant's plea of not guilty in a justice of the peace court to the offense of improper parking on a public thoroughfare, a motion by the defendant that the circuit judge recuse himself, because the judge had "exhibited strong personal animosity toward the defendant and cannot give the defendant a fair trial", and that the prosecuting witness, who was the county sheriff had taken an "overly active part in the recent campaign for the re-election" of the same judge, and that the judge had made a statement to the grand jury in the presence of all petit jurors that the sheriff was "the greatest sheriff he had ever known", even though the motion to recuse may not have been well taken, did not constitute a direct contempt. Boydstun v. State, 244 So. 2d 732 (Miss. 1971).

The situation in which a circuit judge hearing an appeal in a prosecution, is the judge whom the defendant unsuccessfully attempted to defeat in a previous election, and both the judge and the defendant exhibit ill-will and animosity, falls within the meaning of the phrase "or where he may be interested in the same." Boydstun v. State, 244 So. 2d 732 (Miss. 1971).

5. — — Prior knowledge or experience, grounds for disqualification.

Trial judge abused his discretion in declining to recuse himself in a prosecution for aggravated assault and forcible rape of child, since he had served as county prosecuting attorney in an earlier youth-court shelter hearing regarding the child's custody as a result of the events giving rise to the criminal charges, and 1) the threshold issue in that hearing was whether the complainant was an "abused child" under Miss. Code Ann. § 43-21-105(m), which went to the heart of the issue of defendant's guilt; 2) the judge might have personal knowledge of disputed evidentiary facts concerning the criminal case due to his participation in the youth-court shelter hearing. Miller v. State, 94 So. 3d 1120 (Miss. 2012).

Where the judge presiding over appellant's post-conviction motion served a prosecutorial role in the underlying criminal case, the judge should have been recused. It was an abuse of discretion for the judge to rule on appellant's motion for post-conviction relief. Ryals v. State, 914 So. 2d 285 (Miss. Ct. App. 2005).

A circuit court judge should have recused himself in a medical malpractice action against a physician and a hospital where the judge had previously acted as counsel for the hospital, and the physician had been hired by the hospital during the time of the judge's representation. Collins v. Joshi, 611 So. 2d 898 (Miss. 1992).

Evidence that a Supreme Court justice had served as Attorney General at the time the defendant was extradited from another state was insufficient to overcome the presumption that the justice was qualified and unbiased, where the justice had no personal involvement in or actual knowledge of the defendant's case while he was Attorney General, the Office of Attorney General exercised no responsibility in the defendant's trial, the involvement of the Office of Attorney General in the actual extradition of the defendant was minimal, and the Attorney General's entrance into the case arose after being noticed by the filing of the defendant's appeal which occurred only one week prior to the justice's departure from the Office of Attorney General. Turner v. State, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

A judge who had served as the prosecutor at the time of the defendant's indictment should have disqualified himself; the very functions involved in the performance of the positions of judge and prosecutor are contradictory and no person can be considered to be impartial while that person is also acting as a partisan. Since the judge failed to disqualify himself, the defendant was deprived of due process, which includes a fair and impartial trial. Jenkins v. State, 570 So. 2d 1191 (Miss. 1990).

A trial judge who was the brother of a senior partner in a law firm representing a principal defendant should have recused himself from the case because of the appearance of impropriety. Trial judges in such a situation, particularly where the judge has filed a notice of relationship and a motion has been made for recusal because of the close kinship, should grant the motion and decline to participate in the case. In re Moffett, 556 So. 2d 723 (Miss. 1990).

In a proceeding for enforcement against the plaintiff of an oral settlement agreement allegedly reached regarding an automobile accident personal injury claim, the judge should have recused himself where he was present in the room during the critical settlement conference and was a witness to factual matters pertaining to the central issue of the credibility of the plaintiff and the plaintiff's witnesses. Collins v. Dixie Trans., Inc., 543 So. 2d 160 (Miss. 1989).

A judge in a medical malpractice action should have recused himself in light of the fact that the judge's brother was a senior partner in the law firm representing the defendant hospital, obviously a part of the medical community, coupled with allegations and testimony that the medical community in the county had assisted in electing the judge, since this would lead a reasonable person, with knowledge of the circumstances, to harbor doubts about the judge's impartiality. Jenkins v. Forrest County Gen. Hosp., 542 So. 2d 1180 (Miss. 1988).

Chancellor, who had represented one of the parties in 2 separate uniform reciprocal enforcement support act complaints in his official capacity as county attorney, was not required to disqualify himself in a child custody case. Rutland v. Pridgen, 493 So. 2d 952 (Miss. 1986).

Judge is not disqualified from hearing homicide case on basis of fact that homicide defendant's former attorney, against whom defendant has filed bar complaint, has at one time been law partner of judge. Ruffin v. State, 481 So. 2d 312 (Miss. 1985).

6. Affinity or consanguinity, grounds for disqualification.

Recusal was not required by fact that judge was brother-in-law of attorney retained to help defense with jury selection, where all parties agreed to judge's continued service, judge did not act in bad faith or dishonestly, and jury was not informed of the relationship. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

A trial judge should avoid sitting in a case where the sole prosecuting witness is a near relative who is interested in the outcome of the prosecution. Black v. State, 187 So. 2d 815 (Miss. 1966).

Where the prosecuting witness in a case brought under the "bad check" statute was his first cousin, the trial judge should have recused himself. Black v. State, 187 So. 2d 815 (Miss. 1966).

A judge, who is embarrassed by his brother representing defendants in criminal cases, should have recused himself and allowed the Governor to appoint a special judge. Barnes v. State, 220 Miss. 248, 70 So. 2d 920 (1954).

The fact that the stepmother of the prosecutrix in a prosecution for assault with intent to commit rape was an aunt of the trial judge did not disqualify the trial judge under this section, because while there was affinity between the judge and the father of the prosecutrix, this affinity did not extend to the stepdaughter of the aunt, because there is no affinity between the blood relations of the husband and the blood relations of the wife. McLendon v. State, 187 Miss. 247, 191 So. 821 (1939).

A party to a suit within the meaning of this section is one who is directly interested in the subject matter in issue and the mere fact that an attorney is related to the judge does not disqualify the judge where he has no interest; the interest of the attorney must be in the subject matter, or res, of the suit. Shireman v. Wildberger, 125 Miss. 499, 87 So. 657 (1921).

A chancellor will not be disqualified merely because his first cousin, who was the attorney for the defendant in the case, was employed upon a contingent basis. Norwich Union Fire Ins. Co. v. Standard Drug Co., 121 Miss. 510, 83 So. 676, 11 A.L.R. 1321 (1920); Yazoo & Miss. V. Ry. v. Kirk, 102 Miss. 41, 58 So. 710 (1912), suggestion of error sustained, 102 Miss. 56, 58 So. 834, Am. Ann. Cas. 1914C,968 (1912).

A chancellor is disqualified from presiding in receivership proceedings against a bank, where his wife and other relatives are interested in the result of the suit. Dodd v. Kelley, 107 Miss. 471, 65 So. 561 (1914).

Where a son and brother-in-law of the judge have taken the case on a conditional fee, the judge is disqualified to hear the case. Yazoo & Miss. V. Ry. v. Kirk, 102 Miss. 41, 58 So. 710 (1912), suggestion of error sustained, 102 Miss. 56, 58 So. 834, Am. Ann. Cas. 1914C,968 (1912); Norwich Union Fire Ins. Co. v. Standard Drug Co., 121 Miss. 510, 83 So. 676, 11 A.L.R. 1321 (1920).

Where one of the parties was a corporation and a first cousin of the justice of the peace was director, president and stockholder in the corporation, the justice of the peace was disqualified from hearing the cause. Nimocks v. McGehee, 97 Miss. 321, 52 So. 626 (1910).

7. Interest in litigation, grounds for disqualification.

Defendant's convictions for armed robbery and arson were proper where merely presenting a document which, testimony revealed, was inaccurate and written at the behest of defendant, was insufficient to establish that the judge had an interest in the outcome; defendant did not explain what benefit, other than to disqualify the judge, the testimony would have been to his case or how he was prejudiced by its absence. Payton v. State, 897 So. 2d 921 (Miss. 2003).

Fact that justice of the peace might be disqualified because of his interest in the fees and costs in a criminal case was of no consequence, where county court on appeal must try the case de novo. State v. Dearman, 152 Miss. 6, 118 So. 349 (1928).

Where chancery court heard case involving creation of drainage district de novo on appeal from the county board of drainage commissioners, it cannot be reversed on ground commissioners were disqualified because they owned land in the district to be created and signed petition for its creation. Anderson v. Rimmer, 150 Miss. 353, 116 So. 543 (1928).

For a full discussion of the qualifications of a judge to hear a case because of his financial interest in the fees and costs involved in the suit. Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A.L.R. 1243 (1927).

This section does not disqualify a judge because of a general interest in a public proceeding which he feels in common with the mass of citizens. Ferguson v. Brown, 75 Miss. 214, 21 So. 603 (1897).

8. Waiver.

Circuit judge, who as an assistant district attorney had participated in a suspect's prosecution, was disqualified from ruling on the suspect's motion for postconviction relief and should have recused himself because, even assuming that the suspect had effectively waived the judge's disqualification to preside over his guilty plea hearing, that waiver did not extend to the postconviction proceeding, which was separate and distinct from the underlying criminal proceeding. Holmes v. State, 966 So. 2d 858 (Miss. Ct. App. 2007).

A party to a lawsuit may waive the disqualification of the judge. Brown v. State, 149 Miss. 219, 115 So. 436 (1928).

The failure to object to the qualification of the justice of the peace under this section and § 171, before the trial, or before the justice of the peace lost control of the case, was a waiver of the disqualification. Bryant v. State, 146 Miss. 533, 112 So. 675 (1927).

Where a party has as much knowledge of the facts bearing on the disqualification of the trial judge before trial, and no suggestion of disqualification is made, he will not be heard after judgment to raise the question. Shireman v. Wildberger, 125 Miss. 499, 87 So. 657 (1921).

9. Determination of disqualification—In general.

A trial, where a judge is disqualified, is not void, but only voidable, and the question must be raised in the court where the judge presides and he must primarily decide whether he is disqualified or not. Hitt v. State, 149 Miss. 718, 115 So. 879 (1928).

Disqualification of judge because of interest, etc., can be availed of only by objection. Staple Cotton Coop. Ass'n v. Borodofsky, 143 Miss. 585, 108 So. 807 (1926).

The judge, on a motion that he recuse himself, may properly pass on his own disqualification to hear the case. Cashin v.

Murphy, 138 Miss. 853, 103 So. 787 (1925).

An ex parte affidavit is not admissible on a trial of a motion to have the judge recuse himself, but the same rule of law as to evidence applies to such motion as to any other cause in the court. Cashin v. Murphy, 138 Miss. 853, 103 So. 787 (1925).

Objections may be made to the disqualifications of the judge on a motion for a new trial, where the attorneys did not know of such disqualification. Yazoo & Miss. V.R.R. v. Kirk, 102 Miss. 41, 58 So. 710, Am. Ann. Cas. 1914C,968 (1912), suggestion of error sustained, 102 Miss. 56, 58 So. 834, Am. Ann. Cas. 1914C,968 (1912).

10. Presumptions and burden of proof, determination of disqualification.

Presumption is that judge, sworn to administer impartial justice, is qualified and unbiased; to overcome presumption, evidence must produce reasonable doubt about validity of presumption. Hunter v. State, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

11. Review, determination of disqualification.

While attorney may rightfully, in cases where he or she thinks judge's relations would result to injury of defendant, move for recusation of judge, Supreme Court, in such case, will look to whole trial and pass upon questions on appeal in light of completed trial; every act and movement had during entire trial will be considered, and if Supreme Court is unable to find that rulings have been prejudicial to defendant, it will not reverse. Hunter v. State, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

When judge is not disqualified under constitutional or statutory provisions, propriety of his or her sitting is question to be decided by judge and is subject to review only in case of manifest abuse of discretion. Hunter v. State, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

When judge is not disqualified by Constitution or statute, propriety of decision not to recuse himself or herself is reviewed for abuse of discretion. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

There was no error in judge sitting in review of motion for new trial where no abuse of discretion was found; judge was not disqualified from sitting at trial of one accused of crime merely because previously he had participated in other legal proceedings against same person. Cantrell v. State, 507 So. 2d 325 (Miss. 1987).

Primarily, the judge is to judge his own qualification and fairness, and unless a record reflects an abuse of his powers to the extent of showing probable injustice, the supreme court will not reverse a case upon such grounds. Garrett v. State, 187 Miss. 441, 193 So. 452 (1940).

While an attorney may rightfully, in cases where he thinks the judge's relations would result to the injury of the defendant, move for a recusation of the judge, the Supreme Court, in such a case, will look to the whole trial and pass upon questions on appeal in the light of the completed trial; and every act and movement had during the entire trial will be considered, and if the Supreme Court is unable to find that rulings have been prejudicial to the defendant, there will be no reversal. Garrett v. State, 187 Miss. 441, 193 So. 452 (1940).

When a judge is not disqualified hereunder, the propriety of his sitting or recusing himself is a question to be decided by him, and if subject to review at all, would be so only in case of a manifest abuse of discretion. McLendon v. State, 187 Miss. 247, 191 So. 821 (1939).

12. Special and substitute judges.

Where all of the county's chancellors had been recused, the appointment of a former chancellor to rule on the motions was proper and his rulings were valid. McDonald v. McDonald, 850 So. 2d 1182 (Miss. Ct. App. 2002), affirmed by 876 So. 2d 296, 2004 Miss. LEXIS 795 (Miss. 2004).

Constitution § 165, authorizing the Governor to commission a lawyer to preside at a term of the court or in a case, necessarily encompasses the right of the commissioned special judge to sign orders and decrees in a case or cases over which he had been designated to preside. De Moe

v. McLeod, 228 Miss. 491, 89 So. 2d 730 (1956).

A special chancellor, appointed and commissioned by the Governor under this section to try a suit to confirm title to real estate, has authority to sign a final decree in vacation. De Moe v. McLeod, 228 Miss. 491, 89 So. 2d 730 (1956).

Where attorney selected by litigants presides when regular judge is disqualified as authorized by statute, presiding attorney is empowered to rule upon and determine all pertinent questions arising during trial of case, including power to act upon request for view by jury. National Box Co. v. Bradley, 171 Miss. 26, 157 So. 91, 95 A.L.R. 1500 (1934).

Decree rendered by regular chancellor without being first submitted to special chancellor, hearing cause because of regular chancellor's disqualification, was invalid. Hamblett v. Jones, 152 Miss. 120, 118 So. 711 (1928).

Where the parties consent to the trial of the cause by a special judge, by agreement, such judge continues to be the judge for the trial of such cause so long as proceedings are taken therein. Canal Bank & Trust Co. v. Brewer, 147 Miss. 885, 113 So. 552 (1927), motion overruled, 147 Miss. 920, 114 So. 127 (1927).

An appointee of the governor may hold his office until the vacancy is regularly filled. State ex rel. Collins v. Jones, 106 Miss. 522, 64 So. 241 (1914), error overruled, 64 So. 469 (Miss. 1914).

A special judge appointed to hear and determine a particular case will continue in office as long as judicial functions are to be performed in that case. If appointed to act during the temporary disability of a regular judge, his appointment expires upon the return of the regular judge. John E. Hall Comm'n Co. v. R.L. Crook & Co., 87 Miss. 445, 40 So. 20 (1906), vacated, 87 Miss. 445, 40 So. 1006 (1906).

The special judge appointed hereunder, and not the regular judge, must approve the stenographer's notes. Magouirk v. Western Union Tel. Co., 79 Miss. 632', 31 So. 206, 89 Am. St. R. 663 (1902).

ATTORNEY GENERAL OPINIONS

A practicing attorney selected as a special judge for service on the Supreme Court may remain of counsel in all cases presently pending in the state and federal courts. However, pursuant to § 9-1-25 which applies to any judge of the Supreme Court, a special judge may not be engaged in the practice of law and, therefore, may not practice in any of the state courts during his tenure as a special judge. A special judge may, pursuant to the same statute, practice in the federal courts in any case in which he or she was engaged when appointed. Hurst, May, 21, 2004, A.G. Op. 04-0180.

RESEARCH REFERENCES

ALR. Waiver of disqualification of judge. 5 A.L.R. 1588; 57 A.L.R. 292; 73 A.L.R.2d 1238.

Residence or ownership of property in city or other political subdivision which is party to or interested in action as disqualifying judge. 33 A.L.R. 1322.

Necessity as justifying action by judicial or administrative officer otherwise disqualified to act in particular case. 39 A.L.R. 1476.

Disqualification of judge or one acting in judicial capacity to preside in a case in which he has a pecuniary interest in the fine, penalty, or forfeiture imposed upon the defendant. 50 A.L.R. 1256.

Right to judge not legally disqualified to decline to act in legal proceeding upon personal grounds. 96 A.L.R. 546.

Constitutionality of statute which disqualifies judge upon peremptory challenge. 115 A.L.R. 855.

State's right to file affidavit disqualifying judge for bias or prejudice. 115 A.L.R. 866.

Disqualifying relationship by affinity in case of judge or juror as affected by dissolution of marriage. 117 A.L.R. 800.

Relationship of judge to one who is party in an official or representative capacity as disqualification. 10 A.L.R.2d 1307.

Relationship to attorney as disqualifying judge. 50 A.L.R.2d 143.

Disqualification of judge because of his or another's holding or owning stock in corporation involved in litigation. 25 A.L.R.3d 1331.

Disqualification of judge by state, in criminal case, for bias or prejudice. 68 A.L.R.3d 509.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge. 75 A.L.R.3d 1021.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case. 16 A.L.R.4th 550.

Waiver or loss of right to disqualify judge by participation in proceedings-modern state civil cases. 24 A.L.R.4th 870.

Disqualification of judge in state proceedings to punish contempt against or involving himself in open court and in his actual presence. 37 A.L.R.4th 1004.

Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant. 72 A.L.R.4th 651.

Judge's previous legal association with attorney connected to current case as warranting disqualification. 85 A.L.R.4th 700.

Disqualification of judge for bias against counsel for litigant. 54 A.L.R.5th 575.

Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution. 91 A.L.R.5th 437.

Judge's membership in bar association as ground for disqualification under 28 USCS § 455. 42 A.L.R. Fed. 331.

Disqualification of judge under 28 USCS § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding. 55 A.L.R. Fed. 650.

Mandamus as remedy to compel disqualification of federal judge. 56 A.L.R. Fed. 494.

Substitution of judges under Rule 25 of Federal Rules of Criminal Procedure. 73 A.L.R. Fed. 833.

Disqualification of federal judge, under 28 USCS § 455(b)(5)(ii), on ground that judge's relative is acting as lawyer in proceeding. 73 A.L.R. Fed. 879.

Disqualification of judge under 28 U.S.C.S. § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding. 163 A.L.R. Fed. 575.

Am Jur. 46 Am. Jur. 2d, Judges §§ 87 et seq.

8A Am. Jur. Pl & Pr Forms (Rev), Divorce and Separation, Form 407.1 (Motion — Child Custody — Disqualification of judge on grounds of bias).

15 Am. Jur. Pl & Pr Forms (Rev), Judges, Form 31.1 (Affidavit-In support of petition to disqualify judge — partiality of judge).

15 Am. Jur. Pl & Pr Forms (Rev), Judges, Form 39.1 (Motion — To Disqualify judge — Dissolution of marriage — Bias against father in custody matter).

CJS. C.J.S. Judges §§ 142, 145, 220-325.

Law Reviews. Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony, 23 Miss. C. L. Rev. 1, Fall, 2003.

§ 166. Compensation of judges

The judges of the Supreme Court, of the circuit courts, and the chancellors shall receive for their services a compensation to be fixed by law, which shall not be increased or diminished during their continuance in office.

SOURCES: 1832 art IV § 10; 1869 art VI §§ 10, 15.

Cross References — Compensation of elected judiciary, see §§ 25-3-37, 25-3-43.

JUDICIAL DECISIONS

1. In general.

The legislature cannot, under this section, provide that the pay of a special judge shall be deducted from the salary of the regular judge in whose stead he has served. Ex parte Wheeler, 24 So. 261 (Miss. 1898).

RESEARCH REFERENCES

CJS. C.J.S. Judges § 181.

§ 167. Civil officers as conservators of peace

All civil officers shall be conservators of the peace, and shall be by law vested with ample power as such.

SOURCES: 1817 art V § 12; 1832 art IV § 22; 1869 art VI § 22.

JUDICIAL DECISIONS

1. In general.

Although a sheriff, under this section, is a "conservator of the peace" in a general sense, he is not such within the terms of a statute which do not include him among others designated as such. Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745 (1947).

This section is self-executing only to the extent that it designates all civil officers as conservators of the peace, thereby charging them with the duty of keeping the peace; it do not provide ways and means for the discharge of this duty, which must be found either in the common law of the state, or in a statute enacted by the legislature thereof. Martin v. State, 190 Miss. 32, 199 So. 98 (1940).

The words "any conservator of the peace" in § 1321, Code of 1930, are limited to the persons designated as conservators of the peace in § 1320, Code of 1930, and do not embrace all civil officers referred to in this section of the constitution. Martin v. State, 190 Miss. 32, 199 So. 98 (1940).

A clerk of the circuit court is without power to issue a warrant for the arrest of a person charged with crime by an affidavit lodged with him, and, accordingly, the arrest of one for a felony on a warrant issued by a circuit clerk was illegal, and the bond under which he was set at liberty is void. Martin v. State, 190 Miss. 32, 199 So. 98 (1940).

RESEARCH REFERENCES

CJS. C.J.S. Arrest § 9.

C.J.S. Judges §§ 75-77, 136-151, 178, 179.

C.J.S. Justices of the Peace § 25.

C.J.S. Sheriffs and Constables §§ 74-79.

§ 168. Clerks of court

The clerk of the Supreme Court shall be appointed by the Supreme Court in the manner and for a term as shall be provided by the Legislature, and the clerk of the circuit court and the clerk of the chancery court shall be selected in each county in the manner provided by law, and shall hold office for the term of four (4) years, and the Legislature shall provide by law what duties shall be performed during vacation by the clerks of the circuit and chancery courts, subject to the approval of the court.

SOURCES: 1869 art VI § 19; Laws, 1976, ch. 616, eff December 8, 1976.

Editor's Note — The 1976 amendment to Section 168 of Article 6 of the Constitution of 1890 was proposed by Laws, 1976, ch. 616, being Senate Concurrent Resolution No. 548, and upon ratification by the electorate on November 2, 1976, was inserted by proclamation of the Secretary of State on December 8, 1976.

Cross References — Election of officers, see Miss. Const. Art. 5, § 143.

Clerk of supreme court generally, see § 9-3-13 et seq.

Chancery clerks generally, see § 9-5-131 et seq.

Circuit clerks generally, see § 9-7-121 et seq.

JUDICIAL DECISIONS

1. In general.

Attempt to contest will was unseasonable where, while chancery court was in vacation, chancery clerk on January 24, 1983, admitted will and codicils to probate, thereafter issuing Letters Testamentary; on June 13, 1983, chancellor entered order ratifying actions by chancery clerk conducted while court was in vacation; and, action to set aside will alleging mental incompetency when making will was commenced on May 6, 1985. Sims v. Stennis, 510 So. 2d 798 (Miss. 1987).

Statute § 2796 (Code 1880 § 396; Code 1892 § 3051; Code 1906 § 3458), providing that the term of office of all officers in the state, not otherwise provided for by law, shall be limited to four years, and until the successor therein shall be duly qualified, did not apply under Const. 1869 Art. VI § 16, to the terms of the clerks of the circuit and chancery courts. Andrews v. State, 69 Miss. 740, 13 So. 853 (1892).

RESEARCH REFERENCES

CJS. C.J.S. Courts §§ 238, 240, 242.

§ 169. Style of process

The style of all process shall be "The State of Mississippi," and all prosecutions shall be carried on in the name and by authority of the "State of Mississippi," and all indictments shall conclude "against the peace and dignity of the state."

SOURCES: 1817 art V § 13; 1832 art IV § 17; 1869 art VI § 18.

Cross References — Process generally, see §§ 13-3-1 et seq., 99-9-1 et seq.

Indictments generally, see § 99-7-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Process.
3. Affidavit.
4. Indictment.

1. Construction and application.

Written notification of the charge of a criminal violation of a municipal ordinance is not deemed to invoke the provisions of the section and need not conclude with the language mandated by the section. Moore v. City of Louisville, 716 So. 2d 1136 (Miss. Ct. App. 1998).

This section has no application to newspaper notices given by a board of supervisors to the public that equalized tax rolls are ready for inspection. Clanton v. Callender, 36 So. 2d 140 (Miss. 1948).

The section refers to criminal prosecutions for the violation of state laws, and not for the violation of town ordinances. Alexander v. Town Council, 54 Miss. 659 (1877).

2. Process.

Search warrant having caption "State of Mississippi, Bolivar County: to any lawful officer of Bolivar County, Mississippi," held valid. Mai v. State, 152 Miss. 225, 119 So. 177 (1928), overruled on other grounds, O'Bean v. State, 184 So. 2d 635 (Miss. 1966).

3. Affidavit.

The affidavit, a uniform traffic ticket, was legally sufficient without the concluding language "against the peace and dignity of the State." Stidham v. State, 750 So. 2d 1238 (Miss. 1999).

A charging affidavit for an offense against a city ordinance was not required to state that the offense was "against the peace and dignity of the State" as required by Miss Const Art 6 § 169, since § 169 does not apply literally to prosecutions for violations of municipal ordinances in municipal courts. Although its authority is derived from the state, a municipality is a separate governmental entity being within its sphere empowered to mount public prosecutions. Sartain v. City of Water Valley, 528 So. 2d 1125 (Miss. 1988).

An affidavit for the prosecution of an offender is fatally defective when it fails to conclude as required by the section. Dickerson v. Thomas, 68 Miss. 156, 8 So. 465 (1891).

4. Indictment.

In a case in which an inmate appealed the summary dismissal of his motion for post-conviction relief, he argued unsuccessfully that the indictment charging him with armed robbery was defective because his indictment did not properly conclude with the words "against the peace and dignity of the State," thereby violating Miss. Const. Art. 6, § 169. Since he had entered a valid plea of guilty to the crime of strong armed robbery, a lesser offense to the crime of armed robbery charged in the indictment, he could not now challenge the validity of the indictment for the alleged defect he claims existed therein. Joiner v. State, 32 So. 3d 542 (Miss. Ct. App. 2010).

Because a fundamental right was not affected by the mere fact that the portion of the indictment charging defendant as a habitual offender was on a separate page from the words "against the peace and dignity of the State of Mississippi," as required by Miss. Const. Art. VI, § 169, defendant's challenge to the sufficiency of his indictment was waived, and he was procedurally barred from challenging his indictment on appeal. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Inmate's petition for post-conviction relief was denied because he waived the right to challenge on the basis of speedy trial or a defect in the indictment under Miss. Const. Art. VI, § 169 when he entered a guilty plea. Burch v. State, 929 So. 2d 394 (Miss. Ct. App. 2006).

Defendant failed to preserve his claim that the trial court erred in failing to quash the habitual offender portion of the indictment because it was missing the concluding language required by Miss. Const. art. VI, § 169, that stated "against the peace and dignity of the state." Jones v. State, 902 So. 2d 593 (Miss. Ct. App. 2004), writ of certiorari denied by 901 So. 2d 1273, 2005 Miss. LEXIS 336 (Miss. 2005).

An indictment satisfied the constitution where it included five separate counts and each of them began with the phrase "The grand jurors of the State of Mississippi" and concluded with the phrase "against the peace and dignity of the State of Mississippi." Peacock v. State, 783 So. 2d 763 (Miss. Ct. App. 2000).

The fact that the signature of the grand jury foreman came after the constitutionally-mandated phrase "against the peace and dignity of the state" did not render the indictment fatally defective. McCuiston v. State, 758 So. 2d 1082 (Miss. Ct. App. 2000).

The formal defect in the indictment of the defendant, i.e., the failure to include the language "against the peace and dignity of the State of Mississippi," was subject to waiver for the defendant's failure to demur to the indictment at trial. King v. State, 739 So. 2d 1055 (Miss. Ct. App. 1999).

An indictment's formal defect in failing to conclude with the words, "against the peace and dignity of the State of Mississippi," is curable by amendment; thus, such a defect is subject to waiver for the failure to demur to the indictment in accordance with § 99-7-21. Brandau v. State, 662 So. 2d 1051 (Miss. 1995).

Article 6, § 169 of the Mississippi Constitution was violated where language in an indictment charging the defendant as an habitual offender came after the words "against the peace and dignity of the state," since § 169 clearly states that a criminal indictment must "conclude" with those words; thus, the portion of the indictment charging the defendant as an habitual offender was fatally defective, and his sentence as an habitual offender would be reversed. McNeal v. State, 658 So. 2d 1345 (Miss. 1995).

In view of this provision it is no ground of objection to an indictment that it ends "and against the peace and dignity of the State of Mississippi." Stokes v. State, 240 Miss. 453, 128 So. 2d 341 (1961).

Information for contempt need not conclude against peace and dignity of state. Prine v. State, 143 Miss. 231, 108 So. 716 (1926).

It is a fatal defect in an indictment to fail to conclude "against the peace and dignity of the state." J.R. Watkins Co. v. Fornea, 135 Miss. 690, 100 So. 185 (1924).

An indictment containing two or more counts which concludes "against the peace and dignity of the state" is sufficient, as it is not necessary that each count in an indictment should thus conclude. Starling v. State, 90 Miss. 255, 43 So. 952, 13 Am. Ann. Cas. 776 (1907).

An indictment not concluding with the words "against the peace and dignity of the State of Mississippi" is void. State v. Morgan, 79 Miss. 659, 31 So. 338 (1902); Miller v. State, 81 Miss. 162, 32 So. 951 (1902).

RESEARCH REFERENCES

CJS. C.J.S. Indictments and Informations § 28.

C.J.S. Process §§ 2, 11, 12.

§ 170. County districts; board of supervisors

Each county shall be divided into five districts, a resident freeholder of each district shall be selected, in the manner prescribed by law, and the five so chosen shall constitute the board of supervisors of the county, a majority of whom may transact business. The board of supervisors shall have full jurisdiction over roads, ferries, and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law; provided, however, that the Legislature may have the power to designate certain highways as "state highways," and place such highways under the control and supervision of the State Highway Commission, for construction and maintenance. The clerk of the chancery court shall be the clerk of the board of supervisors.

SOURCES: 1832 art IV § 20 and second amendment; 1869 art VI § 20; Laws, 1924, ch 143.

Editor's Note — House Concurrent Resolution 75, Part I, enacted as Chapter 592, Laws, 1990, adopted by the House of Representatives and the Senate on March 28, 1990, proposed to amend Section 170 of Article 6 of the Mississippi Constitution of 1890. The proposed amendment was submitted to the electorate on November 6, 1990, but was rejected.

Section 65-1-1 provides that whenever the term "State Highway Commission," or the term "commission" meaning the State Highway Commission, appears in the laws of this state, it shall mean the Mississippi Transportation Commission.

Cross References — County boards of supervisors generally, see § 19-3-1 et seq.

Alteration, relocation, or abandonment of county roadways, see § 51-35-19.

Highways, bridges and ferries, see § 65-1-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Apportionment of districts.
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1. In general.

Under Article 6, § 170 of the Mississippi Constitution and § 19-17-1, the duties of the clerk of the board of supervisors and the county auditor are just as much a part of the duties of the chancery clerk as attending and keeping the minutes of all chancery court proceedings as is required by §§ 9-5-135 and 9-5-137. Barlow v. Weathersby, 597 So. 2d 1288 (Miss. 1992).

This section neither contemplates nor condones the use of public equipment, materials or labor on private projects for the benefit of individual landowners. Saxon v. Harvey, 190 So. 2d 901 (Miss. 1966).

The boards of supervisors of the several counties are a part of the judicial department of the state. Haley v. State, 108 Miss. 899, 67 So. 498 (1915).

2. Apportionment of districts.

The rule requiring equal apportionment must be held to apply to a governing body which has the broad powers, duties, and responsibilities of the Mississippi County Board of Supervisors, and when the right to an equal voice in selecting the members of that body is diluted and denied by gross misapportionment, the Fourteenth Amendment affords an avenue of relief. Dyer v. Rich, 259 F. Supp. 741 (N.D. Miss. 1966).

The fact that one supervisor's district of a county contained over 63 percent of the entire population of the county while the population of the other four districts ranged from approximately three percent to 10 percent of the county's population, such gross imbalance in the population of the several supervisors' districts constituted a case of invidious discrimination and was violative of the "one person, one vote" rule. Dyer v. Rich, 259 F. Supp. 741 (N.D. Miss. 1966).

3. Validity and effect of statutes.

The remedy at law for enforcing redistricting of a county, provided by Code 1942, § 2870, precludes the issuance of an injunction against holding an election of supervisors until the county shall be redistricted. Glass v. Hancock County Election Comm'n, 378 U.S. 558, 84 S. Ct. 1910, 12 L. Ed. 2d 1035 (1964).

Statute (Code 1942, § 8036) providing for reimbursement for pavement already constructed when taken over by state highway commission is not unconstitutional as violating § 170 of the Constitution on the theory that such section authorizes the Legislature to enact statute only for the "construction and maintenance" of state highways, since the quoted words should be given a broad rather than a narrow construction and include the right to pay for a necessary link of roadway already constructed and in existence. State ex rel. Cowan v. State Hwy. Comm'n, 195 Miss. 657, 13 So. 2d 614 (1943).

The contention that a statute (Code of 1930, § 5979), prohibiting the issuance of warrants, or the incurring of indebtedness by any county or municipality unless there is sufficient money in the particular fund from which payment for such warrant or indebtedness is to be made, except where such indebtedness is incurred upon the petition of a majority of the qualified electors of the county or municipality, violates this section of the constitution, because its application would in some instances prohibit the Board of Supervisors from doing any road work, is without merit in view of the fact that under the statute in question the board can still go ahead and incur the necessary debts for the work if and when authorized by a majority of the electors. Edmondson v. Board of Supvrs., 185 Miss. 645, 187 So. 538 (1939).

Statutes held not to manifest legislative intention that levies by board of supervisors specially made for bridge purposes prior to 1928 statute should be divided between municipality and county. Panola County v. Sardis, 171 Miss. 490, 157 So. 579 (1934); Panola County v. Gully, 157 So. 584 (Miss. 1934); Greenwood v. Leflore County, 157 So. 585 (Miss. 1934).

Law authorizing county supervisors to submit proposal to issue bonds for road district on petition of electors was not denial of due process. Memphis & C. Ry. v. Bullen, 154 Miss. 536, 121 So. 826 (1928), aff'd, 282 U.S. 241, 51 S. Ct. 108, 75 L. Ed. 315 (1931).

Chapter 173, Laws 1914, is in violation of this provision of the Constitution in that it attempts to provide a method by which practically all jurisdiction of the board of supervisors over roads, ferries and bridges may be withdrawn from such board and vested in a road commission. Havens v. Hewes, 128 Miss. 650, 91 So. 397 (1922).

Chapter 169, Laws 1916, which gave road commissioners full authority over roads, is violative of this section. Morgan v. Shelly, 111 Miss. 868, 72 So. 700 (1916).

The law authorizing the creation of the swamp land drainage districts, under the control of the supervisors, does not violate this section. Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911).

Section 1721 of the Code of 1906, which takes the power over roads from the supervisors and confers it on drainage commissioners, violates this section. Board of Supvrs v. Black Creek Drainage Dist., 99 Miss. 739, 55 So. 963 (1911).

Chapter 149 of the Laws 1910, requiring boards of supervisors to appoint commissioners to supervise the construction and maintenance of roads, subject to the approval of the board, does not violate this section of the Constitution. Thomas v. Board of Supvrs., 98 Miss. 232, 53 So. 585 (1910).

4. Powers, functions, and duties of Board of Supervisors generally.

A county board of supervisors' refusal to reinstate the chancery clerk to the positions of clerk of the board of supervisors and county auditor exceeded the board's limited grant of authority under § 19-3-29, which authorizes the board to appoint a clerk pro tempore, where the chancery clerk had merely intended to temporarily vacate those positions and there were no findings that the chancery clerk failed to perform any duty required of him so as to justify the board's refusal to comply with his request for reinstatement. Barlow v. Weathersby, 597 So. 2d 1288 (Miss. 1992).

The supervisors had the power to pay for the hire of drag lines, trucks, etc., as shown by the accounts presented by the contractor to the supervisors, although the clerk was mistaken in his request that they be broken down rather than made out for the purchase price of gravel placed on the roads. Craig v. Wheat, 212 Miss. 258, 54 So. 2d 383 (1951).

Constitutional provision creating board of supervisors, and charging them with duties that can only be performed at board meetings, impliedly requires them to hold such meetings. Wade v. Woodward, 166 Miss. 406, 145 So. 737 (1933).

Meeting of board of supervisors on first Monday of month, which had been time fixed for regular meetings before statutory amendment omitted time therefor, being valid, tax assessment thereat was valid under maxim that common error sometimes passes current as law. Wade v. Woodward, 166 Miss. 406, 145 So. 737 (1933).

The legislature may invest the boards of supervisors with the right to regulate the taking of fish in their respective counties. Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. R. 700 (1905).

History of legislation, constitutional and statutory, relating to the jurisdiction of the board of supervisors reviewed. Monroe County v. Strong, 78 Miss. 565, 29 So. 530 (1900).

The board can do valid acts only as empowered by law. Howe v. State, 53 Miss. 57 (1876), but see Harrison County v. Gulfport, 557 So. 2d 780 (Miss. 1990).

5. Jurisdiction over roads, ferries, and bridges, generally.

The jurisdiction of the board of supervisors over roads, ferries and bridges is restricted to their respective counties, except where authorized specifically by statute, and it has always been considered that the jurisdiction of the board over roads has reference to public roads within its jurisdiction which have been established by dedication, prescription, or under the method provided by statute and where the evidence in a taxpayer's suit established that a member of the board of supervisors had used county machinery, materials, and labor for the benefit of private citizens on unauthorized projects both within and without his own county, the chancellor erred in not directing an accounting as to the unauthorized projects within the supervisor's county, and in not enjoining him from other unauthorized activities in an adjacent county. Saxon v. Harvey, 190 So. 2d 901 (Miss. 1966).

The jurisdiction of the board of supervisors over roads has reference to public roads which have been established either by dedication, prescription, or under the method provided by the statute. Coleman v. Shipp, 223 Miss. 516, 78 So. 2d 778 (1955).

The statute authorizing the construction of sea walls by county supervisors and the appointment of a road protection commission is not unconstitutional as conferring on the commission any of the supervisors' constitutional jurisdiction over roads and bridges; all of the commission's acts involving judgment and discretion being made subject to the supervisors' approval. Henritzy v. Harrison County, 180 Miss. 675, 178 So. 322 (1938).

That constitutional provision vesting in county boards complete jurisdiction over highways and bridges was amended by authorizing creation of State Highway Commission did not affect county board's jurisdiction, but authorized taking away exclusive jurisdiction over certain highways and conferring it upon State Highway Commission. Alabama & V. Ry. Co. v. Graham, 171 Miss. 695, 157 So. 241 (1934).

Under constitutional provisions vesting in county boards complete jurisdiction over highways and bridges, adjudication of county board ordering railway to erect bridge over highway, unappealed from, was conclusive upon railway. Alabama & V. Ry. Co. v. Graham, 171 Miss. 695, 157 So. 241 (1934).

Where county board ordered railway to erect bridge over highway, by common law and by statute, continuing duty rested on railway to maintain bridge and approaches in good order and in condition reasonably safe for ordinary uses of public. Alabama & V. Ry. Co. v. Graham, 171 Miss. 695, 157 So. 241 (1934).

Petition for improvement of roads and for bond issue election may not designate roads to be improved or control expenditure of bond proceeds. Board of Supvrs. v. Self, 156 Miss. 273, 125 So. 828 (1930).

Laws 1924, c 319, providing for protection of roads extending along beaches or shores of any body of tidewater does not violate this section. Ladner v. Road Protection Comm'n, 150 Miss. 416, 116 So. 602 (1928).

The legislature cannot change the jurisdiction of the board of supervisors over the public roads. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

The board of supervisors have jurisdiction to open private roads. Board of Supvrs. v. Olsen, 118 Miss. 885, 80 So. 339 (1919).

As to the jurisdiction of boards of supervisors over public roads prior to the amendment of this section, see Lang v. Board of Supvrs., 114 Miss. 341, 75 So. 126 (1917).

Chapter 176, Laws 1914, authorizing the board of supervisors to construct and maintain public roads in one or more supervisors' districts, or parts of districts, to issue bonds and levy taxes for that purpose, does not deprive the supervisors of general jurisdiction over highways. Prather v. Googe, 108 Miss. 670, 67 So. 156 (1915).

The board of supervisors is not authorized to construct a levee across a bayou that will prevent the natural flow of the water. Board of Supvrs v. Carrier Lumber & Mfg. Co., 103 Miss. 324, 60 So. 326 (1913).

The board of supervisors have authority to prohibit the use of a public highway by a tractor engine used by an individual between his mills. Covington County v. Collins, 92 Miss. 330, 45 So. 854, 131 Am. St. R. 527, 15 Am. Ann. Cas. 1072 (1908).

The jurisdiction over roads, ferries and bridges can be regulated by law, but it cannot be taken away. Jefferson County Supvrs. v. Arrighi, 54 Miss. 668 (1877); Paxton v. Baum, 59 Miss. 531 (1882); Seal v. Donnelly, 60 Miss. 658 (1882); Quitman County v. Self, 156 Miss. 273, 125 So. 828 (1930).

6. Closing or abandonment of roads.

A court is without power to close a public road in private litigation between individuals unless such action is predicated upon a finding that there has been a valid order of the Board of Supervisors closing the road, spread upon its minutes, if it is a county road, or that similar official action has been taken by the State Highway Commission and is reflected by its official records, if it is a state road or highway. Barrett v. Pilgrim, 317 So. 2d 382 (Miss. 1975).

Where the applicable statute, at the time the state highway commission took over a county road under an agreement to maintain it without expense to the county, contained no provision authorizing the commission to take complete jurisdiction over any road or to obligate itself by any such contract, the subsequent abandonment and surrender to the county of a portion of such road did not constitute the impairment of the obligation of a contract. Wilkinson County v. State Hwy. Comm'n, 191 Miss. 750, 4 So. 2d 298 (1941).

In proceeding for closing road where question whether road was private rather than public road was not raised or passed upon by county board of supervisors or circuit court issue could not be considered in Supreme Court. Byrd v. Board of Supvrs., 179 Miss. 880, 176 So. 386 (1937), error overruled, 179 Miss. 889, 176 So. 910 (1937).

Abutting property owners damaged by closing of public road have adequate remedy. Byrd v. Board of Supvrs., 179 Miss. 880, 176 So. 386 (1937), error overruled, 179 Miss. 889, 176 So. 910 (1937).

Where board of supervisors discontinued public road, abutting owner had adequate remedy at law by suing for damages and chancery court was without power to supervise board of supervisors. Berry v. Board of Supvrs., 156 Miss. 629, 126 So. 405 (1930).

Board of supervisors has power to discontinue public roads. Berry v. Jefferson Davis County, 156 Miss. 629, 126 So. 405 (1930); Byrd v. Board of Suprvs., 179 Miss. 880, 176 So. 386 (1937).

As to the measure of damages for closing or discontinuing a road, see Jackson v. Monroe County, 124 Miss. 264, 86 So. 769 (1921).

7. State highways.

When the legislature designated a certain highway as a four-lane highway, the state highway commission was without discretion as to whether the right-of-way should be for two lanes or four lanes, this question having been settled by the legislature, which has full jurisdiction over state highways. Reed v. Mississippi State Hwy. Comm'n, 260 So. 2d 184 (Miss. 1972).

The state highway commission is not prohibited from acquiring sufficient right-of-way for more than two lanes of traffic on highways designated by the legislature as two-lane highways, unless such intent specifically appears in the statutes, since the determination of the amount of right-of-way necessary for any given highway is within the discretion of the commission under policies that it may adopt from time to time, unless the legislature limits this power. Reed v. Mississippi State Hwy. Comm'n, 260 So. 2d 184 (Miss. 1972).

In a proceeding by property owners to enjoin state highway commission from proceeding with proposed construction of a freeway through a city, where the allegations of the bill were sufficient to charge an abuse of discretion on the part of the state highway commission and where the charge was admitted by demurrer, the state highway commission and its officials were required to answer and a hearing was to be held on the merits. Mississippi

State Hwy. Comm'n v. Fuller, 224 Miss. 712, 80 So. 2d 814 (1955).

Where the applicable statutes, at the time the state highway commission took over a county road under an agreement to maintain it without expense to the county, contained no provision authorizing the commission to obligate itself by any such contract, subsequent abandonment and surrender to the county of a portion of such road so taken over did not constitute an impairment of the obligation of a contract. Wilkinson County v. State Hwy. Comm'n, 191 Miss. 750, 4 So. 2d 298 (1941).

The State Highway Commission may construct a highway over school lands without compensation to the county therefor, since public property may be devoted to an additional public use without compensation for such use. Bailey v. Pierce, 194 So. 743 (Miss. 1940).

Amendment to Constitution authorizing transfer of exclusive jurisdiction over State highways to State Highway Commission, and statutes, giving State Highway Commission such jurisdiction and charging it with duty of maintaining such highways, did not affect statutory duty of railway of maintaining bridges over railways and approaches thereto. Alabama & V. Ry. Co. v. Graham, 171 Miss. 695, 157 So. 241 (1934).

Constitution, § 170, as originally ordained, conferred full jurisdiction over roads and bridges upon the boards of supervisors, and as amended in 1924 (Laws 1924, c 143), it provides that Legislature may have power to designate certain highways as State highways and place such highways under control and supervision of State Highway Commission for "construction" and maintenance. The word "construction" in its ordinary sense means to build or erect something which theretofore did not exist. Trahan v. State Hwy. Comm'n, 169 Miss. 732, 151 So. 178 (1933).

Constitutional provision respecting State highways allows legislature to straighten main State highways so far as practicable between principal points in highway and to lay out better locations. Trahan v. State Hwy. Comm'n, 169 Miss. 732, 151 So. 178 (1933).

Designation of State highway in statute by giving principal points from Tennessee to Louisiana lines through which or near which road should run held sufficient under Constitution. Trahan v. State Hwy. Comm'n, 169 Miss. 732, 151 So. 178 (1933).

Under statute designating State highway, highway commission could follow old line of road wherever practicable and depart from old line to straighten road and find better locations. Trahan v. State Hwy. Comm'n, 169 Miss. 732, 151 So. 178 (1933).

State could not, on relation of district attorney, sue to restrain bus companies, having franchise from railroad commission to use highway, from continuing to use State highway, on ground they were wrongfully using highway to extent constituting public nuisance. Capitol Stages, Inc. v. State, 157 Miss. 576, 128 So. 759 (1930).

8. Liabilities.

County was not immune from its duty to properly maintain, inspect, and perform such other duties as may be required by law, with respect to the bridge; pursuant to Miss. Code Ann. § 65-7-117 and Miss. Code Ann. § 65-9-25, the county was under the statutory duty to properly maintain and to inspect State Aid roads such as the bridge where the accident occurred. Ladner v. Stone County, 938 So. 2d 270 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 542 (Miss. 2006).

An appropriation of public funds for the construction or maintenance of private roads or driveways is to an object not authorized by law and a member of board of supervisors was personally liable for maintenance of private roads. Coleman v. Shipp, 223 Miss. 516, 78 So. 2d 778 (1955).

County has jurisdiction over road so as to make it liable for damage resulting from an overflow caused by improper construction of road where county followed method prescribed by law, § 8314, Code 1942, notwithstanding State Highway Department and WPA workers did part of the actual construction of the road, with permission of county supervisors. Stigall v. Sharkey County, 207 Miss. 188, 42 So. 2d 116 (1949).

The measure of damages recoverable of a county by abutting landowners for abandoning a public highway is the amount of loss resulting from depreciation in the fair market value of the land. Jackson v. Monroe County, 124 Miss. 264, 86 So. 769 (1921).

The county and not the road district is liable for damages, if any, due to the construction of a highway in a district, although the county board created the separate road district and appointed highway commissioners over it. Covington County v. Watts, 120 Miss. 428, 82 So. 309 (1919).

ATTORNEY GENERAL OPINIONS

A county is authorized under statutes governing general jurisdiction over roads to acquire right-of-way for and construct sidewalks along county roads as part of the county road system utilizing road and bridge funds if the board of supervisors determines, as reflected by an order entered upon its minutes, that such is necessary and convenient for the use of the traveling public. Hollimon, June 4, 2004, A.G. Op. 03-0616.

A county may not prohibit the traffic on the private road from utilizing the public road. But, the county may exercise reasonable regulation and control through the use of design standards, safety regulations, and current traffic laws when determining how the private road joins the end of the county road. Kilpatrick, July 16, 2004, A.G. Op. 04-0306.

A county may adopt and enforce regulations permitting the construction of certain private structures within county road right-of-ways. However, the county is not authorized to assist in the construction of such structures as this activity would amount to unauthorized expenditure of public funds. Nowak, Feb. 14, 2005, A.G. Op. 05-0036.

If a county desires to expand a road, the owner of a structure placed in the road with the county's permission would be required to remove it at his own cost. Nowak, Feb. 14, 2005, A.G. Op. 05-0036.

RESEARCH REFERENCES

Am Jur. 39 and 40 Am. Jur. 2d, Highways, Streets, and Bridges.

CJS. C.J.S. Counties §§ 63 to 96.

§ 171. Justice court judges; jurisdiction

A competent number of justice court judges and constables shall be chosen in each county in the manner provided by law, but not less than two (2) such judges in any county, who shall hold their office for the term of four (4) years. Each justice court judge shall have resided two (2) years in the county next preceding his selection and shall be high school graduate or have a general equivalency diploma unless he shall have served as a justice of the peace or been elected to the office of justice of the peace prior to January 1, 1976. All persons elected to the office of justice of the peace in November, 1975, shall take office in January, 1976, as justice court judges.

The maximum civil jurisdiction of the justice court shall extend to causes in which the principal amount in controversy is Five Hundred Dollars ($500.00) or such higher amount as may be prescribed by law. The justice court shall have jurisdiction concurrent with the circuit court over all crimes whereof the punishment prescribed does not extend beyond a fine and imprisonment in the county jail; but the Legislature may confer on the justice court exclusive jurisdiction in such petty misdemeanors as the Legislature shall see proper.

In all causes tried in justice court, the right of appeal shall be secured under such rules and regulations as shall be prescribed by law, and no justice court judge shall preside at the trial of any cause where he may be interested, or the parties or either of them shall be connected with him by affinity or consanguinity, except by the consent of the justice court judge and of the parties.

All reference in the Mississippi Code to justice of the peace shall mean justice court judge.

SOURCES: 1817 art V § 8; 1832 art IV § 23; 1869 art VI § 23; Laws, 1975, ch. 518, eff December 8, 1975.

Editor's Note — The 1975 amendment to Section 171 of Article 6 of the Constitution of 1890 was proposed by Laws, 1975, Ch. 518 (House Concurrent Resolution No. 11), and upon ratification by the electorate on November 4, 1975, was inserted by proclamation of the Secretary of State on December 8, 1975.

Cross References — Qualifications to hold public office, generally, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

Justices of the peace, generally, see § 9-11-2 et seq.

Practice and procedure before justices of the peace generally, see § 11-9-101 et seq.

JUDICIAL DECISIONS

1. In general.
2. Jurisdiction generally.
3. Civil jurisdiction.
4. Amount in controversy—In general.
5. Joinder or splitting of causes of action, amount in controversy.
6. Criminal jurisdiction.
7. Criminal orders and judgments.
8. Appeals from justice of the peace.
9. Disqualification of justice of the peace—In general.
10. Waiver and consent, disqualification of justice of the peace.

1. In general.

Candidate was a qualified candidate for the position of justice court judge, even though the candidate did not live within the election subdistrict where the candidate wished to run for office. Montgomery v. Lowndes County Democratic Exec. Comm., 969 So. 2d 1 (Miss. 2007).

Mississippi justice courts and the circuit courts shared concurrent jurisdiction in matters in which the amount in controversy exceeded $200 but not $2,500. Arant v. Hubbard, 824 So. 2d 611 (Miss. 2002).

Justice court judges must regard scrupulously the nature of their office since most citizens have their primary, if not their only, direct contact with the law through the office of the justice court judge and the perception of justice of most citizens is forged out of their experiences with the justice court judges. Although justice court judges for the most part have no formal training in the law, when a person assumes the office of justice court judge, he or she accepts the responsibility of becoming learned in the law. In re Bailey, 541 So. 2d 1036 (Miss. 1989).

The fact that a justice court judge's misconduct was the product of ignorance would not operate to exonerate him. However, lack of improper motive may be considered in mitigation. Misconduct through ignorance warrants sanctions, though not necessarily removal from office, particularly for a first offense. In re Bailey, 541 So. 2d 1036 (Miss. 1989).

This section deals exclusively with district justices of the peace and is not involved in the matter of justices of the peace who are such by virtue of their offices as mayors of towns and villages. Hathaway v. State, 188 Miss. 403, 195 So. 323 (1940).

Where statute creating new justice of peace districts provided that incumbent justices were not affected until after termination of existing terms of office, resignation of justice of peace held not to terminate office, and appointment could be made for unexpired term where any other construction of statute would leave district without a justice of peace. Carroll v. State, 174 Miss. 757, 165 So. 813 (1936).

Legislature could confer upon police justices jurisdiction concurrent with justices of the peace within territorial limits of municipality. Gober v. Phillips, 151 Miss. 255, 117 So. 600 (1928).

Laws 1926 c 131 creating county courts does not violate this section. State ex rel. Knox v. Speakes, 144 Miss. 125, 109 So. 129 (1926).

The courts hereby authorized are distinct from those authorized by section 172. Hughes v. State, 79 Miss. 77, 29 So. 786 (1901).

The section, as to jurisdictional amount, became operative upon the adoption of the Constitution and was not suspended by Section 274. Illinois Cent. R.R. v. Brookhaven Mach. Co., 71 Miss. 663, 16 So. 252 (1894).

2. Jurisdiction generally.

In declining to follow Melikian v. Avent (ND Miss. 1969) 300 F Supp 516, the reviewing court held that the civil side of the Mississippi fee system did not comport with due process, in light of the record which supported the inference that creditors would file more frequently in the courts of the judges who tended to favor the plaintiffs, and where there was testimony to this effect, and further testimony to the effect that judges knew and understood this to be the case, and where the undisputed evidence showed that cases were unevenly distributed throughout the judges in the various counties. Brown v. Vance, 637 F.2d 272 (5th Cir. 1981).

Under ordinary circumstances, the jurisdiction of justices of the peace granted by the Constitution is limited to the district for which they are elected. Farrar v. State, 191 Miss. 1, 2 So. 2d 146 (1941).

Jurisdiction of justices of peace of transitory causes of action against nonresidents is as complete as that of circuit court, except as to amount. Robertson Bros. v. Mobile & O.R.R., 155 Miss. 198, 124 So. 334 (1929).

An action on a judgment before a justice of the peace should be brought in the district in which the defendant resides, rather than in the district in which the original judgment was procured. Wise v. Keer Thread Co., 84 Miss. 200, 36 So. 244 (1904).

Neither the jurisdiction of justices of the peace, nor the executive power of constables, can be extended beyond the district for which they were elected. Riley v. James, 73 Miss. 1, 18 So. 930 (1895).

The jurisdiction of a justice of the peace is conferred by the Constitution and not by the legislature. Illinois Cent. R.R. v. Brookhaven Mach. Co., 71 Miss. 663, 16 So. 252 (1894).

It is not in the power of the legislature to give the mayor of a town the jurisdiction of a justice of the peace as to that part of the justice's district outside of the town. Illinois Cent. R.R. v. Cathy, 70 Miss. 332, 12 So. 253 (1893).

3. Civil jurisdiction.

Chancery court was without power to determine gas company's right to charge sales tax to consumers, that being in law court. Mississippi Power & Light Co. v. Ross, 168 Miss. 400, 150 So. 830 (1933).

The statutory proceeding to obtain possession by landlord, of which a justice of the peace has jurisdiction without regard to the value of the lands involved, is a special proceeding in which the justice of the peace sits as a special officer, and with no further effect than to order possession; title may be involved but there is no adjudication of title to a conclusive effect. Vansant v. Dodds, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

Justice of peace had jurisdiction of nonresident's personal action against nonresident defendant served but not householder or freeholder in district. Robertson Bros. v. Mobile & O.R.R., 155 Miss. 198, 124 So. 334 (1929).

In a proceeding by a landlord to recover possession of premises the jurisdiction of a justice of the peace, who constitutes a special court, is not limited by this section to $200.00, and his jurisdiction is co-extensive with the county in such proceeding, and on appeal and trial de novo the circuit court had jurisdiction to render judgment in excess of $200.00. Stollenwerck v. Eure, 119 Miss. 854, 81 So. 594 (1919), error overruled, 120 Miss. 233, 82 So. 68 (1919).

A suit may be properly brought against a nonresident executor in a different county from which he was appointed, if the debt was made in the district and he be there personally served with process. Williams v. Stewart, 79 Miss. 46, 30 So. 1 (1901).

A claimant of goods attached for rent is not entitled to be notified of the transfer of the case, when on appeal from the justice court the case is reversed for want of jurisdiction and papers are sent back and transferred to a justice having jurisdiction. Pierce v. Watkins, 74 Miss. 394, 21 So. 148 (1896).

A justice of the peace has jurisdiction to issue a writ of attachment and try the cause in a suit against a nonresident, although the only property attached is in another district of the county and where there is a qualified and acting justice in such other district. Griggs v. Jesse French Piano & Organ Co., 70 Miss. 211, 14 So. 24 (1892).

The justices of the peace have jurisdiction to try claimant's issue although the value of the property exceeds two hundred dollars. Morgan v. Schwartz, 66 Miss. 613, 6 So. 326 (1889).

4. Amount in controversy—In general.

The statutory proceeding to obtain possession by an alleged landlord may be prosecuted before a justice of the peace without regard to the value of the lands involved. Vansant v. Dodds, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

Test as to jurisdictional amount in controversy is determined at time of filing suit. Catchot v. Russell, 160 Miss. 330, 134 So. 140, 77 A.L.R. 988 (1931).

Interest is not to be included in determining "principal amount in controversy" on question whether circuit court or justice of the peace has jurisdiction. Catchot v. Russell, 160 Miss. 330, 134 So. 140, 77 A.L.R. 988 (1931).

Where agreed percentage of principal and interest added as attorney's fee to face of note, excluding interest, exceeded $200, circuit court had jurisdiction; attorney's fee being part of "principal amount in controversy." Catchot v. Russell, 160 Miss. 330, 134 So. 140, 77 A.L.R. 988 (1931).

Surety, to whom judgment on draft in excess of $200 was assigned for the sum of $198.00, properly brought suit against principal debtor to recover latter sum in justice of the peace court. Wainwright v. Atkins, 104 Miss. 438, 61 So. 454 (1913).

In a replevin suit the test of jurisdiction is the value of the property as shown in the affidavit, and not as found by the jury. Johnson v. Tabor, 101 Miss. 78, 57 So. 365 (1912); Thompson v. Poe, 104 Miss. 586, 61 So. 656 (1912).

Where a note for less than $200.00 principal stipulates for 10% attorney's fee if sued on, and the attorney's fee and principal together exceed $200.00, a justice of the peace will not have jurisdiction. Parks v. Granger, 96 Miss. 503, 51 So. 716, Am. Ann. Cas. 1912B,232 (1910).

The affidavit in replevin, if made in good faith, determines the jurisdiction of the court as to the value of the property sued for. Ball, Brown & Co. v. Sledge, 82 Miss. 749', 35 So. 447, 100 Am. St. R. 654 (1903).

If the amount of a judgment in a justice's court in another state and the costs of the suit therein paid by the plaintiff exceed two hundred dollars, the circuit court has jurisdiction of a suit for the aggregate amount brought in this state. Western Union Tel. Co. v. Pearce, 82 Miss. 487, 34 So. 152 (1903).

Under the section, a justice of the peace has jurisdiction of a suit against a carrier by a person who has shipped freight by it, a part of which belongs to him and a part to others, to recover damages which he has suffered, if they do not exceed two hundred dollars, although the entire shipment was made under one contract with him and the damages to all the property exceed said sum. Waters v. Mobile & O.R.R., 74 Miss. 534, 21 So. 240 (1897).

The amount of the demand in a civil suit, where honestly made, fixes and determines the amount in controversy (explaining Askew v. Askew, 49 M 301). Fenn

v. Harrington, 54 Miss. 733 (1877); Ross v. Natchez, J. & C.R.R., 61 Miss. 12 (1883); Griffin v. McDaniel, 63 Miss. 121 (1885).

The amount of the principal of the debt at the time suit is brought less the credits then due is the test of jurisdiction as to amount. Martin v. Harden, 52 Miss. 694 (1876).

The amount in controversy is not limited to actions on contracts. Bell v. West Point, 51 Miss. 262 (1875); Higgins v. Deloach, 54 Miss. 498 (1877).

In suits upon penal bonds, jurisdiction is determined by the amount of damages honestly claimed. Shattuck v. Miller, 50 Miss. 386 (1874); State v. Lucky, 51 Miss. 528 (1875).

In computing the amount in controversy, costs, damages, and interest are excluded. New Orleans, J. & G.N.R.R. v. Evans, 49 Miss. 785 (1874); Jackson v. Whitfield, 51 Miss. 202 (1875).

5. Joinder or splitting of causes of action, amount in controversy.

The jurisdictional question of whether separate and distinct demands may be joined in a single suit so as to make up an amount sufficient to confer original jurisdiction on the circuit court, is controlled by the Constitution itself and no statutory device or rule of practice can be invoked to avoid or circumvent the plain provisions of the Constitution on the subject. R.H. Green Whsle. Co. v. Hall, 184 Miss. 296, 185 So. 807 (1939).

The circuit court had no jurisdiction, except on appeal, of an action by three persons jointly for damages resulting from misrepresentation as to the quality of certain seed corn purchased by one of them for himself and the others, where the damages of each were separate and distinct from those of the others, and such separate demands for damages did not individually exceed the amount denoting the limitation of jurisdiction of justices of the peace. R.H. Green Whsle. Co. v. Hall, 184 Miss. 296, 185 So. 807 (1939).

A single demand cannot be split up so as to confer jurisdiction. Vicksburg Waterworks Co. v. Ford, 97 Miss. 198, 52 So. 208 (1910).

A person having two mules valued at $175.00 each killed at the same time and in the same manner, two separate actions cannot be brought, since there is but one cause of action. Yazoo & Miss. V. Ry. v. Payne, 92 Miss. 126, 45 So. 705 (1908).

Separate and distinct suits cannot be consolidated by a justice of the peace when the aggregate amount of the suits exceeds $200.00. Louisville & N.R. Co. v. McCollister, 66 Miss. 106, 5 So. 695 (1889).

An account, though embracing various items, cannot be divided so as to give jurisdiction. Grayson v. Williams, 1 Miss. (1 Walker) 298 (1827); Pittman v. Chrisman, 59 Miss. 124 (1881).

Plaintiff need not embrace in the same suit independent causes of action, though all may be due. Ash v. W.A. Lee & Co., 51 Miss. 101 (1875); Pittman v. Chrisman, 59 Miss. 124 (1881); McLendon v. Pass, 66 Miss. 110, 5 So. 234 (1888) (overruling Schofield v. Pensons, 26 M 402; Mobile & O. R. Co. v. State, 51 M 137); Drysdale v. Biloxi Canning Factory, 67 Miss. 534, 7 So. 541 (1880).

6. Criminal jurisdiction.

Mississippi criminal statutory fees systems for compensating justices of the peace in Hinds and DeSoto Counties are violative of defendant's due process rights to trial before impartial tribunal under the Tumey-Ward test, where the possibility existed that judges in the aforementioned counties would compete for business by currying favor with arresting officers or taking biased actions to increase their case load, and where a judge might minimize the burden of proof required to convict the defendant or might be less than diligent in protecting the defendant's constitutional rights. Brown v. Vance, 637 F.2d 272 (5th Cir. 1981).

One of two courts of concurrent jurisdiction may, by valid order of dismissal, relinquish its exclusive jurisdiction acquired by criminal prosecution being first instituted therein, so that the other court may proceed then with prosecution of same offense. Hegwood v. State, 206 Miss. 160, 39 So. 2d 865 (1949).

Dismissal without prejudice to State of proceeding against defendant in justice of peace court for unlawful possession of intoxicating liquor, on motion of state, did not prevent defendant from being indicted for same offense in circuit court having concurrent jurisdiction. Hegwood v. State, 206 Miss. 160, 39 So. 2d 865 (1949).

Statute making the jurisdiction of a justice of the peace concurrent with the circuit court of the county over all crimes occurring in their several districts of the character of misdemeanor and providing that if there should not be a justice of the peace in the district in which any crime was committed qualified to try the accused, any justice of the peace of the county should have jurisdiction thereof, was valid. Farrar v. State, 191 Miss. 1, 2 So. 2d 146 (1941).

One accused of misdemeanor committed in a supervisor's district in which there was no justice of the peace could be tried in the justice of the peace court of an adjoining district. Farrar v. State, 191 Miss. 1, 2 So. 2d 146 (1941).

Justice of peace had jurisdiction of prosecution for selling beer and wine in county which had voted to prohibit. Blount v. Kerley, 180 Miss. 863, 178 So. 591 (1938).

Justice of peace had jurisdiction of defendant charged with selling liquor and of subject matter where offense was misdemeanor and sentence was by fine and imprisonment in county jail. Hitt v. State, 149 Miss. 718, 115 So. 879 (1928).

Where defendant is charged with assault and battery, and on trial it appears the injured party died from defendant's blows, it is wise to bind the defendant over to await the action of the grand jury. Ex parte Smith, 79 Miss. 373, 30 So. 710 (1901).

After a conviction on a misdemeanor charge the defendant will not be released on habeas corpus because of defects in the affidavit. Hendricks v. State, 79 Miss. 368, 30 So. 708 (1901).

A justice of the peace, who has acquired jurisdiction of the person of a defendant charged with a misdemeanor, cannot have his judgment collaterally attacked. Hendricks v. State, 79 Miss. 368, 30 So. 708 (1901).

Where a justice of the peace has jurisdiction of the subject matter of a criminal prosecution and the defendant appears and pleads not guilty, he thereby waives the question of jurisdiction of his person. Alexander v. State, 21 So. 923 (Miss. 1897).

The criminal jurisdiction of a mayor of a municipality as ex officio justice of the peace is confined to the corporate limit of the municipality and an affidavit before him charging a misdemeanor to have been committed in the district in which the town is situated, but failing to aver that it was committed in the town, states an imperfect venue. Burnett v. State, 72 Miss. 994, 18 So. 432 (1895).

The jurisdiction of the justice of the peace embraces suits founded on any penal statute. Barlow v. Britton, 70 Miss. 427, 12 So. 460 (1893).

Without an affidavit, no jurisdiction is conferred on a justice of the peace to try and punish an offender. Bigham v. State, 59 Miss. 529 (1882).

7. Criminal orders and judgments.

Justice court without authority to enter order of dismissal in criminal case, after continuance of case to definite subsequent date. Green v. Everson, 141 Miss. 129, 106 So. 265 (1925).

Where a defendant is charged with a misdemeanor and upon investigation of the case is bound over by the justice of the peace to await the action of a grand jury and imprisoned for default in making bond, he cannot, by habeas corpus proceeding, have his case remanded to the magistrate for trial. Ex parte Smith, 79 Miss. 373, 30 So. 710 (1901).

Where a justice of the peace enters his judgment on a separate piece of paper and, after the adjournment of his court, copies the entry of his docket, the judgment is not thereby invalid. Alexander v. State, 21 So. 923 (Miss. 1897).

The mere failure of the justice of the peace to enter judgment against the accused for several days after the trial and conviction affords no grounds for the defendant's discharge. Hope v. Hoover, 21 So. 134 (Miss. 1896).

8. Appeals from justice of the peace.

In replevin action in justice of peace court to recover horse worth $50, in which defendant filed counterclaim for $185, for wrongful suing out of writ, counterclaim gave Supreme Court jurisdiction of appeal. Garner v. Broom, 161 Miss. 734, 138 So. 336 (1931).

In regulating appeals from justice courts, the legislature cannot discriminate against classes of litigants. Chicago, St. L. & N.O.R. Co. v. Moss, 60 Miss. 641 (1882).

9. Disqualification of justice of the peace—In general.

The fact that the justice of the peace accompanied the officer on the occasion of defendant's arrest for unlawful sale of intoxicating liquor and thereby acquired a knowledge of the evidence against the defendant, did not of itself constitute a legal disqualification of the justice of the peace to preside at defendant's trial. Winborn v. State, 213 Miss. 322, 56 So. 2d 885 (1952).

For disqualification of a justice of the peace on account of relationship to parties in interest. Nimocks v. McGehee, 97 Miss. 321, 52 So. 626 (1910).

Only kinship or pecuniary interest in the result of a suit disqualifies a justice of the peace. Mere bias or prejudice on his part does not disqualify. Evans v. State, 92 Miss. 34, 45 So. 706 (1908).

10. Waiver and consent, disqualification of justice of the peace.

Failure to object to qualification of judge or justice of the peace before trial, or before losing control of judgment, constitutes waiver. Bryant v. State, 146 Miss. 533, 112 So. 675 (1927).

Where a party to a suit before a disqualified justice of the peace consents to call another justice of the peace to sit in his place and thereby gets substantially the benefit of a transfer of the case, he cannot thereafter complain of want of jurisdiction in the justice called in. Cross v. Levy, 57 Miss. 634 (1880).

ATTORNEY GENERAL OPINIONS

A justice court judge must generally reside in the district he or she intends to serve, but in the Tenth Circuit Court District of Mississippi, a justice court judge is only required to be a qualified elector of the county in which he or she intends to serve. Williamson, Aug. 29, 1997, A.G. Op. #97-0503.

RESEARCH REFERENCES

ALR. As to disqualification of judges generally, see annotations supra, under Miss. Const. Art. 6, § 165.

Criterion of jurisdictional amount where several claimants are interested. 72 A.L.R. 193.

Interest and attorneys' fees as factors in determining jurisdictional amount. 77 A.L.R. 991, 167 A.L.R. 1243.

Prior representation or activity as attorney or counsel as disqualifying judge. 72 A.L.R.2d 443.

Disqualification of judge in state proceedings to punish contempt against or involving himself in open court and in his actual presence. 37 A.L.R.4th 1004.

Judge's previous legal association with attorney connected to current case as warranting disqualification. 85 A.L.R.4th 700.

Am Jur. 47 Am. Jur. 2d, Justices of the Peace.

8A Am. Jur. Pl & Pr Forms (Rev), Divorce and Separation, Form 407.1 (Motion-Child Custody-Disqualification of judge on grounds of bias).

15 Am. Jur. Pl & Pr Forms (Rev) Judges, Form 31.1 (Affidavit — In support of petition to disqualify judge — partiality of judge).

15 Am. Jur. Pl & Pr Forms (Rev), Judges, Form 39.1 (Motion — To Disqualify judge — Dissolution of marriage — Bias against father in custody matter).

CJS. C.J.S. Justices of the Peace §§ 1-5.

§ 172. Establishment and abolishment of inferior courts

The Legislature shall, from time to time, establish such other inferior courts as may be necessary, and abolish the same whenever deemed expedient.

SOURCES: 1832 art IV § 24; 1869 art VI § 24.

Cross References — Qualifications to hold public office, generally, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

Establishment of county courts, see § 9-9-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Validity of statutes.
3. Powers and authority of inferior courts.
4. Special jurisdiction.

1. In general.

When the legislature creates a court and bestows jurisdiction upon it, that court must be inferior in ultimate authority to the constitutionally-created court which exercises the same jurisdiction; this superiority is shown by giving the constitutional court controlling authority over the legislative court, such as by appeal or certiorari. Marshall v. State, 662 So. 2d 566 (Miss. 1995), on remand, 687 So. 2d 758 (Ct. App. 1996).

State and federal courts have concurrent jurisdiction of suits of civil nature arising under Constitution and laws of United States, save in exceptional instances where jurisdiction has been restricted by Congress to federal courts. Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

Legislature may create court exercising same jurisdiction as circuit court so long as circuit court is superior thereto. Ex parte Tucker, 164 Miss. 20, 143 So. 700 (1932).

Legislature may create inferior court having jurisdiction of felonies and have indictments originating in circuit court transferable to inferior court. Ex parte Tucker, 164 Miss. 20, 143 So. 700 (1932).

An amendment to a city charter providing that a police justice shall preside over the city court and in his absence the mayor shall act, does not create a new court. Ex parte Dickson, 89 Miss. 778, 42 So. 233 (1906).

A police justiceship is authorized by this section. Hughes v. State, 79 Miss. 77, 29 So. 786 (1901).

2. Validity of statutes.

Sections 9-4-1 to 9-4-17, which establish the Court of Appeals of the State of Mississippi, are constitutional. Marshall v. State, 662 So. 2d 566 (Miss. 1995), on remand, 687 So. 2d 758 (Ct. App. 1996).

The youth court system does not unconstitutionally usurp jurisdiction committed exclusively to the chancery court by permitting the Supreme Court to hear a direct appeal without appeal to the chancery court, even though the Mississippi Constitution provides that the chancery court shall have full jurisdiction over "minor's business." Youth courts are neither superior, equal, or inferior to other "inferior" courts; they are special courts due to the special nature of their function. Thus, the legislature had authority to vest in the youth courts "exclusive original jurisdiction in all proceedings concerning...an abused child," and the social imperative for prompt disposition of matters affecting children is sufficiently within the police power that the legislature may streamline the appellate process. In re T.L.C., 566 So. 2d 691 (Miss. 1990).

Workmen's Compensation Act does not violate the constitutional provision that the legislature from time to time shall establish such inferior courts as may be necessary. Allen v. R.G. Le Tourneau, Inc., 220 Miss. 520, 71 So. 2d 447 (1954).

The statute making the mayor of a town an ex officio justice of the peace derives its authority from this section. Hathaway v. State, 188 Miss. 403, 195 So. 323 (1940).

A special tribunal consisting of the circuit judge and the municipal election commissioners, provided for by the Corrupt Practices Act (Laws 1935, Extraordinary Sess. chap 19) is such an inferior court as may be established under this section. Hayes v. Abney, 186 Miss. 208, 188 So. 533 (1939).

Statute creating county courts in certain counties under and by virtue of this section did not violate §§ 146, 156, 159 and 171 of the Constitution which confer jurisdiction on the different courts therein provided for. State ex rel. Knox v. Speakes, 144 Miss. 125, 109 So. 129 (1926).

If ch 197, Laws of 1912, providing for the organization of drainage districts and constituting the commissioners a court of record, created a court, it was within the legislative power under this section to create an inferior court. Pegram v. West Hatchie & Owl Creek Drainage Dist., 108 Miss. 793, 67 So. 453 (1915).

3. Powers and authority of inferior courts.

County courts may exercise equity jurisdiction as an inferior court of equity by virtue of this section, notwithstanding that § 159 of the Constitution confers full jurisdiction in equity matters on chancery courts. W. Horace Williams Co. v. Federal Credit Co., 198 Miss. 111, 21 So. 2d 582 (1945).

When a town is located partly in two counties, the county line running through the municipality, the mayor is nevertheless the mayor of the entire town and is an ex officio justice of the peace throughout the entire limits of the municipality, including that part in one county as well as the other; and, that being so, he is a justice of the peace ex officio of both counties and has authority, while acting within the municipality, to issue a search warrant authorizing a search for unlawful possession of intoxicating liquors to be executed in any part of either one of the two counties. Hathaway v. State, 188 Miss. 403, 195 So. 323 (1940).

This section was not violated by a statutory provision (§ 704 Code 1930, as amended by Laws 1932, chap 256) providing for direct appeals from the county court to the supreme court in felony cases which have been transferred from the circuit court to the county court for trial. City of Vicksburg v. Melsheimer, 183 Miss. 525, 185 So. 207 (1938).

County judge had jurisdiction of landlord's action to oust tenant at end of term, under statute, as against contention that county court has no authority to try causes in vacation. McMillan v. Best, 171 Miss. 811, 158 So. 488 (1935).

Legislature could authorize circuit courts to transfer to county courts such indictments originating in circuit court as legislature should deem expedient, leaving to circuit courts' discretion determination of how many indictments should be in fact transferred. Breland v. State, 164 Miss. 32, 143 So. 690 (1932).

Constitutional provision prohibiting reversal of judgment or decree on ground of mistake as to whether cause was one in equity or in law applies to county court. Moore v. GMAC, 155 Miss. 818, 125 So. 411 (1930).

The police court is created under and by virtue of this section, and with respect to jurisdiction is independent of the court provided for by § 171 of the Constitution, supra; and it was competent for the legislature to confer upon police justices jurisdiction concurrent with justices of the peace within the territorial limits of the municipality. Gober v. Phillips, 151 Miss. 255, 117 So. 600 (1928).

It is competent, under the section, for the legislature to give a mayor of a municipality jurisdiction of causes, civil and criminal, within the municipality. Bell v. McKinney, 63 Miss. 187 (1885).

4. Special jurisdiction.

The youth court had exclusive jurisdiction to determine custody and visitation rights with respect to an abused child even though the youth court order was in direct conflict with a chancery court order in the parents' divorce proceedings which were being conducted concurrently with the youth court proceedings. DeLee v. Wilkinson County, 606 So. 2d 1125 (Miss. 1992).

Although the rental for the year, for which certain premises were leased, exceeded the amount of a justice of the peace jurisdiction, the justice of the peace has jurisdiction of an action to dispossess such tenant, such jurisdiction being special statutory jurisdiction under this section. Simpson v. Boykin, 118 Miss. 701, 79 So. 852 (1918); Stollenwerch v. Eure, 119 Miss. 854, 81 So. 594 (1919), error overruled, 120 Miss. 233, 82 So. 68 (1919).

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Courts §§ 20, 27.

CJS. C.J.S. Appeal and Error § 14.

§ 172A. Court order for tax levy or tax increase prohibited

Neither the Supreme Court nor any inferior court of this State shall have the power to instruct or order the State or any political subdivision thereof, or an official of the State or a political subdivision, to levy or increase taxes.

SOURCES: Laws, 1995, ch. 635, eff December 5, 1995.

Editor's Note — The addition of Section 172A of Article 6 of the Constitution of 1890 was proposed by Laws, 1995, ch. 635 (House Concurrent Resolution No. 40), and upon ratification by the electorate on November 7, 1995, was inserted by proclamation of the Secretary of State on December 5, 1995.

§ 173. Attorney General

There shall be an Attorney General elected at the same time and in the same manner as the Governor is elected, whose term of office shall be four years and whose compensation shall be fixed by law. The qualifications for the Attorney General shall be the same as herein prescribed for judges of the circuit and chancery courts.

SOURCES: 1817 art V § 14; 1832 art IV § 25; 1869 art VI § 25.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

State officers generally see Miss. Const. Art. 12, §§ 250 and 252, Art. 14, § 265.

Qualifications for judges of circuit and chancery courts, see Miss. Const., Art 6, § 154.

General provisions relating to office of Attorney General, see § 7-5-1 et seq.

Qualifications of State Bond Attorney the same as those prescribed for the Attorney General, see § 31-13-1.

JUDICIAL DECISIONS

1. Powers and duties of attorney general.

If Attorney General declines to file suit referred to him by state agency such as State Ethics Commission, where matter is of serious concern to state government, then that agency, if it determines its duties and responsibilities to so require, is at least entitled to have some court pass upon whether it should have its full day in court; if court determines that subject matter of litigation is one which agency is called upon to protect and enforce, agency should have full day in court, including right to legal representation; Attorney General's refusal to represent agency does not deprive court of authority to keep jurisdiction and entertain action; in event of disagreement, court and not Attorney General should make final determination as to whether or not agency is carrying out lawful functions for which it was created. Frazier v. State ex rel. Pittman, 504 So. 2d 675 (Miss. 1987).

The Attorney General was authorized to assume control of the defense of a racial discrimination suit against the Board of Trustees of State Institutions of Higher Learning and the entire state university and college system, and the Board was without power to engage private counsel to represent its interests independently. Wade v. Mississippi Coop. Extension Serv., 392 F. Supp. 229 (N.D. Miss. 1975).

The Attorney General is clothed with authority to represent the state in a suit against members of a county board of supervisors for the recovery of misappropriated funds. State ex rel. Patterson v. Warren, 254 Miss. 293, 180 So. 2d 293 (1965), suggestion of error sustained in part, overruled in part, 254 Miss. 293, 182 So. 2d 234 (1966).

Section 2 of Constitution, providing that no person belonging to one department shall exercise power properly belonging to either of the others, and § 144 thereof, providing that judicial power shall be vested in the courts, are not violated by Code 1942, § 4073, authorizing land commissioner, with written approval of attorney general, to strike land from lists sold to State for delinquent taxes, when tax sale was void, since § 4073 does not empower attorney-general to usurp function of courts or to act judicially, but requires him to perform a constitutional duty of his office by making his legal learning and discretionary opinion available to proper state officer in exercise of state function in a matter of public policy. State v. Southern Pine Co., 205 Miss. 80, 38 So. 2d 442 (1949).

The duties attached to office of attorney general are those common-law duties which such officer had previously exercised as chief law officer of the realm. Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y, 196 Miss. 841, 18 So. 2d 483 (1944).

Attorney general is intrusted with management of all legal affairs of state, and prosecution of all suits, civil or criminal, in which state is interested, having power to control and manage all litigation on behalf of state, and to maintain all suits necessary for enforcement of state laws, preservation of order, and protection of public rights. Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y, 196 Miss. 841, 18 So. 2d 483 (1944).

As to litigation, subject-matter of which is of State-wide interest, Attorney-General alone has right to represent State. Capitol Stages, Inc. v. State, 157 Miss. 576, 128 So. 759 (1930); Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y, 196 Miss. 841, 18 So. 2d 483, 153 A.L.R. 883 (1944).

RESEARCH REFERENCES

CJS. C.J.S. Attorney General §§ 1-19.

§ 174. District attorneys

A district attorney for each circuit court district shall be selected in the manner provided by law, whose term of office shall be four years, whose duties shall be prescribed by law, and whose compensation shall be a fixed salary.

SOURCES: 1817 art V § 14; 1832 art IV § 25; 1869 art VI § 25.

Cross References — Impeachments, see Miss. Const. Art. 4, § 50 et seq.

Qualifications to hold public office, generally, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

Office of district attorney generally, see § 25-31-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Powers and duties.
3. Term of office.
4. Compensation.

1. Construction and application.

This provision creating the office of district attorney and authorizing the legislature to prescribe its duties, is to be construed to mean that, when so prescribed, they shall be such duties as will be performed only within his territorial jurisdiction in connection with matters local to such jurisdiction, as distinguished from matters of state-wide public interests. Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y, 196 Miss. 841, 18 So. 2d 483 (1944).

2. Powers and duties.

The prosecuting attorney, as a representative of the state, has an obligation to be fair in his prosecution of a case. This is an obligation that can be fulfilled without relaxing the solemn duty to vigorously prosecute. Hosford v. State, 525 So. 2d 789 (Miss. 1988).

The powers of the district attorney are all statutory pursuant to the direction of this section. Adams v. State, 202 Miss. 68, 30 So. 2d 593 (1947).

District attorney has no authority to represent the state in any litigation the subject matter of which is of state-wide interest as distinguished from local interest. Kennington-Saenger Theatres, Inc. v. State ex rel. District Att'y, 196 Miss. 841, 18 So. 2d 483 (1944).

Powers of district attorneys can neither be increased nor diminished by Attorney-General. Capitol Stages, Inc. v. State, 157 Miss. 576, 128 So. 759 (1930).

3. Term of office.

The legislature cannot, directly or indirectly, abridge the terms of office of the district attorneys. Fant v. Gibbs, 54 Miss. 396 (1877).

4. Compensation.

Chapter 235, Laws of 1924, providing for the inspection, supervision, and auditing of public offices, and for the payment of attorney fees in the collection of sums found to be due, is not in conflict with this section, in that the provision for compensation is not specifically applicable to district attorneys. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

The section does not prevent the legislature from authorizing deductions from the salaries of district attorneys for neglect of official duty, whether from sickness or other cause. The word "fixed" in the section simply marks the change made by the Constitution in the compensation of district attorneys from a system of fees and salaries to one of salaries alone. Cole v. Humphries, 78 Miss. 163, 28 So. 808 (1900).

RESEARCH REFERENCES

CJS. C.J.S. District and Prosecuting Attorneys § 2.

§ 175. Liability and punishment of public officers

All public officers, for wilful neglect of duty or misdemeanor in office, shall be liable to presentment or indictment by a grand jury; and, upon conviction, shall be removed from office, and otherwise punished as may be prescribed by law.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.
Removals from office generally, see § 25-5-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Validity of statutes.
3. Public officers subject to removal.
4. Removal of public officers—In general.
5. Appeal, removal of public officers.
6. Effect of removal.
7. Sealing or expungement of records.

1. In general.

This section is self-executing. Bucklew v. State, 192 So. 2d 275 (Miss. 1966).

The penalty prescribed is mandatory. Shattuck v. State, 51 Miss. 575 (1875).

2. Validity of statutes.

Chapter 188, Laws of 1959 (1942 Code §§ 4054.01 et seq.) providing for the removal of county officers by the Governor pursuant to an election for the purpose, is constitutional. State ex rel. Patterson v. Board of Supvrs., 234 Miss. 26, 105 So. 2d 154 (1958).

Chapter 120 Laws of 1912 providing for a commission form of government for cities, does not violate this section, the removal of officers by the change in the form of government being incidental to the exercise of legislative power. Mayor of City of Jackson v. State, 102 Miss. 663, 59 So. 873, Am. Ann. Cas. 1915A,1213 (1912).

A statute which provides for impeachment and removal of officer without an indictment violates section 175 of the Constitution. Lizano v. City of Pass Christian, 96 Miss. 640, 50 So. 981 (1910).

3. Public officers subject to removal.

In order to come within this provision and § 20 of the Constitution, the officer's duties must be continuing and must be defined by rules prescribed by law, to be discharged by him in his own right and not by permission and under the supervision and control of another. Glover v. City of Columbus, 197 Miss. 467, 19 So. 2d 756, 156 A.L.R. 1350 (1944).

A policeman, serving only by permission of the mayor and council of a city, who not only prescribed his duties but also supervised and controlled the performance thereof, is not a public officer entitled to invoke the provisions of this section and § 20 of the Constitution against removal during term of office except upon conviction of wilful neglect of duty or misdemeanor in office. Glover v. City of Columbus, 197 Miss. 467, 19 So. 2d 756, 156 A.L.R. 1350 (1944).

Neither the deputy land commissioner nor a deputy auditor is a public officer within the meaning of this section. State ex rel. Brown v. Christmas, 126 Miss. 358, 88 So. 881 (1921).

The secretary, treasurer and business manager of the Alcorn Agriculture & Mechanical College is not a public officer of the state, the essential distinction between an employment and an office being defined. McClure v. Whitney, 120 Miss. 350, 82 So. 259 (1919).

4. Removal of public officers—In general.

Claimant to office of Jones County Community Hospital trustee could not prevail upon a contention that he had been removed from office in violation of Mississippi Constitution §§ 20 and 175. State ex rel. Pair v. Burroughs, 487 So. 2d 220 (Miss. 1986).

The term "in addition to the penalties prescribed by law" in Code 1972, § 21-39-1 [repealed], as well as the requisites of Mississippi Constitution Art 6 § 175, requires the conviction of a public official for violations of said statute before he can be involuntarily removed from office. Texas Rd. Boring Co. v. Parker, 298 So. 2d 708 (Miss. 1974).

Under constitutional provision respecting removal, removal from office for commission of crime must be based on conviction therefor. State v. Henderson, 166 Miss. 530, 146 So. 456 (1933).

Under Constitution, judgment of conviction must be rendered in trial on presentment or indictment by grand jury, to warrant removal of officer. State v. Henderson, 166 Miss. 530, 146 So. 456 (1933).

The method of removing officers as prescribed by this section is to be applied in Laws of 1924 c 325. State ex rel. Knox v. Board of Supvrs., 141 Miss. 701, 105 So. 541 (1925).

The state board of health cannot be authorized to remove a county health officer under this section. Mississippi State Bd. of Health v. Matthews, 113 Miss. 510, 74 So. 417 (1917).

An officer under the state board of health cannot be removed by said board arbitrarily without a hearing. State ex rel. Att'y Gen. v. McDowell, 111 Miss. 596, 71 So. 867 (1916); Ware v. State, 111 Miss. 599, 71 So. 868 (1916).

A justice of the peace has no authority to remove an officer from office. Moore v. State, 45 So. 866 (Miss. 1908).

The method of removal is exclusive. Runnels v. State, 1 Miss. (1 Walker) 146 (1823); Hyde v. State, 52 Miss. 665 (1876); Ex parte Lehman, 60 Miss. 967 (1883).

5. Appeal, removal of public officers.

In view of the mandatory terms of the Constitution and of Code 1942, § 4053 a court will not stay a removal from office pending appeal, where the officeholder has been convicted of a felony. Jolliff v. State, 210 So. 2d 47 (Miss. 1968).

The mere fact that a person who has been convicted may, by means of an appeal, ultimately succeed in establishing his innocence does not necessarily entitle him in the meantime to hold public office. Bucklew v. State, 192 So. 2d 275 (Miss. 1966).

Where the mayor of a town was convicted of attempted embezzlement and the judgment of the trial court ordered his removal from office and declared the office vacant, the judgment of removal and vacancy was not stayed by the defendant taking an appeal with supersedeas. Bucklew v. State, 192 So. 2d 275 (Miss. 1966).

6. Effect of removal.

Petitioner, having been removed from the office of supervisor of a county district upon his conviction of fraud in public office, lacked standing to interfere with a special election to fill the vacancy. Furthermore, petitioner forfeited all of his rights to the public office, regardless of what might transpire on appeal, and his right to such office for the remainder of the term to which he was elected was extinguished by reason of his conviction. Cumbest v. Commissioners of Election of Jackson County, 416 So. 2d 683 (Miss. 1982).

7. Sealing or expungement of records.

Since, pursuant to Miss Const of 1890, § 175, the only action a grand jury can take after investigating the conduct of public officer is to return a presentment or indictment, it was necessary to expunge from a grand jury report all references to the nonjudicial conduct of a judge whose indictment was barred by the statute of limitations. In re Moore, 336 So. 2d 736 (Miss. 1976).

Grand jury exceeded its authority by filing a report containing certain derogatory statements and allegations concerning the release of inmates granted executive clemency by a former governor, and such statements were ordered expunged from the report. In re Williams, 317 So. 2d 399 (Miss. 1975).

A grand jury report which charged the mayor of a city with no crime but which contained derogatory statements and inferences concerning his conduct in the matter of riots at a college campus and the eventual killing of 2 students and wounding of others, was in excess of the grand jury's lawful authority, and the mayor was entitled to have the derogatory comments concerning his activities expunged. Sanford v. Hudson, 257 So. 2d 884 (Miss. 1972).

RESEARCH REFERENCES

ALR. Conviction within provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office. 71 A.L.R.2d 593.

Removal of public officer for misconduct during previous term. 42 A.L.R.3d 691.

Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers. 15 A.L.R.4th 1207.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office. 10 A.L.R.5th 139.

CJS. C.J.S. Officers and Public Employees §§ 91, 119 to 126, 255, 257, 274.

Law Reviews. 1982 Mississippi Supreme Court Review: Criminal Law and Procedure: No Right to Hold Public Office After Conviction. 53 Miss. L. J. 155, March 1983.

§ 176. Qualifications for member of board of supervisors

No person shall be a member of the board of supervisors who is not a resident freeholder in the district for which he is chosen. The value of real estate necessary to be owned to qualify persons in the several counties to be members of said board shall be fixed by law.

SOURCES: 1869 art XII § 29.

Editor's Note — House Concurrent Resolution No. 75, Part II, enacted as Chapter 592, Laws, 1990, adopted by the House of Representatives and the Senate on March 28, 1990, proposed to amend Section 176 of Article 6 of the Mississippi Constitution of 1890. The proposed amendment was submitted to the electorate on November 6, 1990, but was rejected.

Cross References — Impeachment, see MS Const Art. 4, § 50 et seq.

Qualifications to hold public office, generally, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

General provisions relating to county boards of supervisors, see § 19-3-1 et seq.

JUDICIAL DECISIONS

1. In general.

Candidate for county supervisor was a resident of another county, and thus ineligible for office under residency requirements of Miss. Const. Art. VI, § 176 and Miss. Code Ann. § 19-3-3, because there was no showing that he maintained a permanent residence in the county of his candidacy, notwithstanding that the candidate grew up in that county, claimed ownership of property there, regularly visited his mother there, had registered to vote and voted there, and had other contacts to that county. Young v. Stevens, 968 So. 2d 1260 (Miss. 2007).

Low-income voters have standing to challenge constitutionality of provision that candidate for membership on county board of supervisors must be freeholder; adoption of freeholder requirement to assure quality of those elected as members of board of supervisors creates arbitrary classification based on economic factors and is unconstitutional as denial of equal protection. Williams v. Adams County Bd. of Election Comm'rs, 608 F. Supp. 599 (S.D. Miss. 1985).

The words "a resident freeholder in the district" in this section referred to as being the equivalent to "legal residents" in determining that removal from one county to another county by reason of holding political office in the state did not change legal residence for the purpose of bringing divorce action. Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

This section does not require that a member of the board of supervisors shall actually reside within his district, if he maintains his home therein with a temporary home in another place. McHenry v. State, 119 Miss. 289, 80 So. 763 (1919).

RESEARCH REFERENCES

CJS. C.J.S. Counties §§ 65, 75.

§ 177. Vacancy in office of judge or chancellor

The governor shall have power to fill any vacancy which may happen during the recess of the senate in the office of judge or chancellor, by making a temporary appointment of an incumbent, which shall expire at the end of the next session of the senate, unless a successor shall be sooner appointed and confirmed by the senate. When a temporary appointment of a judge or chancellor has been made during the recess of the senate, the governor shall have no power to remove the person or appointee, nor power to withhold his name from the senate for their action.

Cross References — Vacancies, see Miss. Const. Art. 4, § 103.

JUDICIAL DECISIONS

1. In general.

As to the effect of the adoption of the amendment to § 153 of the Constitution on the power of the governor to make appointments under this section. State ex rel. Collins v. Jones, 106 Miss. 522, 64 So. 241 (1914), error overruled, 64 So. 469 (Miss. 1914).

RESEARCH REFERENCES

ALR. Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor. 51 A.L.R.5th 747.

CJS. C.J.S. Judges §§ 58-77.

§ 177A. Commission on Judicial Performance

There shall be a Commission on Judicial Performance of the State of Mississippi, to be composed of seven (7) members; three (3) of whom shall be judges of courts of record in the state which are trial courts of original jurisdiction, other than justice courts; one (1) member shall be a justice court judge; two (2) lay persons who reside in the state and who have never held judicial office or been members of the bar of Mississippi; and one (1) practicing attorney who has practiced law in the state for at least ten (10) years. All judicial members are to be appointed by the judiciary of the State of Mississippi as provided by law. Restrictions on the members of the commission may be imposed by statute. Members of the Commission on Judicial Performance not subject to impeachment shall be subject to removal from the commission by two-thirds (⅔) vote of the Supreme Court sitting en banc.

On recommendation of the commission on judicial performance, the Supreme Court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for: (a) actual conviction of a felony in a court other than a court of the State of Mississippi; (b) willful misconduct in office; (c) willful and persistent failure to perform his duties; (d) habitual intemperance in the use of alcohol or other drugs; or (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute; and may retire involuntarily any justice or judge for physical or mental disability seriously interfering with the performance of his duties, which disability is or is likely to become of a permanent character.

A recommendation of the Commission on Judicial Performance for the censure, removal or retirement of a justice of the Supreme Court shall be determined by a tribunal of seven (7) judges selected by lot from a list consisting of all the circuit and chancery judges at a public drawing by the Secretary of State. The vote of the tribunal to censure, remove or retire a justice of the supreme court shall be by secret ballot and only upon two-thirds (⅔) vote of the tribunal.

All proceedings before the commission shall be confidential, except upon unanimous vote of the commission. After a recommendation of removal or public reprimand of any justice or judge is filed with the clerk of the Supreme Court, the charges and recommendations of the commission shall be made public. The commission may, with two-thirds (⅔) of the members concurring, recommend to the Supreme Court the temporary suspension of any justice or judge against whom formal charges are pending. All proceedings before the Supreme Court under this section and any final decisions made by the Supreme Court shall be made public as in other cases at law.

SOURCES: Laws, 1979, ch. 520, eff November 30, 1979.

Editor's Note — The insertion of Section 177A in Article 6 of the Mississippi Constitution of 1890 was proposed by Laws, 1979, ch. 520, being House Concurrent Resolution No. 33 of the 1979 regular session of the Legislature, and upon ratification by the electorate on November 6, 1979, was inserted by the Secretary of State on November 30, 1979.

JUDICIAL DECISIONS

1. Validity of provision.
2. Constitutionality.
3. Construction and application.
4. Justice or judge.
5. Powers and duties of supreme court.
6. Inquiry.
7. Defenses.
8. Willful misconduct.
9. Conduct prejudicial to the administration of justice.
10. Sanctions—In general.
11. — — Reprimand, sanctions.
12. — — Removal from office, sanctions.
13. — — Suspension, sanctions.

1. Validity of provision.

The section is not unconstitutionally vague. Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

Constitutional provision authorizing sanctions against judges for willful misconduct in office which is prejudicial to administration of justice and brings judicial office into disrepute was not unconstitutionally vague, as language of provision and interpretations of that language by Supreme Court were sufficient to put persons of common intelligence on notice of what type of conduct was prohibited. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

2. Constitutionality.

Where, pursuant to its authority under Miss. Const. Art. VI, § 177A, the Mississippi Commission on Judicial Performance recommended that a judge be sanctioned for extra-judicial public statements of his views on the rights of gays and lesbians, the Supreme Court of Mississippi determined that gay rights was a political/public issue, and the judge's statements were religious speech protected by U.S. Const. amend. I and Miss. Const. Art. III, § 13. Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006 (Miss. 2004).

3. Construction and application.

Nothing in this section or in Art. 4 § 53, the two sections which specifically provide for the removal of judges, suggests that they are exclusive. In re Higginbotham, 716 So. 2d 631 (Miss. 1998).

Alleged violation of the Mississippi Canons of Judicial Conduct is not cognizable as a cause of action before the Mississippi trial courts, but rather must be pursued through the Mississippi Commission on Judicial Performance or the Mississippi Special Committee on Judicial Election Campaign Intervention; therefore, a temporary restraining order was dissolved where it was based on a judicial candidate allegedly making false statements during a campaign because a chancery court had no jurisdiction to hear such. In re Bell, 962 So. 2d 537 (Miss. 2007).

Justice court judges must regard scrupulously the nature of their office since most citizens have their primary, if not their only, direct contact with the law through the office of the justice court judge and the perception of justice of most citizens is forged out of their experiences with the justice court judges. Although justice court judges for the most part have no formal training in the law, when a person assumes the office of justice court judge, he or she accepts the responsibility of becoming learned in the law. In re Bailey, 541 So. 2d 1036 (Miss. 1989).

§ 177A should be construed as if "or" was inserted between each sanction permitted. In re Branan, 419 So. 2d 145 (Miss. 1982).

4. Justice or judge.

For purposes of the Mississippi Code of Judicial Conduct, any officer performing judicial functions is a judge. Thus, a mayor who served as a municipal judge pursuant to § 21-23-5 was a "judge" within the contemplation of both the Rules of the Mississippi Commission on Judicial Performance and the Code of Judicial Conduct by virtue of his role as judge pro tempore of the municipal court. Mississippi Judicial Performance Comm'n v. Thomas, 549 So. 2d 962 (Miss. 1989).

5. Powers and duties of supreme court.

Mississippi Commission on Judicial Performance had no direct authority or power to order punishment on a judge after a formal complaint was filed, alleging violations of Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(5), 3B(7), and 3B(8); a memorandum of understanding reached between the judge and the Commission was considered by the court but was not binding on the court in assessing the judge's punishment. Miss. Comm'n on Judicial Performance v. Martin, 995 So. 2d 727 (Miss. 2008).

Assessment of the costs of the Mississippi Commission on Judicial Performance's first inquiry, which the judge contested, was within the Mississippi Supreme Court's discretion and was reasonable because the judge was on notice that such costs were being sought and because his behavior was the reason the costs were incurred; but as he never contested his suspension under a second inquiry, there was no basis to award costs for that inquiry. Miss. Comm'n on Judicial Performance v. Teel, 863 So. 2d 973 (Miss. 2004).

In judicial misconduct proceedings, the Supreme Court was the sole trier of fact and alone possessed the power to impose sanctions. State Comm'n on Judicial Performance v. Carr, 786 So. 2d 1055 (Miss. 2001).

Miss. Const. Art. VI, § 177A (1890) authorizes the Supreme Court to sanction judges for willful misconduct in office or conduct which is prejudicial to the administration of justice which brings the judicial office into disrepute. State Comm'n on Judicial Performance v. Carr, 786 So. 2d 1055 (Miss. 2001).

Imposition of sanctions for judicial misconduct is matter left solely to discretion of Supreme Court; Court gives great deference to recommendations of Commission on Judicial Performance, but is not bound thereby. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

In judicial misconduct proceedings, Supreme Court is trier of fact and has sole power to impose sanctions. Mississippi Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075 (Miss. 1996).

In a disciplinary proceeding the Supreme Court would not be authorized to order restitution, where such sanction was not specified in § 177A. In re Branan, 419 So. 2d 145 (Miss. 1982).

6. Inquiry.

Although Supreme Court had an obligation to conduct an independent inquiry into judicial disciplinary proceeding, it gave great weight to the findings of the Mississippi Commission on Judicial Performance. State Comm'n on Judicial Performance v. Carr, 786 So. 2d 1055 (Miss. 2001).

Although Supreme Court has obligation to conduct independent inquiry in judicial misconduct proceedings, it nonetheless gives great weight to finding of Commission on Judicial Performance, which has had opportunity to observe demeanor of witnesses. Mississippi Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075 (Miss. 1996).

7. Defenses.

The court properly dismissed a judge's claim that a formal complaint against her was based on race-based discrimination in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and § 177A of the Mississippi Constitution because she had no factual basis for such claim; the fact that the Commission on Judicial Performance had recommended discipline against African-American judges in 24% of the total reported cases while they held less than 12% of the judgeship positions was insufficient proof of racial discrimination. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

The fact that a justice court judge was a lay person was not a valid defense to a charge of judicial misconduct. Additionally, the fact that the judge was in office a relatively short period of time and his predecessor began many of the practices in the Commission's complaint did not mitigate the judge's misconduct. In re Seal, 585 So. 2d 741 (Miss. 1991).

The fact that a justice court judge's misconduct was the product of ignorance would not operate to exonerate him. However, lack of improper motive may be considered in mitigation. Misconduct through ignorance warrants sanctions, though not necessarily removal from office, particularly for a first offense. In re Bailey, 541 So. 2d 1036 (Miss. 1989).

8. Willful misconduct.

Judge committed willful misconduct and conduct prejudicial to the administration of justice, bringing the judicial office into disrepute, because the judge recused himself from cases, and then, with full knowledge that he was recused, reinserted himself and took further action in the cases; the judge abused the contempt power by issuing arrest warrants for indirect criminal contempt that led to parents being held without bond for seventy-two hours without notice or a hearing; Miss. Comm'n on Judicial Performance v. Skinner, 119 So. 3d 294 (Miss. 2013).

Analysis of the extent of willfulness will allow for consideration of acts of dishonesty, and the inappropriateness of the action may also be considered under the aggravating circumstances factor; when analyzing the extent to which the conduct exploited the judge's position to satisfy personal desires, we will examine factors such as whether the judge received money, received favors, or otherwise acted in a manner indicative of any improper personal motivation. Miss. Comm'n on Judicial Performance v. Skinner, 119 So. 3d 294 (Miss. 2013).

Supreme court will examine the extent to which the conduct was willful, and the extent to which the conduct exploited the judge's position to satisfy his or her personal desires or was intended to deprive the public of assets or funds rightfully belonging to it; in examining the extent to which the conduct was willful, the supreme court will examine whether the judge acted in bad faith, good faith, intentionally, knowingly, or negligently. Miss. Comm'n on Judicial Performance v. Skinner, 119 So. 3d 294 (Miss. 2013).

Judge was publicly reprimanded and suspended for six months for violating

Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(1), 3(B)(2), 3(B)(7), 3(B)(8), and 3(E)(1), where the judge refused to rule in certain criminal cases pending the outcome of a non-issue related civil case, engaged in ex parte communications, with a litigant and, based upon that information, issued an arrest warrant. Further, the judge held a defendant without bond on a non-capital offense, acquired ex parte information by sitting in on a civil hearing involving parties that had cases pending before the judge, improperly reduced a defendant's bond, behaved with impropriety or the appearance of impropriety toward certain litigants or persons related to litigants that had cases pending in the court, refused to reduce a defendant's bond based upon information received ex parte and allowed testimony at a defendant's preliminary hearing about alleged threats that were supposedly made against the judge by the defendant. Miss. Comm'n on Judicial Performance v. Anderson, 32 So. 3d 1180 (Miss. 2010).

Judge was publicly reprimanded, suspended for a period of six months, and assessed costs for violating Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(7), 3(B)(8), 3(C)(1), and 4(A), where the judge interfered with the administration of justice by delaying the resolution of an eviction action, and committed willful misconduct by failing to disclose a conflict of interest, and failing to properly recuse himself. Miss. Comm'n on Judicial Performance v. Hartzog, 32 So. 3d 1188 (Miss. 2010).

While the judge did delay in issuing a ruling in a case in violation of Miss. Code Jud. Conduct Canon 1, 2A, 3B(8) and 3C(1), the court did not find willfulness under Miss. Const., Art. 6, § 177A(b), (c), but did find negligence. The judge testified that he was presented a case of first impression for him and that it wasn't his intention that it be held up, and the summary judgment hearing was held approximately ten days after he had started treatment for a serious medical condition, with those treatments continuing for a period of several months. Miss. Comm'n on Judicial Performance v. Agin, 17 So. 3d 578 (Miss. 2009).

Removal of the judge from office was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), and 3(E) when he committed a minor child to detention after recusing himself from the case and then entered an order appointing another judge to hear the case without authority. His actions constituted willful misconduct in office and conduct prejudicial to the administration of justice and his assertion that his actions were a mere error of law was without merit. Miss. Comm'n on Judicial Performance v. Osborne, 16 So. 3d 16 (Miss. 2009).

Public reprimand imposed against a judge was proper because he had engaged in ex parte communications with parties involved in a disturbance-of-the-peace case and also entered a plea of not guilty for one of the parties. That misconduct violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(B)(7), and was willful, prejudicial to the administration of justice, and brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Vess, 10 So. 3d 486 (Miss. 2009).

Judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) & (B), 3(B)(5), constituting willful misconduct in the judicial office which brought the judicial office into disrepute, thus causing the judge's conduct to be actionable pursuant to Miss. Const. Art. 6, § 177A; the judge's comments were disparaging results and not matters of legitimate public concern and went beyond the realm of protected campaign speech. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Mississippi Commission on Judicial Performance's finding that a justice court judge violated Miss. Code Ann. §§ 99-23-1, 99-23-5, 99-23-13, and Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3(B)(2), 3(B)(4), 3(B)(7), 3(B)(8), 3(C)(1), and Miss. Const. Art. VI, § 177A, was clearly and convincingly supported by the record because the judge exceeded her authority in repeatedly entering unlawful orders pertaining to peace bonds resulting in the incarceration of an accused. Miss. Comm'n on Judicial Performance v. Boland, 998 So. 2d 380 (Miss. 2008).

Conduct of judge in making disparaging remarks constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute, Miss. Const. Art. 6, § 177A; the judge had to be publicly reprimanded and assessed all costs associated with the proceeding. Miss. Comm'n on Judicial Performance v. Boland, 975 So. 2d 882 (Miss. 2008).

Where the Mississippi Commission on Judicial Performance, acting on information from a police officer, filed a formal complaint against a municipal court judge, accusing the judge of inappropriately engaging in "fixing" traffic tickets, it was determined that the judge used his position to fix tickets by "passing" them to the file without requiring defendants to appear and over the objections from the issuing officer; clear and convincing evidence showed that the judge's actions violated numerous Miss. Code Jud. Conduct Canons as well as Miss. Const. Art. 6, § 177A; whether the judge's actions were actually willful was of no consequence because the result was the same regardless of whether bad faith or negligence and ignorance were involved and warranted sanctions. Miss. Comm'n on Judicial Performance v. Gordon, 955 So. 2d 300 (Miss. 2007).

Judge's suspension of the fines and State assessments were in response to the county's lack of funding for a court bailiff, and said conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute. However, the record did not show any other incidents that demonstrated that his behavior evidenced a pattern of conduct, there was no moral turpitude involved, and mitigating circumstances were also present in light of the fact that the judge acknowledged the inappropriateness of his conduct and was in agreement with the findings of the Mississippi Commission of Judicial Performance; thus, a public reprimand, a fine, and payment of the costs of the proceedings was a proper sanction. Miss. Comm'n on Judicial Performance v. Sheffield, 883 So. 2d 546 (Miss. 2004).

Where a justice court judge acted to cause a complaining officer to not show up for trial so that drunk driving charges could be dismissed for failure to prosecute, the Mississippi Supreme Court held, under Miss. Const. Art. 6, § 177A, that the offense involved moral turpitude, and imposed a 30-day suspension upon the judge. Miss. Comm'n on Judicial Performance v. Sanford, 941 So. 2d 209 (Miss. 2006).

Where a judge failed to maintain adequate control over his docket, resulting in delays between 5 and 15 months before orders were entered in five cases but the judge implemented administrative procedures to remedy the problem immediately after judicial complaints were filed, the evidence did not support a finding of willful misconduct violative of Miss. Const. Art. 6, § 177A(b) or (c). Miss. Comm'n on Judicial Performance v. Former Judge U.U., 875 So. 2d 1083 (Miss. 2004).

Judge's conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute pursuant to Miss. Const. Art. VI, § 177A where the judge negligently engaged in ex parte communications with a police officer; the recommendation that the judge be publicly reprimanded and fined was adopted by the supreme court. Miss. Comm'n on Judicial Performance v. Blakeney, 848 So. 2d 824 (Miss. 2003).

Judge's actions involving the issuance of an ex parte temporary order changing child custody without notice to the nonmovant, without providing a copy of the order to the nonmovant, and later refusing to allow the nonmovant to be heard, constituted willful misconduct in violation of Miss. Const. Art. 6, § 177A and Miss. Code Jud. Conduct Canons 1, 2A, 3A(1) and (4), and 3B(1). Miss. Comm'n on Judicial Performance v. Perdue, 853 So. 2d 85 (Miss. 2003).

Willful misconduct in office under Miss. Const. Art. VI, § 177A is the improper or wrongful use of power of office by a judge acting intentionally or with gross unconcern for his conduct and generally in bad faith, and it involves more than an error of judgment or a mere lack of diligence; the term encompasses conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive; however, these elements are not necessary to a finding of bad faith as a specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. State Comm'n on Judicial Performance v. Carr, 786 So. 2d 1055 (Miss. 2001).

The Supreme Court can generally recognize examples of willful misconduct when they are presented for review, and the misconduct complained of need not be intentional or notorious; rather negligence, ignorance, and incompetence suffice as grounds for behavior to be classified as prejudicial to the administration of justice which brings the office into disrepute and thus worthy of sanctions. State Comm'n on Judicial Performance v. Carr, 786 So. 2d 1055 (Miss. 2001).

Willful misconduct in office under Miss. Const. Art. VI, § 177A of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute; however, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute. State Comm'n on Judicial Performance v. Carr, 786 So. 2d 1055 (Miss. 2001).

Conduct of judge by engaging in ex parte communications and dismissing speeding tickets constituted willful misconduct prejudicial to the administration of justice, bringing the judicial office into disrepute. Mississippi Comm'n on Judicial Performance v. Warren, 791 So. 2d 194 (Miss. 2001).

A justice court judge committed willful misconduct when he allowed arraignment and initial appearance proceedings to be photographed and videotaped by representatives of the news media who thereafter printed or broadcast said photographs and tapes to the public. State Comm'n on Judicial Performance v. Carr, 786 So. 2d 1055 (Miss. 2001).

A justice court judge committed willful misconduct where he was found to have committed 24 acts of judicial misconduct, including ex parte communications, abuse of contempt powers, abuse of partiality and partiality, and lack of integrity and candor. Miss. Comm'n on Judicial Performance v. Willard, 788 So. 2d 736 (Miss. 2001).

A justice court judge committed willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute when he fined two criminal defendants in excess of his statutory authority and sentenced both to jail time in excess of his statutory authority and lacked jurisdiction to hear the charge against one of the defendants, notwithstanding the judge's assertion that he was unaware that he had exceeded his jurisdiction or taken any action in violation of the Code of Judicial Conduct until the Commission on Judicial Performance filed its formal complaint. Mississippi Comm'n on Judicial Performance v. Neal, 774 So. 2d 414 (Miss. 2000).

A judge's conduct, in its totality, constituted willful misconduct. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

A judge violated Article 6, Section 177A of the Mississippi Constitution of 1890, as amended, and judicial canons 1, 2A, 2B, and 3A(1) of the Mississippi Code of Judicial Conduct, when he willfully and improperly reduced DUI charges against several defendants, and he would be publicly reprimanded, fined $1,500, and ordered to pay all costs associated with the case. Mississippi Comm'n on Judicial Performance v. Jones, 735 So. 2d 385 (Miss. 1999).

A judge committed judicial misconduct constituting willful misconduct in office and conduct prejudicial to the administration of justice that brings the office into disrepute where he told a female employee that he noticed how she "checked out" all the men that came into the office and also said, "You check me out too, don't you?" State Comm'n on Judicial Performance v. Justice Court Judge R.R., 732 So. 2d 224 (Miss. 1999).

A judge did not commit judicial misconduct constituting willful misconduct in office and conduct prejudicial to the administration of justice which brings the office into disrepute where he participated in a discussion about a video store covering sexual products or videos. State Comm'n on Judicial Performance v. Justice Court Judge R.R., 732 So. 2d 224 (Miss. 1999).

A judge did not commit judicial misconduct constituting willful misconduct in office and conduct prejudicial to the administration of justice that brings the office into disrepute where (1) although the judge admitted that he touched a deputy clerk's shoulders, it was clear he did so only to get her attention, and (2) another clerk testified she saw the judge touch the deputy clerk only twice, and that after she twice told the judge that the deputy clerk did not like to be touched, she never saw him touch her again. State Comm'n on Judicial Performance v. Justice Court Judge R.R., 732 So. 2d 224 (Miss. 1999).

Where a judge suspended the sentences of two cases previously entered, with the full knowledge that she lacked jurisdiction to enter such orders and without considering the Uniform Post Conviction Relief Act, her conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. Mississippi Comm'n on Judicial Performance v. Sanders, 708 So. 2d 866 (Miss. 1998).

Although "willful misconduct in office" is conduct prejudicial to administration of justice that brings judicial office into disrepute, judge may also, through negligence or ignorance not amounting to bad faith, behave in manner prejudicial to administration of justice so as to bring judicial office into disrepute. Mississippi Comm'n on Judicial Performance v. Franklin, 704 So. 2d 89 (Miss. 1997).

While term "willful misconduct in office" would necessarily encompass conduct by judge involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of office, whatever the motive, those elements are not necessary to finding of bad faith, but rather, specific intent to use powers of judicial office to accomplish purpose which judge knows or should know is beyond legitimate exercise of his authority constitutes 'bad faith.' Mississippi Comm'n on Judicial Performance v. Franklin, 704 So. 2d 89 (Miss. 1997).

"Willful misconduct in office" is improper or wrongful use of power of his office by judge acting intentionally or with gross unconcern for his conduct and generally in bad faith; it involves more than error of judgment or mere lack of diligence. Mississippi Comm'n on Judicial Performance v. Franklin, 704 So. 2d 89 (Miss. 1997).

Judge's course of conduct, including becoming involved in dispute between friend. distant relative and third party, having a switched license tag on her car, albeit, perhaps without her knowledge, writing insufficient funds check, and failing to file reports of campaign contributions or expenditures as required by law, constituted willful misconduct in office and conduct prejudicial to administration of justice bringing judicial office into disrepute. Mississippi Comm'n on Judicial Performance v. Franklin, 704 So. 2d 89 (Miss. 1997).

Judge's acts of releasing inmates from department of corrections when judge did not have authority to do so, and engaging in ex parte communications in connection with such releases, was willful misconduct in office prejudicial to administration of justice where judge either knew or should have known that many of his actions were beyond his authority and jurisdiction. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Judge's misconduct in releasing four state prisoners from custody, in excess of clearly defined limits of judge's authority, which was willful misconduct in office, prejudicial to administration of justice, and brought judicial office into disrepute, warranted public reprimand and fine, notwithstanding mitigating factors including length and character of judge's public service. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Conduct of judge, who incarcerated defendant without notice or hearing and sentenced another defendant to more jail time than allowed by law and then found same defendant guilty of perjury, which was beyond jurisdiction of judge's court, based upon judge's own affidavit and warrant, constituted willful misconduct in office and conduct prejudicial to administration of justice which brought judicial office into disrepute, and warranted public reprimand and assessment of costs of proceeding. Mississippi Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075 (Miss. 1996).

Willful misconduct in office is improper or wrongful use of power of office by judge acting intentionally, or with gross unconcern for his conduct and generally in bad faith, and involves more than error of judgment or mere lack of diligence. Mississippi Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075 (Miss. 1996).

Willful misconduct in office encompasses conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive, but these elements are not necessary to finding of bad faith; specific intent to use powers of judicial office to accomplish purpose which judge knew or should have known was beyond legitimate exercise of his authority constitutes bad faith. Mississippi Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075 (Miss. 1996).

A justice court judge's actions stemming from her relationship with an accused felon who was a fugitive from another state, including obtaining a fugitive warrant on his behalf and then summarily dismissing that warrant, allowing him to drive her car with a suspended license, openly living with him, and actively participating in his criminal case in another state, blatantly violated Article 6, § 177A of the Mississippi Constitution; the judge's conduct warranted her removal from office and a fine in an amount equal to any judicial salary she received after the date on which she agreed to resign from office in a Memorandum of Understanding entered into between her and the Mississippi Commission on Judicial Performance. Mississippi Comm'n on Judicial Performance v. Milling, 651 So. 2d 531 (Miss. 1995).

Judge's conduct constituted willful misconduct in office and conduct prejudicial to administration of justice which brought judicial office into disrepute, and was established by clear and convincing evidence, where: (1) actions had been taken calculated to intimidate police officers in conduct of their duty; (2) interview with rape victim was absolutely uncalled for and contrary to sort of behavior required of public servants and judges; (3) he had made no effort to pay fine assessed by county court and was ignoring court order to pay fine, which was indicative of his disregard of judicial process; (4) failure to acquire new license plate registered at proper address as required by state law was indicative of his disregard for law which he has sworn to uphold; and (5) involving himself in bond election on matter that did not involve improvement of administration of justice was improper. In re Chambliss, 516 So. 2d 506 (Miss. 1987).

9. Conduct prejudicial to the administration of justice.

Judge who abused his contempt powers, failed to recuse himself from contempt proceedings, and prevented those he charged with contempt from presenting any defense, violated Miss. Code Jud. Conduct Canons 1, 2A, 3B(1), (2), and (4), and 3E(1)(A), as well as Miss. Const. art. VI, § 177A; he was fined $2,500 and publicly reprimanded. Miss. Comm'n on Judicial Performance v. Harris, 131 So. 3d 1137 (Miss. 2013).

Judge was publicly reprimanded and suspended for 30 days for misconduct which brought the judicial office into disrepute pursuant to Miss. Const. art. VI, § 177A in failing to properly adjudicate criminal matters, and engaging in ticket-fixing, in exchange for simultaneous payments to a "drug fund" established and maintained by the town police chief, which violated Miss. Code Jud. Conduct Canons 1, 2A, 3B(1), 3B(2), 3B(8); the judge admitted that his decision to accept the lesser pleas contingent on payments into the drug fund was at least partially motivated by his desire to collect fees for the town, and this was not a mistake of the law, but a clear disregard of it, and was sanctionable. After considering the Gibson factors, the commission's recommendation was adopted. Miss. Comm'n on Judicial Performance v. Smith, 109 So. 3d 95 (Miss. 2013).

Chancellor was publicly reprimanded for misconduct in violation of, inter alia, Miss. Code Jud. Conduct Canon 1, 2A, 3B(2), 3C(1) because the chancellor had issued subpoenas to two members of county board of supervisors, and during a later meeting with the board of supervisors, the chancellor admitted that he had failed to comply with the law in doing so; further, the commission found by clear and convincing evidence that the chancellor had engaged in willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute, under Miss. Const. art. VI, § 177A. The record did not indicate any aggravating factors. Miss. Comm'n on Judicial Performance v. Buffington, 55 So. 3d 167 (Miss. 2011).

Public reprimand and a 30-day suspension were reasonable sanctions for engaging in willful misconduct in office prejudicial to the administration of justice because the 10 violations before the court, including ex parte communications, two counts of violating Miss. Unif. R.P.J. Ct. 2.06, an attempt to fix traffic tickets, five counts of improperly dismissing or disposing of charges, and an improper order to issue two contempt warrants, constituted a pattern of behavior and the judge's conduct involved moral turpitude, but he had no prior appearance before the Mississippi Commission on Judicial Performance. Miss. Comm'n on Judicial Performance v. Bradford, 18 So. 3d 251 (Miss. 2009).

Order that the judge be suspended from office for a period of one year was appropriate because his disparaging racial remarks were not protected speech under either the federal or state constitution. The judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) and (B), and 3(B)(5), thus causing the judge's conduct to be actionable under Miss. Const. Art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

Judge's actions in engaging in ex parte communications with community members constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute, Miss. Const. Art. 6, § 177A; the judge's actions violated Miss. Code Jud. Canons 1, 2A, 2B, 3B(2), and 3B(7); he was publicly reprimanded and suspended for sixty days. Miss. Comm'n on Judicial Performance v. Carr, 990 So. 2d 763 (Miss. 2008).

County judge was ordered to be publicly reprimanded and suspended for 30 days because he had repeatedly offered advice to a litigant in ex parte conversations, conduct that was prejudicial to the administration of justice, violated various canons of the Code of Judicial Conduct, and was actionable pursuant to Miss. Const. Art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Fowlkes, 967 So. 2d 12 (Miss. 2007).

In handling several matters set before his court, a judge was found to be in violation of numerous Canons of the Miss. Code Jud. Conduct as well as the Mississippi Constitution where the judge acknowledged that his actions in refusing to allow a defendant to present evidence, in presiding over a probation revocation matter in which there were recusal issues, trying a defendant in absentia, and in revoking bail and issuing an arrest warrant were in violation of judicial canons; the judge's conduct constituted willful misconduct, and a public reprimand, suspension from office, and assessment of a fine and costs were warranted. Miss. Comm'n on Judicial Performance v. Roberts, 952 So. 2d 934 (Miss. 2007).

State supreme court granted a joint motion for the approval of the recommendation of sanctions against a judge who violated Miss. Code Jud. Conduct Canon 3(E) by participating in proceedings where there was an admitted conflict of interest, and committed willful misconduct that brought the judicial office into disrepute pursuant to Miss. Const. Art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Cowart, 936 So. 2d 343 (Miss. 2006).

Judge was publicly reprimanded, assessed costs of proceedings, and fined after he and a woman wrote over $ 330,000 in bad checks for a house and motor vehicles, in violation of Miss. Const. Art. 6, § 177A(b), because any economic injury suffered by the businesses visited by the judge and the woman had been repaid. Judge's actions constituted willful misconduct in office and conduct prejudicial to the administration of justice, bringing the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Hartzog, 904 So. 2d 981 (Miss. 2004).

Where a judge failed to maintain adequate control over his docket, resulting in delays of between 5 and 15 months before orders were entered in five cases, such conduct was prejudicial to the administration of justice and a violation of Miss. Const. Art. 6, § 177A(e), and a private reprimand was warranted. Miss. Comm'n on Judicial Performance v. Former Judge U.U., 875 So. 2d 1083 (Miss. 2004).

A judge committed willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute where she "fixed" 11 traffic tickets by dismissing them based upon ex parte communications with the defendants or other persons or for other reasons which were not entered into the docket or court file. Mississippi Comm'n on Judicial Performance v. Boykin, 763 So. 2d 872 (Miss. 2000).

A judge committed willful misconduct or conduct which brought the judicial office into disrepute when he contacted another judge and a police officer with regard to his son's arrest for driving under the influence, notwithstanding his assertion that he did not do anything more than what a concerned father would do and his denial that he threatened the officer. Mississippi Comm'n on Judicial Performance v. Brown, 761 So. 2d 182 (Miss. 2000).

Although there was no proof that a judge willfully intended to misuse a sentencing statute, the judge violated the constitution where she did misuse it and subsequently did nothing to correct her error, and also made a false statement under oath regarding the sentencing. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

A judge's conduct, in its totality, constituted conduct prejudicial to the administration of justice. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

Circuit court judge was not required to pay the fine that was recommended by the Mississippi Commission on Judicial Performance, but was publicly reprimanded and assessed costs for committing willful misconduct and conduct prejudicial to the administration of justice which brings the judicial office into disrepute by abusing her contempt powers and by illegally expunging the drug convictions of two persons. Mississippi Comm'n on Judicial Performance v. Sanders, 749 So. 2d 1062 (Miss. 1999).

Where a judge suspended the sentences of two cases previously entered, with the full knowledge that she lacked jurisdiction to enter such orders and without considering the Uniform Post Conviction Relief Act, her conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. Mississippi Comm'n on Judicial Performance v. Sanders, 708 So. 2d 866 (Miss. 1998).

10. Sanctions—In general.

Judge was publicly reprimanded, suspended, and fined because he committed willful misconduct and conduct prejudicial to the administration of justice when he recused himself from cases and reinserted himself and took further action in the cases and abused the contempt power; however, there was no evidence of any premeditation, that the judge's conduct was done to satisfy any personal desires, or that the judge personally gained from his actions. Miss. Comm'n on Judicial Performance v. Skinner, 119 So. 3d 294 (Miss. 2013).

As a judge violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(C)(1), and Miss. Const. art, VI, § 177A by attempting to use his office to advance the private interests of his tenant and himself as landlord, and by being impatient and discourteous and abusing his contempt power when arguing with a probation officer, and he had a pattern of prior misconduct, he was publicly reprimanded and fined. Miss. Comm'n on Judicial Performance v. Fowlkes, 121 So. 3d 904 (Miss. 2013).

Mississippi Commission on Judicial Performance had no direct authority or power to order punishment on a judge after a formal complaint was filed, alleging violations of Miss. Code Jud. Conduct

Canons 1, 2A, 3B(2), 3B(5), 3B(7), and 3B(8); a memorandum of understanding reached between the judge and the Commission was considered by the court but was not binding on the court in assessing the judge's punishment. Miss. Comm'n on Judicial Performance v. Martin, 995 So. 2d 727 (Miss. 2008).

In a disciplinary proceeding the Mississippi Commission on Judicial Performance properly fined a judge $2,000 and publicly reprimanded him, where Mississippi Constitution § 177A authorized multiple sanctions, and where the judge's conduct constituted wilful and persistent failure to perform his duties and conduct prejudicial to the administration of justice which brought the judicial office into disrepute. In re Lambert, 421 So. 2d 1023 (Miss. 1982).

In a disciplinary proceeding multiple sanctions would be permissible and imposed against a justice court judge, where his procedure in collecting bad checks constituted both wilful and persistent failure to perform the duties of his office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute; a $1,000 fine and a public reprimand was thus warranted. In re Branan, 419 So. 2d 145 (Miss. 1982).

11. — — Reprimand, sanctions.

Judge was publicly reprimanded, fined, and assessed costs of the proceeding because the judge, among other things, mentioned to counsel in chambers, but did not make a disclosure on the record, that his father might have been tested for asbestosis, failed to disclose the history of his parent's asbestosis claims, and the settlement between the judge's father and one of the parties, and failed to rule on counsel's motion to recuse made after the conflict was discovered. Miss. Comm'n on Judicial Performance v. Bowen, 123 So. 3d 381 (Miss. 2013).

Judge was publicly reprimanded and assessed costs because his actions in 1) having ex parte contact with a defendant; 2) not disclosing this to the prosecutor; 3) dismissing the defendant's tickets without a hearing or notice to the prosecutor; and 4) falsifying court records violated Miss. Code Jud. Conduct Canons 1, 2(B), 3(B)(1), 3(B(7), and 3(B(8) and constituted willful misconduct in office that brought the judicial office into disrepute under Miss. Const. art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Carver, 107 So. 3d 964 (Miss. 2013).

Public reprimand against a judge was proper because he misused the powers of contempt and violated Miss. Code Jud. Conduct Canons 1, 3(B)(2), and 3(B)(8) when he held a defendant in criminal contempt for failing to recite the pledge of allegiance in open court. He violated Miss. Code Jud. Conduct Canons 2(A) and 3(B)(4) by incarcerating the defendant for expressing his rights under U.S. Const. amend. I. Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968 (Miss. 2011).

Judge was publicly reprimanded, suspended from office for 30 days without pay, and assessed costs for violating Miss. Code Jud. Conduct Canon 1, 2(A), 2(B), 3(B)(1), 3(B)(2), 3(C)(1), and 3(E)(1) by sua sponte reducing bonds and charges without proper motion; conditioning the reduction on church attendance; exceeding her authority by altering bonds after a defendant had been released on bond or had waived preliminary hearing, or after a preliminary hearing had been conducted; permitting others to create the impression that they were in a special position to influence her as a judge; initiating and inviting ex parte communications; and presiding at her nephew's initial appearance. Miss. Comm'n on Judicial Performance v. Dearman, 66 So. 3d 112 (Miss. 2011).

Based on the judge's actions and his history of judicial misconduct, the harshest constitutional remedy — removal from office — would be appropriate; however, the judge had resigned his position, and since the judge's actions constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute, the judge was ordered to be publicly reprimanded. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Where a justice court judge violated Miss. Code Ann. §§ 99-23-1, 99-23-5, 99-

23-13, and Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3(B)(2), 3(B)(4), 3(B)(7), 3(B)(8), 3(C)(1), and Miss. Const. Art. VI, § 177A, was clearly and convincingly supported by the record because the judge exceeded her authority in repeatedly entering unlawful orders pertaining to peace bonds resulting in the incarceration of an accused, the court ordered the judge publicly reprimanded and subjected the judge an additional fine in lieu of suspension of office. Miss. Comm'n on Judicial Performance v. Boland, 998 So. 2d 380 (Miss. 2008).

Where a judge violated Canons 1, 2B and 3B(2) of the Code of Judicial Conduct by expressing anger at a second judge for refusing to talk with him before signing an arrest warrant, and then instructing a deputy clerk not to issue the warrant, public reprimand was appropriate because such conduct created the appearance that the judge might be partial to certain interests and brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Thompson, 972 So. 2d 582 (Miss. 2008).

Recommendation for a public reprimand was not adopted since it was too lenient for a judge who committed willful misconduct under Miss. Const. Art. 6, § 177A by violating Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(7), 3B(8), and 3C(1) when he engaged in improper ex parte communications; moreover, he ignored Miss. Code Ann. § 9-11-33 and Miss. Unif. R. P. J. Ct. 2.06 when he set aside a final judgment and interfered with orders handed down by another judge. Miss. Comm'n on Judicial Performance v. Britton, 936 So. 2d 898 (Miss. 2006).

Judge was privately reprimanded for allowing photography during a court hearing; the court examined several factors: (1) the length and character of the judge's public service; (2) whether there was any prior case law on point; (3) the magnitude of the offense and the harm suffered; (4) whether the misconduct was an isolated incident or evidences a pattern of conduct; (5) whether moral turpitude was involved; and, (6) the presence or absence of mitigating or aggravating circumstances before disregarding the Mississippi Commission on Judicial Conduct's recommendation for a public reprimand. Miss. Comm'n on Judicial Performance v. Blakeney, 905 So. 2d 521 (Miss. 2004).

Judge's setting aside judgments issued by another judge without any notice or hearing was a gross abuse of his power to act in his official capacity as a municipal court judge that violated Miss. Const. Art. 6, § 177A(b) and (e). The supreme court ordered that the judge be publicly reprimanded and that he pay the fine that he had improperly set aside. Miss. Comm'n on Judicial Performance v. Gibson, 883 So. 2d 1155 (Miss. 2004).

Baker is modified to apply generally to the determination of all sanctions in judicial misconduct proceedings (rather than merely applying to the question of public reprimand) and the appropriateness of such sanctions is based on the following factors: (1) the length and character of the judge's public service; (2) whether there is any prior case law on point; (3) the magnitude of the offense and the harm suffered; (4) whether the misconduct is an isolated incident or evidences a pattern of conduct; (5) whether moral turpitude was involved; and (6) the presence or absence of mitigating or aggravating circumstances. Miss. Comm'n on Judicial Performance v. Gibson, 883 So. 2d 1155 (Miss. 2004).

Although there were unanswered questions regarding the mitigating facts concerning the judge's discipline, the Supreme Court accepted the recommendation before it, because it came to the Supreme Court as an agreed recommendation; the judge was represented by counsel, as was the Mississippi Commission on Judicial Performance, and there was nothing before the Supreme Court to indicate a need to set aside that agreement. Miss. Comm'n on Judicial Performance v. Williams, 880 So. 2d 343 (Miss. 2004).

Where a county judge had not willfully abused the privilege of filing new complaints while in office, the court adopted the commission's recommendation that the judge be publicly reprimanded and that he be reinstated after his temporary suspension. Miss. Comm'n on Judicial Performance v. Osborne, 876 So. 2d 324 (Miss. 2004).

While acting in an official capacity, judge violated Miss. Const. Art. VI, § 177A, Miss. Code Ann. § 9-11-33, and Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(A), 3(B)(2), 3(B)(7), 3(B)(8), 3(C)(1), 3(C)(2), 4(A), and 4(D)(1), by conducting ex parte communications with parties, by habitually taking civil cases under advisement and failing to render timely decisions or correct orders when necessary; a public reprimand, suspension for 30 days without pay, and payment of the costs of the proceeding was held to be appropriate discipline. Miss. Comm'n on Judicial Performance v. McPhail, 874 So. 2d 441 (Miss. 2004).

Former judge's failure to pay office-related charges to vendors after being reimbursed for such charges by the State was willful misconduct prejudicial to the administration of justice which brought the judicial office into disrepute, and he was publicly reprimanded. Miss. Comm'n on Judicial Performance v. Teel, 863 So. 2d 973 (Miss. 2004).

Trial judge was publicly reprimanded for allowing arraignment and initial appearance proceedings to be photographed and videotaped by representatives of the news media who thereafter printed or broadcast said photographs and tapes to the public. State Comm'n on Judicial Performance v. Carr, 786 So. 2d 1055 (Miss. 2001).

A justice court judge was properly publicly reprimanded and assessed the costs of the proceeding where (1) he committed willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute when he fined two criminal defendants in excess of his statutory authority and sentenced both to jail time in excess of his statutory authority and lacked jurisdiction to hear the charge against one of the defendants, but (2) the Commission on Judicial Performance was impressed with the judge's humility and willingness to take responsibility for his actions, (3) the judge had served as justice court judge for 11 years without any previous complaints being filed against him, and (4) as a result of this incident, a full-time prosecutor was hired by the county to prosecute criminal cases and help prevent similar problems from occurring in the future. Mississippi Comm'n on Judicial Performance v. Neal, 774 So. 2d 414 (Miss. 2000).

Where a judge committed willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute where she "fixed" 11 traffic tickets by dismissing them based upon ex parte communications with the defendants or other persons or for other reasons which were not entered into the docket or court file, she was publicly reprimanded, fined $861.50, and assessed the costs of the proceeding. Mississippi Comm'n on Judicial Performance v. Boykin, 763 So. 2d 872 (Miss. 2000).

Where a judge committed willful misconduct or conduct which brought the judicial office into disrepute when he contacted another judge and a police officer with regard to his son's arrest for driving under the influence, he was properly publicly reprimanded, fined $500, and assessed over $400 in costs. Mississippi Comm'n on Judicial Performance v. Brown, 761 So. 2d 182 (Miss. 2000).

A private reprimand was a sufficient sanction for a judge who ordered three defendants to get married as a condition of probation where the judge later rescinded such orders and explained that he imposed such a condition because he did not want anyone who was living in adultery to be placed immediately in jeopardy of being revoked based on their living arrangements in violation of the unlawful cohabitation statute. Mississippi Comm'n on Judicial Performance v. A Mun. Court Judge, 755 So. 2d 1062 (Miss. 2000).

Where a judge either knew or should have known that her repeated actions were in excess of the authority and jurisdiction conferred upon her as a circuit court judge, but she had already been removed by the people of her electoral district, she would be reprimanded, fined $1,500, and ordered to pay the total costs of the proceeding. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

Where a judge not only unjustifiably initiated physical contact with a handcuffed defendant, but did so in a crowded courtroom during a judicial proceeding and, moreover, uttered profanity during the incident, he was suspended for 90 days without pay, fined $1,500.00, and assessed all costs of the proceeding, which totaled $839.65. Mississippi Comm'n on Judicial Performance v. Guest, 717 So. 2d 325 (Miss. 1998).

Where a judge suspended the sentences of two cases previously entered, with the full knowledge that she lacked jurisdiction to enter such orders and without considering the Uniform Post Conviction Relief Act, she was publicly reprimanded and fined $1,500. Mississippi Comm'n on Judicial Performance v. Sanders, 708 So. 2d 866 (Miss. 1998).

Judge's misconduct, including becoming involved in dispute between friend. distant relative and third party, having a switched license tag on her car, albeit, perhaps without her knowledge, writing insufficient funds check, and failing to file reports of campaign contributions or expenditures as required by law, warranted public reprimand, fine of $1,500, and suspension without pay for 30 days, in light of prior discipline for similar conduct. Mississippi Comm'n on Judicial Performance v. Franklin, 704 So. 2d 89 (Miss. 1997).

A recommendation by the Mississippi Commission on Judicial Performance that a justice court judge be publicly reprimanded was appropriate where the judge notarized a deed with a false acknowledgement that the party signing the deed had appeared before the judge, and he entered orders in cases which were not pending before his court, but there had been no prior allegations of misconduct against him, he had not personally benefited from the incidents of misconduct, and he had filed a memorandum of understanding with the Commission with regard to his future conduct. Mississippi Comm'n on Judicial Performance v. Hartzog, 646 So. 2d 1319 (Miss. 1994).

The issuance of a public reprimand and a $400 fine against a justice court judge was an appropriate penalty under Article 6, § 177A of the Mississippi Constitution where the judge "fixed" 8 traffic violations and twice refused to hold court during scheduled sessions, but there were no allegations that these offenses involved moral turpitude, it was the judge's first offense, he did not personally benefit from any of the incidents in question, and he cooperated fully with the Commission on Judicial Performance during its investigation. Mississippi Comm'n on Judicial Performance v. Gunn, 614 So. 2d 387 (Miss. 1993).

A justice court judge's conduct warranted a private reprimand, rather than a public reprimand, where he personally accepted fine monies on 46 occasions, and he dismissed cases based upon representations made by the defendant without hearing the State's side of the case, but he collected the fine monies as a courtesy when the justice court clerk was unavailable, he gave receipts for the monies, he turned over all fine monies collected by him to the justice court clerk, and the judge's infractions were never intended to be detrimental to law enforcement and judicial fairness, but were what he at the time thought were fair and common sense dispositions of quite minor offenses. Mississippi Judicial Performance Comm'n v. Justice Court Judge, 580 So. 2d 1259 (Miss. 1991).

Judge was publicly reprimanded and fined $250 where Commission on Judicial Performance found by clear and convincing evidence that judge had found criminal defendants not guilty without trial or notice to officer and other officials had attempted to influence judge in these cases; also, judge had improperly assessed constable fees, wrongfully entered judgment notwithstanding verdict, interfered with orderly assignment of cases, and engaged in improper conduct in handling of criminal bad check cases. Commission found this conduct violated Code of Judicial Conduct of Mississippi judges, constituted willful and persistent failure to perform duties of office, and was prejudicial to administration of justice and brought judicial office into disrepute. In re Hearn, 515 So. 2d 1225 (Miss. 1987).

12. — — Removal from office, sanctions.

Motion to dismiss order of interim suspension filed by the Mississippi Commission on Judicial Performance was dismissed as moot and a circuit court judge was removed from office because the Commission exceeded its authority under

Miss. Const. Art. 6, § 177A since the supreme court had neither been presented with nor asked to approve any agreement between the Commission and a circuit court judge; the supreme court could not allow the dismissal of formal complaints in two separate cases pursuant to the circuit court judge's resignation or any mere agreement not to seek judicial office in the future, and based upon the seriousness of the circuit court judge's admitted criminal acts and judicial misconduct, he was removed from office. Miss. Comm'n on Judicial Performance v. DeLaughter, 29 So. 3d 750 (Miss. 2010).

A justice court judge was removed from office and assessed the cost of the proceedings on the basis of willful misconduct, willful and persistent failure to perform the duties of his office, and conduct prejudicial to the administration of justice where he was found to have committed 24 acts of judicial misconduct, including ex parte communications, abuse of contempt powers, abuse of partiality and partiality, and lack of integrity and candor. Miss. Comm'n on Judicial Performance v. Willard, 788 So. 2d 736 (Miss. 2001).

Removal from office was the appropriate sanction where a judge demonstrated a pattern of repeated misconduct and violated almost every Canon of the Code of Judicial Conduct. Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

A justice court judge's conduct warranted his removal from office pursuant to Article 6, § 177A of the Mississippi Constitution where the judge abused his contempt powers, engaged in ticket fixing, and attempted to influence other judges. Mississippi Comm'n on Judicial Performance v. Chinn, 611 So. 2d 849 (Miss. 1992).

The conduct of a justice court judge warranted his removal from office where, during a 3-year period, he adjudicated approximately 28 driving under the influence cases wherein he did not file an abstract of the court record of convictions with the Commissioner of Public Safety as required by § 63-11-37(1) and he adjudicated approximately 552 routine traffic convictions but failed to report these to the Department of Public Safety as required by § 63-9-17. In re Quick, 553 So. 2d 522 (Miss. 1989).

A judge's conduct warranted removal from office where he had utilized the criminal processes to collect fines and fees, had failed to properly account for said fines, and had converted them to his own use, thereby receiving pecuniary benefits. Mississippi Judicial Performance Comm'n v. Coleman, 553 So. 2d 513 (Miss. 1989).

Recommendation of Commission on Judicial Performance, pursuant to Commission's rules, was accepted by the Supreme Court and removal ordered for a justice court judge who had knowingly accepted money from fine violations, falsely entered a judgment "dismissed" on court dockets and records, and retained fine money for his own use. In re Stewart, 490 So. 2d 882 (Miss. 1986).

The recommendation of the Commission on Judicial Performance that a justice court judge be removed from office for violations of Const. Art. 6 § 177A would be accepted, where the justice failed to answer, deny or defend the charges, and where the judge's action in the matters in which he was charged, to which he had testified in a former hearing, as well as his failure to remedy his practice in regard to the issuance of garnishments, and his failure or refusal to refund garnishment costs that had been deposited with him by party litigants, were sufficient to bring disrepute to the judicial office and warrant the sanctions imposed. In re Anderson, 451 So. 2d 232 (Miss. 1984).

13. — — Suspension, sanctions.

Order that the judge be suspended for 30 days from office without pay, along with a public reprimand, a fine, and an assessment of costs was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), (B), 3(A), (B)(1), (B)(2), and 3(B)(7) and his egregious actions constituted willful misconduct in office and conduct prejudicial to the administration of justice. By involving himself in another judge's cases and attempting to assist defendants with their tickets, the judge compromised the integrity and independence of the judiciary and his actions created an impression that certain defendants were in a special position to influence him.

Miss. Comm'n on Judicial Performance v. McKenzie, 63 So. 3d 1219 (Miss. 2011).

Justice court judge was suspended from office for ninety days without pay and was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3B(2), 3B(4), 4A, and Miss. Const. Art. 6, § 177A, where the judge engaged in ex parte communications with a female litigant and inappropriately handled a fine reduction. Allegations that the judge made sexual advances toward the female litigant were not established by clear and convincing evidence. Miss. Comm'n on Judicial Performance v. Boone, 60 So. 3d 172 (Miss. 2011).

Although a judge admitted to willful misconduct under Miss. Const. art. 6, § 177A and it was the first time the judge had been sanctioned, a public reprimand was too lenient, as the judge's conduct, which included abusing the judge's contempt powers and wrongfully issuing a search warrant, called for a suspension, especially as the judge had deprived litigants of due process. Miss. Comm'n on Judicial Performance v. Patton, 57 So. 3d 626 (Miss. 2011).

Where a judge breached the peace during the repossession of an automobile jointly owned by the judge's wife and mother-in-law, his conduct violated Miss. Code Jud. Conduct Canon 1. Pursuant to Miss. Const. Art. 6, § 177A, the Supreme Court of Mississippi suspended the judge for 180 days without compensation. Miss. Comm'n on Judicial Performance v. Osborne, 977 So. 2d 314 (Miss. 2008).

ATTORNEY GENERAL OPINIONS

Complaints before the Commission on Judicial Performance that are dismissed or otherwise not filed with the Supreme Court, and the commission minutes reflecting same, are exempt from the Public Records Act. Brantley, March 26, 1999, A.G. Op. (No number in original).

RESEARCH REFERENCES

ALR. Abuse or misuse of contempt power as ground for removal or discipline of judge. 76 A.L.R.4th 982.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness. 82 A.L.R.4th 567.

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties. 87 A.L.R.4th 727.

Disqualification of judge for bias against counsel for litigant. 54 A.L.R.5th 575.

CJS. C.J.S. Judges §§ 54, 95-98, 99.

Law Reviews. 1982 Mississippi Supreme Court Review: Administrative Law: Workmen's Compensation. 53 Miss. L. J. 113, March 1983.

1982 Mississippi Supreme Court Review: Civil Procedure. 53 Miss. L. J. 127, March 1983.

Note: 1991 Mississippi Supreme Court Review: Misconduct of attorneys and judges. 61 Miss. L. J. 686, Winter, 1991.

ARTICLE 7.

CORPORATIONS.

Sec.
178. Formation; charter of incorporation
179. Compliance with provisions
180. Organization
181. Taxation
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193. Remedy for injury to railroad employee
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197. Repealed.
198. Trusts, combinations, contracts and agreements inimical to public welfare
198A. Right to work; labor unions
199. "Corporation" defined
200. Enforcement of provisions

§ 178. Formation; charter of incorporation

Corporations shall be formed under general laws only. The Legislature shall have power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created, whenever, in its opinion, it may be for the public interest to do so. Provided, however, that no injustice shall be done to the stockholders.

SOURCES: Laws, 1987, ch. 690, eff December 4, 1987.

Editor's Note — The insertion of Section 178 in Article 7 of the Mississippi Constitution of 1890, was proposed by Laws, 1987, Ch. 690 (Senate Concurrent Resolution No. 549), and upon ratification by the electorate on November 3, 1987, was inserted as part of the Constitution by proclamation of the Secretary of State on December 4, 1987.

Cross References — Definition of corporation, see Miss. Const. Art. 7, § 199.

Taxation generally, see § 27-1-1 et seq.

Corporations generally, see § 79-1-1 et seq.

Banks and financial institutions generally, see § 81-1-57 et seq.

Insurance and insurance companies generally, see § 83-1-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Alteration, amendment, and repeal of charters.
3. Increasing stockholders' liability.
4. Taxation.

1. In general.

Chapter 122 Laws of 1908 prohibiting a corporation from doing business wholly in this state, if it remove a case from the state court to a Federal court, violates the Constitution of the United States. Louisville & N.R. Co. v. State, 107 Miss. 597, 65 So. 881 (1914).

Chapter 119 Laws of 1910 does not create a corporation of the State Normal College. Turner v. City of Hattiesburg, 98 Miss. 337, 53 So. 681 (1910).

2. Alteration, amendment, and repeal of charters.

The idea that a franchise or charter granted by the state may be immutable and unamendable by the state has been effectively eliminated. Mississippi Power Co. v. South Miss. Elec. Power Ass'n, 254 Miss. 754, 183 So. 2d 163 (1966), cert. denied, 385 U.S. 823, 87 S. Ct. 51, 17 L. Ed. 2d 60 (1966).

Under this section the legislature may amend the charter of a building and loan association by taking away its right to charge usurious interest. Mississippi Bldg. & Loan Ass'n v. McElveen, 100 Miss. 16, 56 So. 187 (1911).

Impairment of the contract rights acquired by a corporation under a foreclosure sale of the franchise and rights conferred upon the mortgage owner by a municipal ordinance adopted prior to the Constitution of 1890, cannot be justified as an exercise of the right to alter, amend, or repeal corporate charters reserved in § 178 of that Constitution, although the corporation in question was organized after the constitution went into effect. City of Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453, 26 S. Ct. 660, 50 L. Ed. 1102, 6 Am. Ann. Cas. 253 (1906).

The reserved right to alter, amend or repeal corporate charters given by this provision "provided, however, that no injustice shall be done to the stockholders" does not authorize the legislature to empower a municipality to construct a waterworks of its own during the term of an exclusive waterworks franchise possessed by a private corporation under a municipal ordinance adopted with legislative sanctions. City of Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453, 26 S. Ct. 660, 50 L. Ed. 1102, 6 Am. Ann. Cas. 253 (1906).

3. Increasing stockholders' liability.

The statute increasing the liability of stockholders of banks to their depositors as to deposits thereafter made, does not impair the obligation of contract. Pate v. Bank of Newton, 116 Miss. 666, 77 So. 601 (1918).

4. Taxation.

A waterworks franchise is taxable property. Adams v. Samuel R. Bullock & Co., 94 Miss. 27, 47 So. 527, 19 Am. Ann. Cas. 165 (1908).

RESEARCH REFERENCES

ALR. Power of state to amend charter of private incorporated charity. 62 A.L.R. 573.

Applicability of constitutional or statutory provisions relating to added liability of stockholders to holders of stock issued, or stockholders of corporations organized, before their enactment. 72 A.L.R. 1252.

Power of corporation to amend its charter in respect of character or kind of business. 111 A.L.R. 1525.

Reinstatement of repealed, forfeited, expired, or suspended corporate charter as validating interim acts of corporation. 42 A.L.R.4th 392.

Am Jur. 18A Am. Jur. 2d, Corporations §§ 30-49, 96-101.

6 Am. Jur. Legal Forms 2d, Corporations § 74:127 (articles of incorporation-with option for subchapter election).

CJS. C.J.S. Corporations §§ 24 to 27, 54 to 61.

C.J.S. Taxation §§ 169-319, 531-596, 657-664.

§ 179. Compliance with provisions

The Legislature shall never remit the forfeiture of the franchise of any corporation now existing, nor alter nor amend the charter thereof, nor pass any general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter and franchises subject to the provisions of this Constitution; and the reception by any corporation of any provision of any such laws, or the taking of any benefit or advantage from the same, shall be conclusively held an agreement by such corporation to hold thereafter its charter and franchises under the provisions hereof.

Cross References — Power of the Governor to remit fines, see Miss. Const. Art. 5, § 124.

Power of Legislature to impose penalties on certain corporations, see Miss. Const. Art. 7, § 186.

Definition of corporation, see Miss. Const. Art. 7, § 199.

Corporations generally, see § 79-1-1 et seq.

JUDICIAL DECISIONS

1. In general.

The contract clause of Const. § 16 is of equal dignity and must be read in connection with this section. Southern Bell Tel. & Tel. Co. v. City of Meridian, 241 Miss. 678, 131 So. 2d 666 (1961).

Where charter of religious organization, granted by special act prior to adoption of Constitution in 1890, exempted organization from taxation, amendment of charter after adoption of Constitution rendered organization subject to provision of Constitution prohibiting passage of local, private, or special laws exempting property from taxation and rendered the exemption originally granted to the organization void, notwithstanding amendment of organization's charter merely provided for extension of terms of office of trustees and officers and for filling of vacancies in such offices. City of Biloxi v. Trustees of Miss. Annual Conference Endowment Fund, 179 Miss. 47, 173 So. 797 (1937).

Statute authorizing the Yazoo & Mississippi Valley Railroad Company to lease or purchase and to maintain and operate a branch of another railroad could not be upheld under this section, where the statute was designed to enable such railroad to avoid the condition specified. Yazoo & Miss. V. Ry. v. Southern Ry., 83 Miss. 746, 36 So. 74 (1904).

RESEARCH REFERENCES

CJS. C.J.S. Corporations §§ 54 to 61, 860.

§ 180. Organization

All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this Constitution shall be subject to the provisions of this article; and all such charters under which organizations shall not take place in good faith and business be commenced within one year from the adoption of this Constitution, shall thereafter have no validity; and every charter or grant of corporate franchise hereafter made shall have no validity, unless an organization shall take place thereunder and business be commenced within two years from the date of such charter or grant.

Cross References — Corporations generally, see § 79-1-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Construction.

1. In general.

Statute permitting corporations to file report of organization after the time limited by § 930, Code of 1906 (§ 4104, Hemingway's Code) did not violate this section. Southern Coal Co. v. Yazoo Ice & Coal Co., 118 Miss. 860, 80 So. 334 (1919).

Both the right to exist as a corporation and the power to consolidate with another corporation are within the section. Adams v. Yazoo & Miss. V.R. Co., 77 Miss. 194, 24 So. 200 (1898), motion denied, 77 Miss. 302, 24 So. 317 (1898), aff'd, 180 U.S. 1, 21 S. Ct. 240, 45 L. Ed. 395 (1901), reh'g denied, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901).

An exemption from taxation contained in a charter of a railroad company, which afterwards loses its corporate existence by consolidation with another company, was cut off by the section, notwithstanding the charter provided that the exemptions should pass to the consolidated company. Adams v. Yazoo & Miss. V.R. Co., 77 Miss. 194, 24 So. 200 (1898), motion denied, 77 Miss. 302, 24 So. 317 (1898), aff'd, 180 U.S. 1, 21 S. Ct. 240, 45 L. Ed. 395 (1901), reh'g denied, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901).

2. Construction.

There was nothing sinister in the fact that the organizational documents of a corporation were drafted after its formation and dated so that they were made retroactive to the date of formation because the documents were drafted after the incorporation of corporation, but within the two-year period of time specified under Miss. Const. Art. 7, § 180. Bayou Louie Farm, Inc. v. White (In re Heigle), 401 B.R. 752 (Bankr. S.D. Miss. 2008).

RESEARCH REFERENCES

CJS. C.J.S. Corporations § 24.

§ 181. Taxation

The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this Constitution, shall remain in full force and effect for the time of such exemption as expressed in their respective charters, or by general laws, unless sooner repealed by the Legislature. And, domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies doing business in this State, except to the extent of the excess of their ad valorem tax over the privilege tax imposed upon such foreign companies; and the Legislature may impose privilege taxes on building and loan associations in lieu of all other taxes except on their real estate.

SOURCES: 1869 art XII § 13.

Cross References — Taxation of corporations, see Miss. Const. Art. 4, § 112 and Art. 7, § 182.

Taxation generally, see § 27-1-1 et seq.
Corporations generally, see § 79-1-1 et seq.
Banks and financial institutions, see § 81-1-57 et seq.
Insurance and insurance companies generally, see § 83-1-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Validity of statutes.
3. Property subject to tax.
4. Banks and banking capital.
6. Exemptions.

1. In general.

A private corporation for pecuniary gain is no more entitled to deduct its indebtedness from its property for the purpose of taxation than is an individual. Panola County v. C.M. Carrier & Son, 89 Miss. 277, 42 So. 347 (1906).

Taxes upon the privileges of corporations being taxed upon their property are subject to the limitations of the constitutional provision requiring the property of corporations to be taxed, like that of individuals, in proportion to its value. Gulf & S.I.R.R. v. Hewes, 183 U.S. 66, 22 S. Ct. 26, 46 L. Ed. 86 (1901).

The charter of a railroad company granted subsequent to the constitution of 1869 is, even if it be considered as a revival of the rights and privileges which had formerly belonged to a company chartered in 1850, subject to the provision of the constitution of 1869 which requires the property of such corporation to be taxed, like that of individuals, in proportion to its value. Gulf & S.I.R.R. v. Hewes, 183 U.S. 66, 22 S. Ct. 26, 46 L. Ed. 86 (1901).

2. Validity of statutes.

This section recognizes the authority to provide by statute a different method of assessing banks than that for assessing other corporations and individuals as regards whether the classification adopted by the legislature is discriminatory in imposing a tax upon finance companies for the privilege of engaging in the business defined by the statute and excepting banks and local merchants from the payment thereof. Stone v. General Elec. Contracts Corp., 193 Miss. 317, 7 So. 2d 811 (1942).

Statute providing corporations shall be assessed at the market value of their stock paid in, less real estate owned, to be separately assessed as other real estate, is not contrary to the Constitution. People's Whse. Co. v. Yazoo City, 97 Miss. 500, 52 So. 481 (1910).

3. Property subject to tax.

Private corporation's capital, invested in evidences of debt bearing not more than 6% interest, is not taxable. Equitable Fin. Co. v. Board of Supvrs., 146 Miss. 734, 111 So. 871 (1927).

A domestic corporation was not taxable on the portion of its capital stock invested in shares of the capital stock of another domestic corporation. Robertson v. Mississippi Valley Co., 120 Miss. 159, 81 So. 799 (1919).

Where the aggregate market value of the stock of a corporation exceeds the value of the real and personal property thereof, a tax on the difference is a tax on the value of the franchise, and is authorized by law. People's Whse. Co. v. Yazoo City, 97 Miss. 500, 52 So. 481 (1910).

The franchise of a waterworks company is taxable as personal property. Adams v. Samuel R. Bullock & Co., 94 Miss. 27, 47 So. 527, 19 Am. Ann. Cas. 165 (1908).

Statute taxing joint stock companies and corporations on the market value of their capital stock less the value of their real estate did not exempt personal property of such corporations from tax where value of the real estate exceeded the market value of the capital stock. Panola County v. C.M. Carrier & Son, 89 Miss. 277, 42 So. 347 (1906).

4. Banks and banking capital.

Absent a legislatively-created "special mode" of assessment for banks providing otherwise, the guarantees of equal and uniform assessment conferred by Mississippi Constitution Article 4 § 112 and Article 7 § 181 extend to banks just as to all other taxpayers. As there is no stature authorizing the assessment of bank intangibles at a rate greater than other personal property in general, §§ 112 and 181 protects such bank property from disproportionate assessment. Calhoun County Bd. of Supvrs. v. Grenada Bank, 543 So. 2d 138 (Miss. 1988).

Statute exempting surplus of banks from taxation until outstanding guaranty certificates are liquidated does not violate this section. City of Jackson v. Deposit Guar. Bank & Trust Co., 160 Miss. 752, 133 So. 195 (1931).

True value of bank real estate must be deducted from aggregate true value of assets in determining true value of capital stock for taxation. Bank of Tupelo v. Board of Supvrs., 155 Miss. 436, 124 So. 482 (1929).

It is legal under this section that an assessment for taxation be made of the capital stock of the bank at par, augmented by the surplus of undivided profits, less real estate of the bank at full value, although other property in the same county was assessed on a valuation of 66 cents on the dollar. Magnolia Bank v. Board of Supvrs., 111 Miss. 857, 72 So. 697, 3 A.L.R. 1365 (1916), error dismissed, 248 U.S. 546, 39 S. Ct. 135, 63 L. Ed. 414 (1919).

6. Exemptions.

Amendment of charter of religious organization, after adoption of Constitution 1890, rendered provision for tax exemption void. City of Biloxi v. Trustees of Miss. Annual Conference Endowment Fund, 179 Miss. 47, 173 So. 797 (1937).

Statute exempting surplus of banks from taxation until outstanding guaranty certificates are liquidated does not violate this section. City of Jackson v. Deposit Guar. Bank & Trust Co., 160 Miss. 752, 133 So. 195 (1931).

Statutes exempting domestic insurance corporations from ad valorem taxes were not violative of constitutional provision requiring property of private corporations to be taxed same as individuals. Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

Statute exempting property of incorporated college from taxation does not violate this section. Board of Supvrs. v. Gulf Coast Military Academy, 126 Miss. 729, 89 So. 617 (1921).

An exemption contract as to taxation by a municipality under authority then existing with a railway company does not pass to a consolidated company, organized after the adoption of the Constitution. Yazoo & Miss. V. Ry. v. City of Vicksburg, 209 U.S. 358, 28 S. Ct. 510, 52 L. Ed. 833 (1908).

The exemption from taxation granted by laws 1882 p 84 to encourage the establishment of factories, etc., was and is constitutional, and was continued in force, subject to legislative repeal, by this section. Adams v. Tombigbee Mills, 78 Miss. 676, 29 So. 470 (1901).

A new corporation resulting from a consolidation of two railroad companies, since the adoption of the Constitution prohibiting exemptions, is not entitled to an exemption from taxation contained in the charter of one of the consolidating companies, although such charter was granted prior to the adoption of the Constitution. Adams v. Yazoo & Miss. V.R. Co., 77 Miss. 194, 24 So. 200 (1898), motion denied, 77 Miss. 302, 24 So. 317 (1898), aff'd, 180 U.S. 1, 21 S. Ct. 240, 45 L. Ed. 395 (1901), reh'g denied, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901).

The Constitution of 1869 (Art 12 § 13) together with § 20, same article, was mandatory and deprived the legislature of all power to exempt the property of corporations for pecuniary profits from taxation. Adams v. Yazoo & Miss. V.R. Co., 77 Miss. 194, 24 So. 200 (1898), motion denied, 77 Miss. 302, 24 So. 317 (1898), aff'd, 180 U.S. 1, 21 S. Ct. 240, 45 L. Ed. 395 (1901), reh'g denied, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901).

RESEARCH REFERENCES

ALR. Constitutionality of taxing statute which refuses to corporation deduction of credits allowed to individual taxpayer. 42 A.L.R. 1049.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion. 4 A.L.R.2d 744.

CJS. C.J.S. Taxation §§ 469-664, 1683, 1736, 1737.

§ 182. Tax exemptions

The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, except that the Legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period of not exceeding ten (10) years on each such enterprise hereafter constructed, and may grant exemptions not exceeding ten (10) years on each addition thereto or expansion thereof, and may grant exemptions not exceeding ten (10) years on future additions to or expansions of existing manufactures and other enterprises of public utility. The time of each exemption shall commence from the date of completion of the new enterprise, and from the date of completion of each addition or expansion, for which an exemption is granted. When the Legislature grants such exemptions for a period of ten (10) years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures and other new enterprises of public utility, entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined.

SOURCES: Laws, 1961, 1st Ex Sess, ch 9, eff October 16, 1961.

Editor's Note — The 1961 amendment to Section 182 of the Constitution was proposed by Laws, 1961, 1st Ex Sess, ch 9, and, upon ratification by the electorate on Oct. 3, 1961, was inserted by Proclamation of the Secretary of State on Oct. 16, 1961, by virtue of the authority vested in him by Section 273 of the Constitution.

Cross References — Taxation of property, see Miss. Const. Art. 4, § 90 and Code § 27-1-1 et seq.

General laws, see Miss. Const. Art. 7, §§ 192 and 199.

General exemptions from ad valorem taxes, see § 27-31-1 et seq.

Explanation of application of time limits imposed in this section, see § 27-31-7.

Corporations generally, see § 79-1-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Validity and effect of statutes.
3. Character of enterprises entitled to exemption.
4. Persons or corporations entitled to exemption.

1. Construction and application.

In view of the limitation of Miss Const Art 7 § 182, according to which neither the legislature nor the courts have power to grant exemptions in the encouragement of manufacturers, or to grant similar exemptions for expansions of a particular project beyond a ten year limitation period, an exemption from ad valorem taxation in favor of a manufacturer would be upheld, except that the judgment would be modified to the extent that the exemption not exceed the ten year limitation period. Board of Supvrs. v. Hattiesburg Coca-Cola Bottling Co., 448 So. 2d 917 (Miss. 1984).

While this section prohibits the surrender or abridgement of the power to tax corporations and their property, it has taken no reference to the property of public bodies, corporate and politic. Quinn v. City of McComb, 212 Miss. 730, 55 So. 2d 479 (1951).

The language used herein was intended to have, and must be given, a physical, not a legalistic meaning, in view of the purpose thereof to bring new enterprises into the state, new economic sources of welfare and happiness to its people, a wide and ever wider extension in the state of the practice of the useful arts, the institution there of properties adding to the state's resources, and to the employment of its people. Gully v. Interstate Natural Gas Co., 82 F.2d 145 (5th Cir. 1936), cert. denied, 298 U.S. 688, 56 S. Ct. 958, 80 L. Ed. 1407 (1936).

2. Validity and effect of statutes.

Section 27-35-35 and § 27-35-37 are not unconstitutionally vague and ambiguous in that they fail to set forth a specific formula for valuation of branch bank intangibles. Any vagueness or ambiguity in § 27-35-35 and § 27-35-37 when read in isolation is cured by reading them in pari materia with other statutes dealing with the same or similar subjects, especially § 27-13-13. Additionally, § 27-35-35 is not unconstitutional on the ground that it fails to allow deduction from taxable capital (i.e., net worth) those amounts invested in tax exempt government securities since government obligations are expressly exempted from ad valorem taxation by § 27-31-1(u). It is clear that § 27-31-1(u) is to be read in pari materia with all taxation statutes and nothing in § 27-35-35 implies that the general exemptions of § 27-31-1 are inapplicable to banks. Calhoun County Bd. of Supvrs. v. Grenada Bank, 543 So. 2d 138 (Miss. 1988).

The Housing Authority Act (§§ 7295-7322-06, inclusive, Code 1942) neither violates § 112 nor § 182 of the Constitution. Biloxi-Pascagoula Real Estate Bd., Inc. v. Mississippi Regional Hous. Auth. No. VIII, 231 Miss. 89, 94 So. 2d 793 (1957).

Statute (Laws of 1936, 1st extraordinary sess., chap 1, § 19, as amended by laws of 1936, 2nd extraordinary sess., chap 18, § 1) providing for exemption from ad valorem taxation for a period of five years of new factory and enterprises does not violate this section since such statute clearly prescribes the mode and manner in which the exemption is to be determined and itself grants the exemption without any further affirmative action by the board of supervisors when a finding of fact is made by such board to the effect that the factory to be operated is in fact a new enterprise of public utility. Meador v. Mac-Smith Garment Co., 188 Miss. 98, 191 So. 129 (1939).

The date of commencement of the exemption from ad valorem taxation in the case of new enterprises and factories as provided by statute (Laws 1936, 1st extraordinary session, chap 1, § 19, as amended by laws of 1936, chap 18, § 1), does not violate this section, since the work in a particular case commenced with the preparations for the installation of new machinery upon the purchase of an old factory site and structure on the date provided by the statute for such exemption to be effective. Meador v. Mac-Smith Garment Co., 188 Miss. 98, 191 So. 129 (1939).

Statutes under which county supervisors' order granting statutory tax exemption to new enterprises of public utility becomes effective within specified time in absence of petition for election were not unconstitutional as granting legislative power. Gully v. Wilmut Gas & Oil Co., 174 Miss. 794, 165 So. 620 (1936).

Statutory tax exemption to new enterprises of public utility held not waived merely by delay in claiming exemption, or by antecedent payment of taxes, provided claim is made within five-year exemption period. Gully v. Wilmut Gas & Oil Co., 174 Miss. 794, 165 So. 620 (1936).

County supervisors' order granting statutory tax exemption to certain enterprises of public utility was not incomplete where, under statute, order became effective within specified time in absence of petition for election, notwithstanding statutory provision for order declaring it to be supervisors' "intention" to grant tax exemption. Gully v. Wilmut Gas & Oil Co., 174 Miss. 794, 165 So. 620 (1936).

Statutes exempting domestic insurance corporations from ad valorem taxes were not invalid as surrender of power to tax corporations. Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

Chapter 48 Acts of 1900, exempting plants and factories in course of establishment, from taxation for five years, is not a violation of § 182. Adams v. Winona Cotton Mills, 92 Miss. 743, 46 So. 401 (1908).

3. Character of enterprises entitled to exemption.

Where an individual purchased a factory site formerly used by a thread spinning company in the manufacture of hosiery, and, after the effective date of the statute granting exemption from taxation to new enterprises, began to install new machinery for the making of shirts, the old machinery used in the thread spinning business not being adaptable to such manufacture, evidence sustained finding that the factory and enterprise so established was in fact a new factory and enterprise within the meaning of the statute. Meador v. Mac-Smith Garment Co., 188 Miss. 98, 191 So. 129 (1939).

A foreign corporation which laid its pipelines in the state for the sale and distribution of natural gas as a wholesale seller by private contract to municipalities and corporations, was entitled to the statutory exemption from taxation accorded new enterprises, as against the contention that the statute, in using the words "public utility" used them in the sense of property devoted and dedicated to the public use. Gully v. Interstate Natural Gas Co., 82 F.2d 145 (5th Cir. 1936), cert. denied, 298 U.S. 688, 56 S. Ct. 958, 80 L. Ed. 1407 (1936).

The exemption was intended to encourage "manufacture and other new enterprises of public utility," the use of the word "other" not being used inadvertently but denoting enterprises, which by being serviceable and ordinarily profitable are enterprises of utility, although not strictly public utilities in the restricted sense. Interstate Natural Gas Co. v. Gully, 4 F. Supp. 697 (D. Miss. 1933), rev'd on other grounds, 292 U.S. 16, 54 S. Ct. 565, 78 L. Ed. 1088 (1934); Memphis Natural Gas Co. v. Gully, 8 F. Supp. 169 (S.D. Miss. 1934), modified, 82 F.2d 150 (5th Cir. 1936), cert. denied, 298 U.S. 688, 56 S. Ct. 956, 80 L. Ed. 1407 (1936), cert. denied, 298 U.S. 688, 56 S. Ct. 958, 80 L. Ed. 1407 (1936).

4. Persons or corporations entitled to exemption.

Because the county admitted to omitting the holder's leasehold interest from the ad valorem tax rolls, pursuant to Miss. Code Ann. § 27-35-155, the leasehold interest was not subject to ad valorem taxation for any past year that it was not listed on the ad valorem tax roll as Miss. Const. Art. 7, § 182 limited a tax exemption to a period of 10 years; because the holder's lease with the county began in 1977, the ad valorem tax exemption would have been in effect through 1987, but by omitting the leasehold interest, the back taxes could not be assessed against the holder. In re Assessment of Ad Valorem Taxes on Leasehold Interest Held by Reed Mfg., Inc., 854 So. 2d 1066 (Miss. 2003).

Where as prescribed by statute a county board of supervisors made a finding of fact, in favor of an individual purchaser of factory property, that a proposed factory and enterprise on the site of a former factory was in truth and in fact a new factory and enterprise, the exemption from taxation accorded by such statute inured to the benefit of the corporation thereafter organized by such purchaser, since the statute rendered the property itself free of the burden of ad valorem taxation without regard to its ownership. Meador v. Mac-Smith Garment Co., 188 Miss. 98, 191 So. 129 (1939).

Where corporation was entitled to tax exemption as new enterprise of public utility, purchaser of corporation's property at foreclosure sale held entitled to similar exemption for balance of five-year exemption period. Gully v. Wilmut Gas & Oil Co., 174 Miss. 794, 165 So. 620 (1936).

The exemption referred to herein applies to foreign corporations. Gully v. Interstate Natural Gas Co., 82 F.2d 145 (5th Cir. 1936), cert. denied, 298 U.S. 688, 56 S. Ct. 958, 80 L. Ed. 1407 (1936); Interstate Natural Gas Co. v. Gully, 4 F. Supp. 697 (D. Miss. 1933), rev'd on other grounds, 292 U.S. 16, 54 S. Ct. 565, 78 L. Ed. 1088 (1934); Memphis Natural Gas Co. v. Gully, 8 F. Supp. 169 (S.D. Miss. 1934), modified, 82 F.2d 150 (5th Cir. 1936), cert. denied, 298 U.S. 688, 56 S. Ct. 956, 80 L. Ed. 1407 (1936), cert. denied, 298 U.S. 688, 56 S. Ct. 958, 80 L. Ed. 1407 (1936).

A foreign corporation claiming exemption from taxation as a new enterprise and seeking relief from the financial peril of tax exaction by insolvent collectors acting without authority of law, was entitled to a declaratory decree in Federal Court as to the validity of the asserted tax exemption. Memphis Natural Gas Co. v. Gully, 8 F. Supp. 169 (S.D. Miss. 1934), modified, 82 F.2d 150 (5th Cir. 1936), cert. denied, 298 U.S. 688, 56 S. Ct. 956, 80 L. Ed. 1407 (1936), cert. denied, 298 U.S. 688, 56 S. Ct. 958, 80 L. Ed. 1407 (1936).

ATTORNEY GENERAL OPINIONS

Governing authorities of a municipality which annexes an area which includes a warehouse for a manufacturer may grant an exemption from municipal ad valorem taxes for a period of up to ten years from the date of the annexation for finished goods in the warehouse. Fernald, Jan. 24, 2003, A.G. Op. #03-0025.

The current corporate lessee of county-owned property first leased in 1963 under the old A. & I. statutes with exemption from ad valorem taxes for an unspecified period is entitled to an exemption for 10 years from the date the county approved assignment of the lease to that company. When the 10 years has already expired and the county erroneously omitted that leasehold from the tax assessment rolls for several years, the county may not assess back taxes. Approval by the county of sub-leases of the property is not an unlawful donation to a private party. Munn, March 9, 2007, A.G. Op. #07-00067, 2007 Miss. AG LEXIS 101.

RESEARCH REFERENCES

ALR. Validity of special statute authorizing exemption of industrial concern from taxation. 64 A.L.R. 1217.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion. 4 A.L.R.2d 744.

What constitutes manufacturing and who is a manufacturer under tax laws. 17 A.L.R.3d 7.

CJS. C.J.S. Taxation §§ 261-393, 1683, 1736, 1737.

§ 183. Subscription to capital stock by counties or municipalities

No county, city, town, or other municipal corporation shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation, or loan its credit in aid of such corporation or association. All authority heretofore conferred for any of the purposes aforesaid by the Legislature or by the charter of any corporation, is hereby repealed. Nothing in this section contained shall affect the right of any such corporation, municipality, or county to make such subscription where the same has been authorized under laws existing at the time of the adoption of this Constitution, and by a vote of the people thereof, had prior to its adoption, and where the terms of submission and subscription have been or shall be complied with, or to prevent the issue of renewal bonds, or the use of such other means as are or may be prescribed by law for the payment or liquidation of such subscription, or of any existing indebtedness.

Cross References — Credit and indebtedness, see Miss. Const. Art. 14, § 258.

County finance and taxation generally, see § 19-9-1 et seq.
Municipal taxation and finance generally, see § 21-33-1 et seq.
Corporations generally, see § 79-1-1 et seq.
Banks and financial institutions generally, see § 81-1-57 et seq.
Insurance and insurance companies generally, see § 83-1-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Corporations and associations within meaning of provision.
3. Donations.
4. Sale or lease of property.

1. In general.

While tenants in common may be required to bear their proportionate share of expenditures and disbursements and to pay off proportionately the purchase price for outstanding titles and claims, a drainage district has not the power to spend funds to meet these obligations as a tenant in common with others. Eden Drainage Dist. v. Swaim, 212 Miss. 386, 54 So. 2d 547 (1951), error overruled 212 Miss. 386, 55 So. 2d 439.

Laws 1948, ch 430, § 1, amending Laws 1946, ch 363, § 6 (Code 1942, § 7146-06), providing for state aid to nonprofit hospitals under the supervision of a state agency in connection with a state-wide hospital plan does not violate this section, since it applies only to counties and municipalities and not to legislative appropriations. Craig v. North Miss. Community Hosp., 206 Miss. 11, 39 So. 2d 523 (1949).

Under the section, a municipality cannot make an appropriation of money in aid of a corporation, whether the money belongs to it in a public or private capacity, even if it accrued by a contractor's forfeiture and be in the hands of a custodian and never have been in the treasury. Adams v. Jackson Elec. Ry., L. & P. Co., 78 Miss. 887, 30 So. 58 (1901).

A municipality is not forbidden by the section to contract with a corporation for electric lights for its streets. Reid v. Trowbridge, 78 Miss. 542, 29 So. 167 (1901).

2. Corporations and associations within meaning of provision.

A contract between a city park commission and a corporation owning an island, for the development of the island out of the proceeds of revenue bonds, whereby the corporation was to contribute 70% of the island and the riparian or littoral rights and to have the right to approve the overall plan of development, and the remaining building lots were to be divided between the commission and the corporation, is void as a loan of municipal credit to a private corporation. Giles v. City of Biloxi, 237 Miss. 65, 112 So. 2d 815 (1959), error overruled 237 Miss. 65, 113 So. 2d 544.

Hospital corporation was "private corporation" within constitutional provision forbidding municipal corporation to subscribe to capital stock or loan credit in aid thereof. Brister v. Leflore County, 156 Miss. 240, 125 So. 816 (1930).

Whether corporation is public or private depends on whether control is under power of public through public agents responsibly accountable to government; "public corporation," "private corporation" defined. Brister v. Leflore County, 156 Miss. 240, 125 So. 816 (1930).

Law authorizing county to appropriate money in aid of hospital corporation was unconstitutional as contemplating appropriation to private corporation. Brister v. Leflore County, 156 Miss. 240, 125 So. 816 (1930).

Chapter 119, Laws of 1910 creating a State Normal College does not create a corporation. J. Livelar & Co. v. State, 98 Miss. 330, 53 So. 681 (1910).

3. Donations.

Contribution by city of lots as site for community hospital proposed to be established by certain supervisors' districts as authorized by Laws 1948, c 435 (Code 1942, § 7129-50), is not a donation within the prohibition of this section, since supervisors' districts are political subdivisions and not private corporations. City of Indianola v. Sunflower County, 209 Miss. 116, 46 So. 2d 81 (1950).

A fund forfeited to a municipality by a corporation for failure to build and put in operation a light plant and street railroad, could not, under this section, be donated by the municipality to another corporation which completed the project. Jackson Elec. Ry. & L. Power Co. v. Adams, 79 Miss. 408, 30 So. 694 (1901).

4. Sale or lease of property.

Economic development districts are not prohibited to enter into a "lease intended for security," where such terms are in the best interests of the public and serve a public purpose. American Gen. Aircraft Corp. v. Washington County Economic Dev. Dist., 190 B.R. 275 (Bankr. N.D. Miss. 1995).

The issuance of revenue bonds for the purpose of acquiring hospital facilities to be leased to a non-profit corporation was not a loan of the city's credit to a private corporation in violation of Mississippi Constitution, Article 7, § 183, where the bonds were entirely payable from revenues to be derived from the lease and where the full faith, credit and resources of the city were not obligated or pledged. Kerley v. City of Hattiesburg, 361 So. 2d 44 (Miss. 1978).

There was no violation of this section where the mayor and board of aldermen of a city, pursuant to a special act empowering these officials to sell or lease certain property acquired by the city, undertook to lease the property to a college for a term of years for an annual rental of one dollar per annum. Whitworth College, Inc. v. City of Brookhaven, 161 F. Supp. 775 (S.D. Miss. 1958), aff'd, 261 F.2d 868 (5th Cir. 1958).

This section is inapplicable to a statute which, for the avowed purpose of relieving unemployment and aiding agriculture and industry, authorized municipalities to raise funds by taxation for the acquisition of lands and the construction of factories to be leased to individuals and private corporations on terms which would insure their continued operation. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

Statute authorizing issuance of bonds, payable from taxes, enabling town, desiring to increase employment, to build and lease garment factory, violated State Constitution by denying due process and lending town's credit in aid of private corporation. Carothers v. Town of Booneville, 169 Miss. 511, 153 So. 670 (1934).

ATTORNEY GENERAL OPINIONS

A board of supervisors may neither invest in a corporation nor obligate the full faith and credit of the county as guarantor of a loan to such corporation. Griffith, Dec. 19, 1997, A.G. Op. #97-0788.

A board of supervisors may neither invest in a corporation nor obligate the full faith and credit of the county as guarantor of a loan to such corporation. McWilliams, January 9, 1998, A.G. Op. #97-0799.

A municipality is prohibited from purchasing or acquiring shares of the capital stock in a corporation regardless of action taken or to be taken after such acquisition and regardless of whether the city becomes the sole shareholder of such corporation. Cochran, July 9, 1999, A.G. Op. #99-0333.

A county was required to readvertise for proposals in order to amend a solid waste collection and disposal contract to allow the county to utilize the county's credit in order to obtain a more favorable lease-purchase price for garbage carts that would be used by customers. Griffith, Mar. 9, 2001, A.G. Op. #01-0072.

County hospital may not effect the issuance of an irrevocable letter of credit by a bank in favor of the insurance carrier in any amount. Yarborough, June 6, 2003, A.G. Op. 03-0255.

RESEARCH REFERENCES

ALR. See also annotations under § 192, infra.

Constitutionality of statute or ordinance authorizing use of public funds, credit, or power of taxation for restoration or repair of privately owned public utility. 13 A.L.R. 313.

Encouragement or promotion of industry not in nature of public utility, carried on by private enterprise, as public purpose for which tax may be imposed or public money appropriated. 112 A.L.R. 571.

Power of county or municipality to exempt from taxation or otherwise aid or subsidize private enterprises conducted for recreational, exhibition, or entertainment purposes. 116 A.L.R. 889.

Constitutional or statutory provisions prohibiting municipalities or other subdivisions of the state from subscribing to, or acquiring stock of, private corporations. 152 A.L.R. 495.

Constitutional prohibition of municipal corporation lending its credit or making donation as applicable to sale or leasing of its property. 161 A.L.R. 518.

Municipal establishment or operation of off-street public parking facilities. 8 A.L.R.2d 373.

Am Jur. 65 Am. Jur. 2d, Railroads § 29.

44 Am. Jur. (1st ed), Railroads §§ 55 et seq.

CJS. C.J.S. Counties §§ 204 to 207.

C.J.S. Municipal Corporations §§ 1610-1613.

Law Reviews. 1978 Mississippi Supreme Court Review: Administrative Law. 50 Miss. L. J. 11, March 1979.

§ 184. Railroads

All railroads which carry persons or property for hire shall be public highways, and all railroad companies so engaged shall be common carriers. Any company organized for that purpose under the laws of the state shall have the right to construct and operate a railroad between any points within this state, and to connect at the state line with roads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad; and all railroad companies shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without unnecessary delay or discrimination.

Cross References — Right to lay railroad tracks, see Miss. Const. Art. 4, § 90(r).

JUDICIAL DECISIONS

1. Contract rate.
2. Duty to receive cars from other railroads.
3. Adverse possession against railroad.

1. Contract rate.

A railroad may contract to carry articles from one point in the state to another point in the state in the absence of tariff rates filed with the state railroad commission. Illinois Cent. R.R. v. King, 125 Miss. 734, 88 So. 322 (1921).

2. Duty to receive cars from other railroads.

The section does not require railroads to receive and transport foreign cars obviously defective and dangerous to its employees, nor exempt them from liability to employees for injuries sustained because of the defective or unsafe condition of machinery and appliances on foreign cars received without inspection, nor exempt them from such liability where by inspection the defects or dangerous condition could have been discovered. Illinois Cent. R.R. v. Price, 72 Miss. 862, 18 So. 415 (1895).

3. Adverse possession against railroad.

Private party such as the landowners who brought suit against the railroad could not obtain a prescriptive easement across active railroad tracks, which were tracks that carried persons or property for hire; under Miss. Const. art. 7, § 184, the tracks were public highways. Miss. Exp. R.R. Co. v. Rouse, 926 So. 2d 218 (Miss. 2006).

Judgment allowing easement by prescription of a railroad crossing was reversed because under the Mississippi Constitution, the tracks were considered public highways and prescriptive easements could not be obtained by private citizens across active railroad lines. Miss. Exp. R.R. v. Rouse, — So. 2d —, 2005 Miss. LEXIS 808 (Miss. Dec. 8, 2005), opinion withdrawn by, substituted opinion at 926 So. 2d 218, 2006 Miss. LEXIS 190 (Miss. 2006).

Title by adverse possession as against a railroad, which is a public highway, may be acquired to a part of its right of way not being used by the railroad and not necessary for the transaction of its business as a common carrier. Mobile & O.R. Co. v. Strain, 125 Miss. 697, 88 So. 274 (1921).

RESEARCH REFERENCES

Am Jur. 65 Am. Jur. 2d, Railroads §§ 131-137.

37 Am. Jur. Proof of Facts 2d 439, Inadequacy of Warning Device at Railroad Crossing.

44 Am. Jur. (1st ed), Railroads §§ 278-288.

CJS. C.J.S. Aeronautics and Aerospace § 221.

C.J.S. Carriers § 2.

C.J.S. Railroads §§ 24, 25.

§ 185. Rolling-stock as personal property subject to execution and sale

The rolling-stock belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to execution and sale as such.

RESEARCH REFERENCES

CJS. C.J.S. Executions §§ 18, 19.

C.J.S. Property §§ 18, 20, 32-36.

§ 186. Telephone, telegraph and railroad charges

The Legislature shall pass laws to prevent abuses, unjust discrimination, and extortion in all charges of express, telephone, sleeping-car, telegraph, and railroad companies, and shall enact laws for the supervision of railroads, express, telephone, telegraph, sleeping-car companies, and other common carriers in this State, by commission or otherwise, and shall provide adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their franchises.

Cross References — Forfeiture of franchises, see Miss. Const. Art. 7, § 179.

Motor carriers generally, see § 77-7-1 et seq.

Express companies generally, see § 77-9-601 et seq.

Telegraph and telephone companies generally, see § 77-9-701 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Powers and duties of railroad commission.
3. Bids and bidding.

1. Construction and application.

The legislative act creating the Mississippi Public Service Commission and setting forth its duties and the manner in which it shall function was authorized by Const § 186, and does not unlawfully delegate legislative power or impinge on the power of the governor. Bounds v. L & A Contracting Co., 303 So. 2d 464 (Miss. 1974).

2. Powers and duties of railroad commission.

Order making Railroad Commission's approval prerequisite to increase in intrastate railroad rates was within commission's authority. Gulf & S.I.R.R. v. Laurel Oil & Fertilizer Co., 172 Miss. 654, 159 So. 838 (1935), corrected, 172 Miss. 657, 160 So. 564 (1935).

Railroad commission cannot pass order effect of which produces plain discrimination in transportation rates. Mississippi R.R. Comm'n v. Mobile & O.R.R., 154 Miss. 871, 123 So. 876 (1929).

Absent special circumstances, railroad commission could not require railroad to continue to apply rate between certain points much lower than that declared reasonable and prescribed by commission for similar hauls. Mississippi R.R. Comm'n v. Mobile & O.R.R., 154 Miss. 871, 123 So. 876 (1929).

3. Bids and bidding.

A county board of supervisors in contracting with South Central Bell for telephone service for the county courthouse was not required to resort to public bidding where South Central Bell, as a public utility, was subject to state regulation and was only permitted to charge rates that had been fixed and determined according to the tariffs which it had been required to file with the Mississippi Public Service Commission; however, had the board chosen to purchase or lease equipment from an independent, unregulated equipment supplier, the contract would then have been required to be let on competitive bids because the protection afforded to the public by regulation of South Central Bell would then have been absent. Telcom Sys. v. Lauderdale County Bd. of Supvrs., 405 So. 2d 119 (Miss. 1981).

RESEARCH REFERENCES

CJS. C.J.S. Aeronautics and Aerospace §§ 221, 223.

C.J.S. Carriers §§ 470 to 472, 474.

§ 187. Repealed

Repealed by Laws, 1977, ch. 585, eff December 22, 1978.

Editor's Note — Former Section 187 required that if a railroad passed within three miles of any county seat that it was required to pass through same and establish a depot therein unless prevented by natural obstacles and provided for the grant of rights of way and grounds for depot purposes.

The repeal of Section 187 of Article 7 of the Constitution of 1890 was proposed by Laws, 1977, Ch. 585 (Senate Concurrent Resolution No. 552) and upon ratification by the electorate on November 7, 1978, was deleted from the Constitution by proclamation of the Secretary of State on December 22, 1978.

§ 188. Free or discounted tickets to public officers

No railroad or other transportation company shall grant free passes or tickets, or passes or tickets at a discount, to members of the Legislature, or any State, district, county, or municipal officers, except railroad commissioners. The Legislature shall enact suitable laws for the detection, prevention, and punishment of violations of this provision.

RESEARCH REFERENCES

CJS. C.J.S. Aeronautics and Aerospace § 226.

C.J.S. Carriers § 499.

§ 189. Repealed

Repealed by Laws, 1987, ch. 692, eff December 4, 1987.

Editor's Note — Former Section 189 provided that all charters granted to private corporations in the state be recorded in the chancery clerk's office of the county in which the principal office or place of business of the company is located.

The repeal of Section 189 of Article 7 of the Mississippi Constitution of 1890, was proposed by Laws, 1987, Ch. 692 (Senate Concurrent Resolution No. 551), and upon ratification by the electorate on November 3, 1987, was deleted from the Constitution by proclamation of the Secretary of State on December 4, 1987.

§ 190. Eminent domain; police powers

The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the Legislature from taking the property and franchises of incorporated companies, and subjecting them to public use; and the exercise of the police powers of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or general well-being of the State.

Cross References — Exercise of the right of eminent domain, see Miss. Const. Art. 4, § 90(r) and § 11-27-1 et seq.

Condemning rights of way for private roads, see Miss. Const. Art. 4, § 110.

Corporations generally, see § 79-1-1 et seq.

JUDICIAL DECISIONS

1. Exercise of police powers.

Amendments to Public Utilities Act of 1956 requiring Public Service Commission (PSC) cancellation of public utility's certificate of public convenience and necessity before municipality could exercise eminent domain power to acquire utility's facilities did not violate state constitutional provision prohibiting abridgment of eminent domain rights, despite contention that, by allowing utility to correct any inadequacies before Commission would cancel certificate, amended Act effectively placed ability to abridge power of eminent domain in hands of private corporations; legislature, which could grant or deny power of eminent domain to municipality, could also establish procedure or method by which power might be void. City of Oxford v. Northeast Miss. Elec. Power Ass'n, 704 So. 2d 59 (Miss. 1997).

Section 4058, making it the duty of railroad companies to maintain proper cattleguards where their tracks pass through enclosed land, is a legitimate exercise of police power. Yazoo & Miss. V. Ry. v. Harrington, 85 Miss. 366, 37 So. 1016, 3 Am. Ann. Cas. 181 (1905).

Section 4053, providing that when a railroad is constructed so as to cross a highway, and a bridge is necessary for passage across the railroad, it shall be the duty of the railroad company to erect and maintain the bridge, is within the police power of the state. Illinois Cent. R.R. v. Copiah County, 81 Miss. 685, 33 So. 502 (1903).

A telegraph company engaged in domestic as well as interstate business is subject to such reasonable police regulations as the state may impose. Western Union Tel. Co. v. Mississippi R.R. Comm'n, 74 Miss. 80, 21 So. 15 (1896).

Section 4058, requiring railroads to construct and maintain stock gaps and cattleguards, is a legitimate exercise of the police power. Kansas City, M. & B.R. Co. v. Spencer, 72 Miss. 491, 17 So. 168 (1895).

Section 4046, prohibiting running, flying, walking or kicking switches within the limits of a municipality and making a railroad company liable for damages sustained thereby without regard to contributory negligence of the person injured is a legitimate exercise of the police power. Jones v. Alabama & V. Ry., 72 Miss. 22, 16 So. 379 (1894).

RESEARCH REFERENCES

ALR. Validity of municipal regulation of solicitation of magazine subscriptions. 9 A.L.R.2d 728.

Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated—state takings. 49 A.L.R.5th 769.

Am Jur. 26 Am. Jur. 2d, Eminent Domain §§ 17-20.

CJS. C.J.S. Counties § 40.

C.J.S. Eminent Domain § 24, 56.

C.J.S. Municipal Corporations § 123.

C.J.S. States §§ 75-77.

§ 191. Protection of corporate employees

The Legislature shall provide for the protection of the employees of all corporations doing business in this State from interference with their social, civil, or political rights by said corporations, their agents or employees.

Cross References — Definition of corporation, see Miss. Const. Art. 7, § 199.

Employers and employees generally, see Code § 71-1-1 et seq.

RESEARCH REFERENCES

ALR. Validity of statutes restricting political activities of public officers or employees. 28 A.L.R.3d 717.

On-the-job sexual harassment as violation of state civil rights law. 18 A.L.R.4th 328.

Recovery for discharge from employment in retaliation for filing workers' compensation claim. 32 A.L.R.4th 1221.

Right to discharge allegedly "at will" employee as affected by employer's promulgation of employment policies as to discharge. 33 A.L.R.4th 120.

Conduct or activities of employees during off-duty hours as misconduct barring unemployment compensation benefits. 35 A.L.R.4th 691.

Liability for discharge of at-will employee for in-plant complaints or efforts relating to working conditions affecting health or safety. 35 A.L.R.4th 1031.

Right of employee to injunction preventing employer from exposing employee to tobacco smoke in workplace. 37 A.L.R.4th 480.

Validity and enforceability of provision that employer shall be liable for stipulated damages on breach of employment contract. 40 A.L.R.4th 285.

Workers' compensation as precluding employee's suit against employer for sexual harassment in the workplace. 51 A.L.R.5th 163.

What acts amount to violation of Hatch Act (5 USCS secs. 1501-1503) prohibiting political activity of certain state and local employees. 8 A.L.R. Fed. 343.

Prohibiting public employee from running for elective office as violation of employee's federal constitutional rights. 44 A.L.R. Fed. 306.

Employer's discharge of employee as unlawful employment practice in violation of § 704(a) of Civil Rights Act of 1964 (42 USCS § 2000e-3(a)) where basis for discharge is employee's opposition to discriminatory conduct of co-worker. 49 A.L.R. Fed. 712.

Propriety of treating separate entities as one for determining number of employees required by Title VII of Civil Rights Act of 1964 (42 USCS § 2000e(b)) for action against "employer." 49 A.L.R. Fed. 900.

Prohibition of discrimination against, or discharge of, employee because of exercise of right afforded by Occupational Safety and Health Act, under § 11(c)(1) of the Act (29 USCS § 660(c)(1)). 66 A.L.R. Fed. 650.

Propriety, under unfair labor practice provisions of National Labor Relations Act (29 USCS § 158(a)), of employer's selective discipline of employees who are union officials and who participated in unauthorized strike. 66 A.L.R. Fed. 801.

Dismissal of, or other adverse personnel action relating to, public employee for political patronage reasons as violative of First Amendment. 70 A.L.R. Fed. 371.

Who is "employee, " as defined in § 701(f) of the Civil Rights Act of 1964, 42 USCS § 2000e(f). 72 A.L.R. Fed. 522.

Union's discriminatory operation of exclusive hiring hall as unfair labor practice under § 8(b) of the National Labor Relations Act (29 USCS § 158(b)). 73 A.L.R. Fed. 171.

"Mass discharge" of employees as evidence of unfair labor practice under §§ 8(a)(1) and (3) of National Labor Relations Act (29 USCS § 158(a)(1), (3)). 137 A.L.R. Fed. 445.

Allowance and rates of interest on backpay award under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.). 138 A.L.R. Fed. 1.

Preemption of state law wrongful discharge claim, not arising from whistleblowing, by § 541(A) of Employee Retirement Income Security Act of 1974 (29 U.S.C.S. § 1144(A)). 176 A.L.R. Fed. 433.

CJS. C.J.S. Labor Relations §§ 7-9.

§ 192. Public utilities may be exempted from municipal tax; duration

Provision shall be made by general laws whereby cities and towns may be authorized to aid and encourage the establishment of manufactories, gasworks, waterworks, and other enterprises of public utility other than railroads, within the limits of said cities or towns, by exempting all property used for such purposes from municipal taxation for a period not longer than ten years.

Cross References — Prohibition against enactment of certain local, private, or special laws affecting corporations, see Miss. Const. Art. 4, § 90.

Taxation of corporations, see Miss. Const Art. 7, § 182.

Municipal public utilities and transportation generally, see § 21-27-1 et seq.

Municipal taxation and finance generally, see § 21-33-1 et seq.

Public utilities and carriers generally, see § 77-1-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Validity and effect of statutes.

1. In general.

By general laws the legislature may confer upon municipalities authority to encourage the establishment of factories within the corporate limits by exemption from taxation. Robertson v. Southern Paper Co., 119 Miss. 113, 80 So. 384 (1919).

The power herein given municipalities to aid and encourage the establishment of manufactories by exemption from taxation does not authorize a municipality to exempt a manufactory already established. Adams v. Lamb-Fish Lumber Co., 103 Miss. 491, 60 So. 645 (1912).

2. Validity and effect of statutes.

Statutes exempting domestic insurance corporations from ad valorem taxes were not violative of this section. Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930).

If Laws 1922 c 259 were construed as granting exemption from taxes to certain hotels and not others, it would violate this section. City of Jackson v. Edwards House, 145 Miss. 135, 110 So. 231 (1926).

Law exempting state insurance companies from all taxes except real estate and privilege taxes held not unconstitutional. City of Jackson v. Mississippi Fire Ins. Co., 132 Miss. 415, 95 So. 845 (1923), error dismissed, 263 U.S. 730, 44 S. Ct. 228, 68 L. Ed. 529 (1924).

ATTORNEY GENERAL OPINIONS

A contractual provision granting a tax exemption is unenforceable to the extent that the exemption exceeds the constitutional and statutory limits for such exemptions. Cofer, June 12, 1998, A.G. Op. #98-0327.

RESEARCH REFERENCES

ALR. See also annotations under § 183, supra.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion. 4 A.L.R.2d 744.

Municipal establishment or operation of off-street public parking facilities. 8 A.L.R.2d 373.

CJS. C.J.S. Taxation §§ 313, 318, 320.

§ 193. Remedy for injury to railroad employee

Every employee of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employees, as are allowed by law to other persons not employees where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employee of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The Legislature may extend the remedies herein provided for to any other class of employees.

Cross References — Protection of employees, see Miss. Const. Art. 7, § 191.
Definition of corporation, see Miss. Const. Art. 7, § 199.
Worker's compensation generally, see § 71-3-1 et seq.

JUDICIAL DECISIONS

1. Validity of provision.
2. Construction and application.
3. Validity of statutes.
4. Character of corporation as railroad corporation.
5. Right to recover for injuries—In general.
6. Superior officers or agents, etc., right to recover for injuries.
7. Fellow servants engaged in another department of labor, etc., right to recover for injuries.
8. Injuries from defective or unsafe machinery or appliances.
9. Contributory negligence.
10. Assumption of risk.
11. Knowledge of defective or unsafe machinery or appliances.
12. Actions to recover for injuries.
13. Wrongful death actions.

1. Validity of provision.

This section has been upheld as not violative of the Constitution of the United States. Easterling Lumber Co. v. Pierce, 106 Miss. 672, 64 So. 461 (1914), error dismissed, 235 U.S. 380, 35 S. Ct. 133, 59 L. Ed. 279 (1914).

2. Construction and application.

Under this section causes of action were created that had never before existed. Bussey v. Gulf & S.I.R. Co., 79 Miss. 597, 31 So. 212 (1902).

The section had no retroactive effect. Illinois Cent. R.R. v. Cathy, 70 Miss. 332, 12 So. 253 (1893).

3. Validity of statutes.

Statutes cannot be enacted under this section authorizing employees of a corporation to recover when employees of individuals, etc., similarly situated, cannot. Such statutes must be based on some difference inherent in the nature of the business, which difference serves as a basis for and warrants the classification. Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 Am. St. R. 476 (1903).

Such statutes cannot be saved where the language applies to employees of all corporations, by construing it to apply only to corporations engaged in a hazardous business; this is not severance between constitutional and unconstitutional provisions, but judicial legislation. Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 Am. St. R. 476 (1903).

Where a statute contains on its face the boundaries by which severance can be made between non-interdependent clauses, the court may sever; but the court cannot make such severance by construing the act, according to the evidence in each case, as falling within or without. Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 Am. St. R. 476 (1903).

The legislature was competent to extend the remedies to other persons who could sue for the assertion of the rights provided in this section. Bussey v. Gulf & S.I.R. Co., 79 Miss. 597, 31 So. 212 (1902).

4. Character of corporation as railroad corporation.

But a lumber company, which was engaged in operating a railroad for hauling logs, equipped with cars run on tracks and operated by steam, was within the provisions of c 194 § 1 Laws of 1908 which abrogated the fellow-servant rule as to railroads. Hunter v. Ingram-Day Lumber Co., 110 Miss. 744, 70 So. 901 (1916).

This section of the Constitution does not embrace logging or mining railroads but only railroads proper which carry freight and passengers. Givens v. Southern Ry., 94 Miss. 830, 49 So. 180 (1909).

A construction company authorized to own, but not operate a railroad, is not a railroad corporation within the meaning of this section. Bradford Constr. Co. v. Heflin, 88 Miss. 314, 42 So. 174, 8 Am. Ann. Cas. 1077 (1906).

This section does not affect an employee of a construction company operating a train merely in the construction of a railroad. Bradford Constr. Co. v. Heflin, 88 Miss. 314, 42 So. 174, 8 Am. Ann. Cas. 1077 (1906).

5. Right to recover for injuries—In general.

Although a railroad is not an insurer of the safety of its employees, a railroad does have a nondelegable duty to provide its employees with a safe place to work. Seaboard Sys. R.R. v. Cantrell, 520 So. 2d 479 (Miss. 1987).

Statute extending benefit of this section to employees using engines, locomotives or cars of any description, running on tracks, was prospective only and did not permit recovery by employee injured while using a hand car prior to the passage of such statute. Givens v. Southern Ry., 94 Miss. 830, 49 So. 180 (1909).

A railroad company will not be liable for damages to a fireman where the injury was caused by a mere accident. Gulf & S.I.R.R. v. Blockman, 87 Miss. 192, 39 So. 479 (1905).

A railroad employee injured while engaged in the discharge of his ordinary duties, but by the negligence of a superior officer or agent having the right to direct his services, can recover. Southern Ry. v. Cheaves, 84 Miss. 565, 36 So. 691 (1904).

This section has no application to an action based on the negligence of the railroad company itself, that is to say, the master, in failing to provide a safe roadbed. Gulf & S.I.R.R. v. Bussey, 82 Miss. 616, 35 So. 166 (1903); Yazoo & Miss. V.R. Co. v. Schraag, 84 Miss. 125, 36 So. 193 (1904).

A brakeman who violates a rule of the railroad company, although acting in so doing by order of the conductor, who had "the right to control or direct his services," within the meaning of the section, cannot recover for injuries received because of so doing, since he was under no obligation to obey an order to violate a rule binding alike on him and the conductor. Richmond & D.R. Co. v. Rush, 71 Miss. 987, 15 So. 133 (1894).

The section does not aid a plaintiff in the absence of evidence that the injury resulted from the negligence of a "superior agent or officer, or of a person having the right to control or direct the services" of the party injured, or of a "fellow servant engaged in another department of labor." Short v. New Orleans & N.E.R. Co., 69 Miss. 848, 13 So. 826 (1892).

6. Superior officers or agents, etc., right to recover for injuries.

Whether one servant is under the direction of another servant within the meaning of this section, is not to be determined by the rules of the railroad company; it should be determined always by the facts in the case and the nature of the act performed. By looking to the facts surrounding the act itself and the actual relation of the two servants to the act, the rules of the company in such case are competent evidence, but are simply evidence at last, and where the rules and the actual facts conflict as to whether the servant has the right to control and direct, the facts, and not the rules, govern. Cheaves v. Southern Ry., 82 Miss. 48, 33 So. 649 (1903), error overruled, 82 Miss. 58, 34 So. 385 (1903).

The engineer of a switch engine is not a superior agent or officer of the railway company to a yardmaster of the same company within the section. Washington v. State, 78 Miss. 189, 28 So. 850 (1900).

This section provides not only that a "superior agent" is not a fellow servant of those over whom he is such superior agent, but it also expressly declares "that any person having the right to control or direct the services of the party injured" is not a fellow servant of such person. In such a case the question is not whether the duties are "routine duties born of the occasion," as said in the Evans case, but the question was merely whether the person suing has been injured by the negligence of another servant having the right to control or direct his services. Evans v. Louisville, N.O. & T. Ry., 70 Miss. 527, 12 So. 581 (1893).

The engineer is not the superior agent or officer, or "person having the right to control or direct the services" of brakeman on same train, with the section. Evans v. Louisville, N.O. & T. Ry., 70 Miss. 527, 12 So. 581 (1893).

7. Fellow servants engaged in another department of labor, etc., right to recover for injuries.

Chapter 194 Laws of 1908 abolishing the fellow servant rule does not violate any provisions of the Constitution. Easterling Lumber Co. v. Pierce, 106 Miss. 672, 64 So. 461 (1914), error dismissed, 235 U.S. 380, 35 S. Ct. 133, 59 L. Ed. 279 (1914).

This section of the Constitution applies to certain railroad employees injured in the discharge of their duties, which injury is caused by the negligence of co-employees operating a train. Mobile, J. & K.C.R. Co. v. Hicks, 91 Miss. 273, 46 So. 360, 124 Am. St. R. 679 (1908), aff'd, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78, Am. Ann. Cas. 1912A, 463 (1910).

The section having modified the fellow-servant rule in part, and authorized the legislature to further modify it, thereby recognized so much of it as has not been abrogated by it or subsequent legislation. Washington v. State, 78 Miss. 189, 28 So. 850 (1900).

A fireman on a locomotive and a telegraphic operator at a railroad station are engaged in different departments of labor or "about a different piece of work," within the meaning of the section. Illinois Cent. R.R. v. Hunter, 70 Miss. 471, 12 So. 482 (1893).

8. Injuries from defective or unsafe machinery or appliances.

A railroad company is liable for damages caused by defective machinery or appliances under the common law, independent of this section, and under the common law a railroad is under duty to furnish employees safe machinery and appliances, and a failure in this regard is the negligence of the company. White v. Louisville, N.O. & T. Ry., 72 Miss. 12, 16 So. 248 (1894).

9. Contributory negligence.

Damages for injury to a brakeman while coupling cars may be diminished in proportion as the contributory negligence of the injured party caused his injury. Natchez & S.R. Co. v. Crawford, 99 Miss. 697, 55 So. 596 (1911).

This section does not abolish the defense of contributory negligence, but the railroad company must show in some way that something more than mere knowledge of the defect contributed to the injury in order to avail itself of the defense. Yazoo & Miss. V. Ry. v. Scott, 95 Miss. 43, 48 So. 239 (1909).

The question of contributory negligence of the plaintiff in using a defective hand car was properly left to the jury, the foreman in charge of the car not being a conductor thereby. Yazoo & Miss. V. Ry. v. Parker, 88 Miss. 193, 40 So. 746 (1906).

The section does not destroy the defense of contributory negligence. It merely abrogates the previous rule that knowledge of the defects and dangers was, of itself, a bar. Buckner v. Richmond & D.R. Co., 72 Miss. 873, 18 So. 449 (1895).

The section abolishes the defense of contributory negligence in the actions to which it applies, unless the negligence of the employee be willful or reckless. Moore v. Brady, 11 So. 723 (Miss. 1892).

10. Assumption of risk.

That employee voluntarily assisted in lifting mat did not preclude recovery for employer's negligence in not furnishing sufficient number of employees to move mat. Holliday v. State, 180 So. 800 (Miss. 1938).

Sawmill company's employee operating motorcar on company's railroad with full knowledge of defective horn and brakes, assumed risk of injury in resulting collision with school bus at highway crossing. Latimer v. Dent, 177 Miss. 869, 172 So. 126 (1937).

Where the surrounding condition is obvious to the servant and is not known to the officer sending him, the former takes upon himself whatever of added risk may come from the existing condition of the place in which, or the appliance with which, he is to work. Illinois Cent. R.R. v. Emerson, 88 Miss. 598, 40 So. 818 (1906).

11. Knowledge of defective or unsafe machinery or appliances.

Where lumber company's injured employee was employed on skidder, under supervision of skidder foreman, as drum operator for purpose of drawing logs from woods to employer's logging tracks, employee held not "engineer in charge," within statute providing that injured employee's knowledge of defective or unsafe condition of machinery or appliances shall not be defense to action caused thereby, except as to conductors or "engineers" in charge of unsafe cars or engines voluntarily operated by them. Edward Hines Lumber Co. v. Harriel, 171 Miss. 670, 158 So. 146 (1934).

The foreman in charge of a hand car is not within the excepted class of employees under this section, and his knowledge that the hand car was defective will not bar his recovery for injuries incurred thereby. Gulf & S.I.R.R. v. Dana, 110 Miss. 666, 70 So. 828 (1916).

A foreman in charge of a night switching crew was not a conductor nor was the yard master a conductor within the meaning of the terms of this section. St. Louis & S.F. Ry. v. Guin, 109 Miss. 187, 68 So. 78 (1915).

Chapter 194 Laws of 1908, providing that employee's knowledge of unsafe condition of machinery, etc., shall not be a defense, except as to conductor or engineer in charge, does not apply where the cars were not defective, but where the dangers arose from other conditions. Myers v. Lamb-Fish Lumber Co., 106 Miss. 766, 64 So. 727 (1914).

Engineers and conductors in charge of dangerous or unsafe cars or engines, voluntarily operated by them, are exempted from the section. Illinois Cent. R.R. v. Guess, 74 Miss. 170, 21 So. 50 (1896); Yazoo & Miss. V. R. Co. v. Woodruff, 98 Miss. 36, 53 So. 687 (1910).

That part of the section providing that "knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways or appliances shall not be a defense," etc., has no application to a case where a defective car, not used by the company in its business, but which has been condemned to the repair shops, has safely reached the station of its destination and is being transferred to the shops, when an employee in handling it is injured; and it is immaterial that the car might have been left at the shops on the route nearer the place of starting. Illinois Cent. R.R. v. Bowles, 71 Miss. 1003, 15 So. 138 (1894).

12. Actions to recover for injuries.

Plaintiff while not restricted in the number of counts in his declaration may not join in one suit common-law cause as to unsafe ways and appliances with causes arising from the negligence of fellow-servant under this section of the Constitution. Yazoo & Miss. V. Ry. v. Wallace, 90 Miss. 609, 43 So. 469, 122 Am. St. R. 321 (1907).

A cause of action arising from the negligence of a fellow servant, based on this section, cannot be joined in the same count with a cause of action predicated on the master's negligence in failing to furnish his servant a safe place in which to work. Illinois Cent. R.R. v. Abrams, 84 Miss. 456, 36 So. 542 (1904).

Under this section and § 3559 of the Code of 1892 (Code 1906 § 4056) a declaration in a suit by a fireman charging that he was injured by the negligence of the engineer, being a superior having the right to control plaintiff's services, the declaration being in the language of the statute, is not demurrable. Cheaves v. Southern Ry., 82 Miss. 48, 33 So. 649 (1903), error overruled, 82 Miss. 58, 34 So. 385 (1903).

13. Wrongful death actions.

Legal or personal representatives in this section embrace not only the executor or administrators, but the heirs or next of kin. Yazoo & Miss. V. Ry. v. Washington, 92 Miss. 129, 45 So. 614 (1908).

Negligence of master in failing to furnish fit and competent employees which resulted in death of employee warranted recovery. Yazoo & Miss. V. Ry. v. Schraag, 84 Miss. 125, 36 So. 193 (1904).

An action cannot be maintained, based on the section, by an administrator of a deceased employee for injuries causing the death of the intestate if the death was instantaneous. McVey v. Illinois Cent. R.R., 73 Miss. 487, 19 So. 209 (1896).

An action for the death of a person through the negligence of a fellow-servant must be brought by the personal representative of the deceased under this section. White v. Louisville, N.O. & T. Ry., 72 Miss. 12, 16 So. 248 (1894).

Only the executor or administrator, "the legal or personal representative," can sue under the section for the death of an employee [decided after the adoption of the Constitution of 1890 but before any legislation on the subject other than § 3559, Code of 1892]. Illinois Cent. R.R. v. Hunter, 70 Miss. 471, 12 So. 482 (1893).

RESEARCH REFERENCES

ALR. Willful, wanton, or reckless conduct of coemployee as ground of liability despite bar of workers' compensation law. 57 A.L.R.4th 888.

Am Jur. 32B Am. Jur. 2d, Federal Employers' Liability and Compensation Acts §§ 1 et seq.

CJS. C.J.S. Employers' Liability for Injuries to Employees § 2.

§ 194. Repealed

Repealed by Laws, 1987, ch. 691, eff December 4, 1987.

[Laws, 1954, ch. 424; 1955 Ex Sess ch. 131]

Editor's Note — Former Section 194 provided for shareholder voting for managers and directors of incorporated companies, provided for issuance of preferred stock with no voting rights, and provided that no person engaged or interested in a competing business serve on the board of directors without consent of a majority in interest of the stockholders.

The repeal of Section 194 of Article 7 of the Mississippi Constitution of 1890, was proposed by Laws, 1987, Ch. 691 (Senate Concurrent Resolution No. 550), and upon ratification by the electorate on November 3, 1987, was deleted from the Constitution by proclamation of the Secretary of State on December 4, 1987.

§ 195. Common carriers designated

Express, telegraph, telephone, and sleeping-car companies are declared common carriers in their respective lines of business, and subject to liability as such.

Cross References — Authority of Legislature to prevent abuses, etc., see Miss. Const. Art. 7, § 186.

Express companies generally, see § 77-9-601 et seq.

Telegraph and telephone companies generally, see § 77-9-701 et seq.

JUDICIAL DECISIONS

1. In general.
2. Duties and liabilities.
3. Contractual limitation of liability.

1. In general.

An easement acquired by eminent domain for telephone and telegraph lines, may be used for television transmission along with other telephone and telegraph purposes and such use was a public use and such television transmission would be done by company as common carrier. Ball v. AT & T, 227 Miss. 218, 86 So. 2d 42 (1956).

The statutes relating to the railroad commission conferred jurisdiction upon it as to the matter of regulating telephone rates and provided remedies for violation of law to the exclusion of the general anti-trust law. Cumberland Tel. & Tel. Co. v. State, 99 Miss. 1, 54 So. 446 (1911).

A telegraph company, engaged in domestic as well as interstate business, is subject to such reasonable police regulations as the state may impose. Western Union Tel. Co. v. Mississippi R.R. Comm'n, 74 Miss. 80, 21 So. 15 (1896).

2. Duties and liabilities.

That one sending money through telegraph company to person he had never seen, under contract requiring positive identification, had been imposed on by person who communicated with him, held no defense to telegraph company, where payment was not made to person named in contract. Western Union Tel. Co. v. Goodman, 166 Miss. 782, 146 So. 128 (1933).

Liability of telegraph company for paying money to impostor, under contract whereby sender directed payment to person he had never seen, and required positive identification, held question for jury under evidence of failure to obtain sufficient identification. Western Union Tel. Co. v. Goodman, 166 Miss. 782, 146 So. 128 (1933).

Under this section it is the duty of sleeping-car companies to notify passengers when they have reached their destination, and to afford them reasonable opportunity to alight. Pullman Co. v. Kelly, 86 Miss. 87, 38 So. 317 (1905).

The declaration in the Constitution that sleeping car companies are common carriers and subject to liability as such does not render a privilege tax imposed on sleeping and Pullman car companies carrying passengers from one point to another within the state an unconstitutional regulation of interstate commerce, where the constitutional provision is regarded by the state courts as imposing no obligation on the company to transport local passengers. Pullman Co. v. Adams, 189 U.S. 420, 23 S. Ct. 494, 47 L. Ed. 877 (1903).

This section does not relieve a sleeping-car company from liability to a privilege tax even if its local business be done at a loss and the tax has to be paid from its interstate business. Pullman Palace Car Co. v. Adams, 78 Miss. 814, 30 So. 757, 84 Am. St. R. 647 (1901), aff'd, 189 U.S. 420, 23 S. Ct. 494, 47 L. Ed. 877 (1903).

3. Contractual limitation of liability.

As to interstate business the rule announced in Postal Teleg. Co. v. Wells, 82 M 733, 35 So 190, has been changed by the decision of the Supreme Court of the United States, which holds that when such stipulations are approved by the interstate commerce commission they are valid, and that Congress has taken over the field of interstate commerce as applied to telegraph business. Western Union Tel. Co. v. Halbert, 124 Miss. 214, 86 So. 760 (1921), citing Postal-Teleg. Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27, 40 S. Ct. 69, 64 L. Ed. 118 (1919), and Western Union Tel. Co. v. Speight, 252 U.S. 576, 40 S. Ct. 244, 64 L. Ed. 724 (1920) [Western Union Tel. Co. v. Speight, 254 U.S. 17, 40 S. Ct. 344, 64 L. Ed. 724 (1920)]; Western Union Tel. Co. v. Allsworth, 124 Miss. 214, 86 So. 762 (1921); Western Union Tel. Co. v. Allsworth, 124 Miss. 214, 86 So. 762 (1921).

Under this section, which declares that telegraph companies are common carriers in their line of business and subject to liability as such, a provision limiting the amount of damages on unrepeated messages was void, and the company was liable for actual damages. Western Union Tel. Co. v. Bassett, 111 Miss. 468, 71 So. 750 (1916).

The stipulation on the back of a telegraph message that the company will not be liable beyond the charge paid for transmission for mistake in unrepeated messages or errors in transmitting cipher messages is unavailing as a defense, since this section makes telegraph companies common carriers and liable as such. Postal Tel. & Cable Co. v. Wells, 82 Miss. 733, 35 So. 190 (1903).

The holding of our Supreme Court that telegraph companies cannot contract against their own negligence as to intrastate business in this state, does not apply to contracts made by them in foreign states. Shaw v. Postal Tel. Cable Co., 79 Miss. 670, 31 So. 222, 89 Am. St. R. 666 (1902).

RESEARCH REFERENCES

CJS. C.J.S. Aeronautics and Aerospace § 221.

C.J.S. Carriers § 2.

§ 196. Repealed

Repealed by Laws, 1987, ch. 689, eff December 4, 1987.

Editor's Note — Former Section 196 section provided that no transportation corporation could issue stocks or bonds except for money or labor done or agreed to be done or money or property actually received and the section declared fictitious increases of stock or indebtedness void.

The repeal of Section 196 of Article 7 of the Mississippi Constitution of 1890, was proposed by Laws, 1987, Ch. 689 (Senate Concurrent Resolution No. 548), and upon ratification by the electorate on November 3, 1987, was deleted from the Constitution by proclamation of the Secretary of State on December 4, 1987.

§ 197. Repealed

Repealed by Laws, 1989, ch. 588, eff August 1, 1989.

Editor's Note — Former Section 197 required that any foreign corporation or association wishing to be granted a license to build, operate or lease any railroad in the state, where such railroad would be partially in Mississippi and partially in another state or states, must first become incorporated under the laws of Mississippi. The former section also pertained to a domestic railroad company consolidating with a foreign company.

The repeal of Section 197 of Article 7 of the Constitution of 1890 was proposed by House Concurrent Resolution No. 6 (Chapter 588, Laws, 1989), and upon ratification by the electorate on June 20, 1989, was deleted from the Constitution by proclamation of the Secretary of State on August 1, 1989.

§ 198. Trusts, combinations, contracts and agreements inimical to public welfare

The Legislature shall enact laws to prevent all trusts, combinations, contracts, and agreements inimical to the public welfare.

Cross References — Prohibition against abridgement of state police powers to permit corporations to infringe upon rights of individuals, see Miss. Const. Art. 7, § 190.

Trusts and combines in restraint or hindrance of trade generally, see § 75-21-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Legislative powers.
3. Specific applications.

1. Construction and application.

Under this section only such trusts, combinations, contracts and agreements were to be prevented by the legislature as would be "inimical to the public welfare." Yazoo & Miss. V. Ry. v. Searles, 85 Miss. 520, 37 So. 939 (1905).

A public contract for an article for less than cost is not within this section. B.F. Johnson Pub. Co. v. Mills, 79 Miss. 543, 31 So. 101 (1902).

2. Legislative powers.

The legislature, independent of this section, has the power to prohibit trusts, combinations, contracts and agreements "inimicable to the public welfare." State v. Jackson Cotton Oil Co., 95 Miss. 6, 48 So. 300 (1909).

3. Specific applications.

Where clay deposit locators and a brick manufacturer, entered into an agreement which provided that the locators would be paid a certain royalty over and above a royalty to be received by the lessors of land containing the clay deposit, provided that the manufacturer could not compete with the locators in leasing lands for the purpose of mining clay, and further provided that the manufacturer had a right to a lease if the locators were unable to lease lands which the manufacturer found necessary for its corporate purposes, with the locators still to receive such overriding royalty, the agreement was not a noncompetitive agreement in restraint of trade, but was instead an agreement providing for the payment of an overriding royalty on all clay used for the manufacturer's corporate purposes. Hood Indus., Inc. v. King, 255 So. 2d 912 (Miss. 1971).

Section 1108, Code 1942, known as "Fair Trade Act," permitting producer, manufacturer or owner to contract with retailer as to resale price of his own product which is in fair and open competition with commodities of same general class produced by others does not violate this section. W.A. Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950).

Although the arrangement of c 119 Laws of 1908 may be subject to criticism, the law is not violative of this section. Delmas v. Pascagoula S. Ry. & P. Co., 103 Miss. 235, 60 So. 210 (1912).

A contract on the part of one company to give all its long-distance messages to another which was not harmful to the public interest, was not in violation of law. Cumberland Tel. & Tel. Co. v. State, 99 Miss. 1, 54 So. 446 (1911).

RESEARCH REFERENCES

ALR. Validity, construction, and application of state right-to-work provisions. 105 A.L.R.5th 243.

Lawyers' Edition. Hospital's exclusive contract with firm of anesthesiologists held not to violate Sherman Act. 80 L. Ed. 2d 2.

§ 198A. Right to work; labor unions

It is hereby declared to be the public policy of Mississippi that the right of a person or persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. Any agreement or combination between any employer and any labor union or labor organization whereby any person not a member of such union or organization shall be denied the right to work for an employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be an illegal combination or conspiracy and against public policy. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization. Any person who may be denied employment or be deprived of continuation of his employment in violation of any paragraph of this section shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this state such actual damages as he may have sustained by reason of such denial or deprivation of employment.

The provisions of this section shall not apply to any lawful contract in force on the effective date of this section, but they shall apply to all contracts thereafter entered into and to any renewal or extension of an existing contract thereafter occurring. The provisions of this section shall not apply to any employer or employee under the jurisdiction of the Federal Railway Labor Act.

SOURCES: Laws, 1960, ch 512, eff June 22, 1960.

Editor's Note — The 1960 insertion of this section into Article 7 of the Constitution of 1890 was proposed by Laws 1960, ch 512, so as to guarantee that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in a labor union or labor organization, and declaring the public policy of this state in this regard. This proposed amendment was ratified by the electorate at a special election held June 7, 1960, and was inserted into the Constitution by Proclamation of the Secretary of State on June 22, 1960, by virtue of the authority vested in him by Section 273 of the Constitution as amended.

Cross References — Employers and employees generally, see § 71-1-1 et seq.

JUDICIAL DECISIONS

1. In general.

"Right to work" amendment was validly adopted. Barnes v. Ladner, 241 Miss. 606, 131 So. 2d 458 (1961).

The validity of a constitutional amendment cannot be questioned until it has been enforced in a way to injure complainant. Barnes v. Ladner, 241 Miss. 606, 131 So. 2d 458 (1961).

RESEARCH REFERENCES

ALR. Liability, under statute, of labor union or its membership for torts committed in connection with primary labor activities-state cases. 85 A.L.R.4th 979.

CJS. C.J.S. Labor Relations §§ 7-9.

Law Reviews. Unionization of the Legal Profession. 50 Miss. L. J. 451, June 1979.

Public Sector Collective Bargaining in Mississippi: An Argument for Acceptance.

56 Miss L. J. 379, August 1986.

§ 199. "Corporation" defined

The term "corporation" used in this article shall include all associations and all joint-stock companies for pecuniary gain having privileges not possessed by individuals or partnerships.

JUDICIAL DECISIONS

1. In general.

Ordinarily the term "corporation" means private corporation. Feemster v. City of Tupelo, 121 Miss. 733, 83 So. 804 (1920), referring to this section in holding that c 290, Laws of 1918 authorizing the city of Tupelo to issue bonds for not more than $50,000 for the construction and equipment of a hospital was not violative of this section.

RESEARCH REFERENCES

CJS. C.J.S. Corporations § 2.

§ 200. Enforcement of provisions

The legislature shall enforce the provisions of this article by appropriate legislation.

ARTICLE 8.

EDUCATION.

SEC.
201. Free public schools
202. State Superintendent of Public Education
203. State Board of Education
204. County superintendents of education
205. Repealed.
206. State common-school fund; additional tax levy by district
206A. Establishment of education improvement trust fund
207. Repealed.
208. Control of funds by religious sect; certain appropriations prohibited
209. Institutions for education of deaf, dumb and blind
210. Sale of public school supplies
211. Sixteenth section lands
212. Interest rate on Chickasaw School Fund and other educational trust funds
213. Agricultural and mechanical colleges
213A. State institutions of higher learning
213B. Repealed.

§ 201. Free public schools

The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.

SOURCES: Laws, 1934, ch 362; Laws, 1960 ch 547; Laws, 1987, ch. 671, eff December 4, 1987.

Editor's Note — The 1960 amendment to Section 201 of the Constitution was proposed by Laws 1960, ch 547, and, upon ratification by the electorate on Nov. 8, 1960, was inserted by Proclamation of the Secretary of State on Nov. 23, 1960, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

The 1987 amendment of Section 201 in Article 8 of the Mississippi Constitution of 1890 was proposed by Laws, 1987, Ch. 671 (House Concurrent Resolution No. 9), and upon ratification by the electorate on November 3, 1987, was made a part of the Constitution by proclamation of the Secretary of State on December 4, 1987.

Cross References — Public schools, see § 37-1-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Handicapped children.
3. Discipline.
4. Uniformity—In general.
5. Raising and use of school funds, uniformity.
6. Establishment of and change in school districts, uniformity.
7. Schools of higher education.

1. Construction and application.

In the construction and erection of elementary and junior high schools and the preparation of school grounds, trustees of the city municipal separate school district were exercising power conferred upon them by the Constitution and the legislature, and were not agents of the city. Harrell v. City of Jackson, 229 Miss. 815, 92 So. 2d 240 (1957).

Constitutional provision requiring establishment of free public schools, and statute making school attendance compulsory, did not preclude municipality from refusing complainant admission to city schools because of failure to submit to required smallpox vaccination. Hartman v. May, 168 Miss. 477, 151 So. 737, 93 A.L.R. 1408 (1934).

School facilities must be made available to every educable child, and all land in county must be embraced in some district; school district cannot be changed to deprive any educable child of school facilities within convenient reach. Myers v. Board of Supvrs., 156 Miss. 251, 125 So. 718 (1930).

Constitutional provision relating to establishment of schools does not deprive legislature of power to pass laws authorizing trustees to make rules and regulations. McLeod v. State, 154 Miss. 468, 122 So. 737, 63 A.L.R. 1161 (1929).

This section plainly makes it the duty of the legislature to promote public education in the state by all suitable means, by taxation or otherwise, by establishing a uniform system of free public schools, and that they should do this as soon as practicable. Miller v. State, 130 Miss. 564, 94 So. 706 (1923).

2. Handicapped children.

Handicapped child's right to education is guaranteed by state constitution, Article VIII, § 201, which is effectuated under § 37-13-1, which provides for maintenance of uniform system of free public schools. Jackson v. Franklin County Sch. Bd., 806 F.2d 623 (5th Cir. 1986).

3. Discipline.

When a student was suspended after allegedly intentionally inflicting cuts on her arm, the student's right to an education under Miss. Const. Art. VIII, § 201 was not violated because she was offered placement in an alternative school instead of the suspension. Foster v. Tupelo Pub. Sch. Dist., 569 F. Supp. 2d 667 (N.D. Miss. 2008).

4. Uniformity—In general.

The creation of a state normal school does not violate this section of the Constitution, as such is provided for in c 119 Laws 1910. J. Livelar & Co. v. State, 98 Miss. 330, 53 So. 681 (1910).

Legislative act appointing designated persons as trustees of a public school for a term of twenty years, and granting them power to fill vacancies, exclusive control and various other powers not conferred on trustees of public schools generally, violated the requirement of uniformity. Ellis v. Greaves, 82 Miss. 36, 34 So. 81 (1903).

While § 4008 of the code of 1892, regulating the election of trustees generally but excepting existing appointed trustees, did not supersede § 148 of the Laws of 1888 relative to the trustees of the Hazlehurst public school, nevertheless the act of 1888 in conferring extraordinary powers upon such trustees, was unconstitutional hereunder. Ellis v. Greaves, 82 Miss. 36, 34 So. 81 (1903).

It is not required that the manner of selecting county superintendent shall be uniform. Wynn v. State, 67 Miss. 312, 7 So. 353 (1890).

5. Raising and use of school funds, uniformity.

Appropriation to create a fund for the purchase of free textbooks to be distributed and loaned to pupils of elementary schools, whether private or public, sectarian or non-sectarian, was not a use or diversion of school or other educational funds within the constitutional prohibition against control of any part of the school or other educational funds of the state by any religious or other sect, or against the appropriation of any funds toward the support of any sectarian school or school not conducted as a free school, in view of the fact that such fund was to be used for the benefit of the pupils themselves and in keeping with the duty of the state to educate the children. Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

Statute authorizing bond issue for building program by agricultural high school held not to violate constitutional provision against local laws for common school system. Humphreys v. Hinds County Agric. High Sch.-Junior College, 177 Miss. 1, 170 So. 530 (1936); Wyatt v. Harrison-Stone-Jackson Agric. High Sch.-Junior College, 177 Miss. 13, 170 So. 526 (1936).

Bill by taxpayers against county superintendent of education and chancery clerk to enjoin issuance of pay certificates and warrants on school equalizing funds on the ground that such funds, designed to permit schooling beyond the four months' term, were wrongfully used to maintain the four months' term, held not to state cause of action. Hodges v. Trantham, 171 Miss. 374, 157 So. 715 (1934).

Equity will not grant preventative injunction if school equalizing funds had been unlawfully appropriated prior to filing of bill. Hodges v. Trantham, 171 Miss. 374, 157 So. 715 (1934).

All legislative power not prohibited by the Constitution directly, or by necessary implication, is vested in the legislature, and laws authorizing counties to levy an ad valorem tax to support common schools of four months' term are not unconstitutional. St. Louis & S.F. Ry. v. Benton County, 132 Miss. 325, 96 So. 689 (1923).

The act of the legislature creating what is known as a revolving fund for the public schools beyond the period of 4 months provided under § 205, was declared constitutional, that it did not violate this section, nor § 205, nor 206 of the Constitution. Miller v. State, 130 Miss. 564, 94 So. 706 (1923).

Chapter 255 Laws 1912, which provides for transportation of pupils in consolidated school districts and for the raising of funds to maintain such schools, does not violate this section of the Constitution. Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458 (1913).

The school fund can only be applied to such schools as are within the uniform system devised. Otken v. Lamkin, 56 Miss. 758 (1879).

The legislature may not authorize a diversion of the common school fund, but may (decided under § 1, Art VIII, Constitution 1869) empower local authorities to provide schools outside the established system and pay therefor by taxation. Otken v. Lamkin, 56 Miss. 758 (1879); Chrisman v. Mayor of Brookhaven, 70 Miss. 477, 12 So. 458 (1892).

6. Establishment of and change in school districts, uniformity.

Territory cannot be taken from school district and added to consolidated district if insufficient territory is left to maintain school in remaining territory not added to any district. Myers v. Board of Supvrs., 156 Miss. 251, 125 So. 718 (1930).

Statutes relating to separate schools for white and colored races, and relating to adding territory to consolidated districts, must be construed in pari materia; territory cannot be added to consolidated district if there is not adjacent territory left to constitute school district, unless omitted territory is added to another district. Myers v. Board of Supvrs., 156 Miss. 251, 125 So. 718 (1930).

School authorities cannot so run boundaries of school district as to gerrymander educable children of district; proceeding to add territory to school district must be operated in fair, just and sensible manner. Myers v. Board of Supvrs., 156 Miss. 251, 125 So. 718 (1930).

7. Schools of higher education.

Legislature's power to establish colleges and universities does not rest on constitutional grant. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).

State teachers' college was not part of State's uniform system of free public schools. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).

Legislature could establish and support, as part of teachers' college, practice schools teaching branches of learning within common school curriculum. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).

In order for school to be within system of "free public schools" required by Constitution, establishment and control must be vested in public officials charged with duty of establishing and supervising that system of schools. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).

"Schools," within constitutional provision respecting establishment of schools of higher grade, are those which are part of uniform system of free public schools supported from common school fund. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).

State teachers' college may charge students attending its demonstration and practice school with tuition. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).

High schools come within definition of "schools of higher grade" in constitutional provision relating to establishing schools. McLeod v. State, 154 Miss. 468, 122 So. 737, 63 A.L.R. 1161 (1929).

RESEARCH REFERENCES

ALR. Schools: extent of legislative power with respect to attendance and curriculum. 39 A.L.R. 477, 53 A.L.R. 832.

Schools: free textbooks and other school supplies for individual use of pupils. 67 A.L.R. 1196.

Power of municipal or school authorities to prescribe vaccination or other health measure as a condition of school attendance. 93 A.L.R. 1413.

What is common or public school within contemplation of constitutional or statutory provisions. 113 A.L.R. 697.

Sectarianism in schools. 45 A.L.R.2d 742.

CJS. C.J.S. Schools and School Districts §§ 3, 4, 6, 8, 74, 557, 571.

Law Reviews. Dill, Education law abstract: a survey of prominent issues in Mississippi's public schools. 13 Miss. C. L. Rev. 337 (Spring, 1993).

Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

§ 202. State Superintendent of Public Education

(1) Until July 1, 1984, there shall be a Superintendent of Public Education elected at the same time and in the same manner as the Governor, who shall have the qualifications required by the Secretary of State, and hold his office for four (4) years, and until his successor shall be elected and qualified, who shall have the general supervision of the common schools and and of the educational interests of the state, and who shall perform such other duties and receive compensation as shall be prescribed by law. However, an election for the Superintendent of Public Education shall not be held at the general election in 1983, and the term of the Superintendent of Public Education who was elected at the general election in 1979 shall be extended to July 1, 1984, on which date it shall expire.

(2) From and after July 1, 1984, there shall be a State Superintendent of Public Education who shall be appointed by the State Board of Education, with the advice and consent of the Senate, and serve at the board's will and pleasure. He shall possess such qualifications as may be prescribed by law. He shall be the chief administrative officer for the State Department of Education and shall administer the department in accordance with the policies established by the State Board of Education. He shall perform such other duties and receive such compensation as shall be prescribed by law.

SOURCES: 1869 art VIII § 3; Laws, 1982, ch. 616, eff January 28, 1983.

Editor's Note — The 1982 amendment to Section 202 of Article 8 of the Constitution of 1890 was proposed by Laws, 1982, ch. 616, being Senate Concurrent Resolution No. 506 of the 1982 regular session of the Legislature and, upon ratification by the electorate on November 2, 1982, was inserted as a part of the Constitution by proclamation of the Secretary of State on January 28, 1983.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.
Secretary of state, see Miss. Const. Art. 5, § 133.
Election of Governor, see Miss. Const. Art. 5, § 140.
Qualifications of officers, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

RESEARCH REFERENCES

CJS. C.J.S. Schools and School Districts §§ 81 to 92, 174.

§ 203. State Board of Education

(1) Until July 1, 1984, there shall be a Board of Education, consisting of the Secretary of State, the Attorney General and the Superintendent of Public Education, for the management and investment of the school funds according to law, and for the performance of such other duties as may be prescribed. The superintendent and one (1) other of said board shall constitute a quorum.

(2) From and after July 1, 1984, there shall be a State Board of Education which shall manage and invest school funds according to law, formulate policies according to law for implementation by the State Department of

Education, and perform such other duties as prescribed by law. The board shall consist of nine (9) members of which none shall be an elected official. The Governor shall appoint one (1) member who shall be a resident of the Northern Supreme Court District and who shall serve an initial term of one (1) year, one (1) member who shall be a resident of the Central Supreme Court District and who shall serve an initial term of five (5) years, one (1) member who shall be a resident of the Southern Supreme Court District and who shall serve an initial term of nine (9) years, one (1) member who shall be employed on an active and full-time basis as a school administrator and who shall serve an initial term of three (3) years, and one (1) member who shall be employed on an active and full-time basis as a schoolteacher and who shall serve an initial term of seven (7) years. The Lieutenant Governor shall appoint two (2) members from the state at large, one (1) of whom shall serve an initial term of four (4) years and one (1) of whom shall serve an initial term of eight (8) years. The Speaker of the House of Representatives shall appoint two (2) members from the state at large, one (1) of who shall serve an initial term of two (2) years and one (1) of whom shall serve an initial term of six (6) years. The initial terms of appointees shall begin on July 1, 1984, and all subsequent appointments shall begin on the first day of July for a term of (9) years and continue until their successors are appointed and qualify. An appointment to fill a vacancy which arises for reasons other than by expiration of a term of office shall be for the unexpired term only. The Legislature shall by general law prescribe the compensation which members of the board shall be entitled to receive. All members shall be appointed with the advice and consent of the Senate and no members shall be actively engaged in the educational profession except as stated above.

SOURCES: 1869 art VIII § 3; Laws, 1982, ch. 616, eff January 28, 1983.

Editor's Note — The 1982 amendment to Section 203 of Article 8 of the Constitution of 1890 was proposed by Senate Concurrent Resolution No. 506 of the 1982 regular session of the Legislature and, upon ratification by the electorate on November 2, 1982, was inserted as a part of the Constitution by proclamation of the Secretary of State on January 28, 1983.

Cross References — State Board of Education generally, see § 37-1-1 et seq.

State common-school fund, see Miss. Const. Art. 8, § 206.

JUDICIAL DECISIONS

1. In general.

Statute requiring State Board of Education to furnish certified copy of apportionment of equalizing fund to counties and school districts by implication required board to keep written record of its acts and doings. Trantham v. Russell, 171 Miss. 481, 158 So. 143 (1934).

RESEARCH REFERENCES

CJS. C.J.S. Schools and School Districts §§ 81, 92, 174.

§ 204. County superintendents of education

There shall be a superintendent of public education in each county, who shall be appointed by the board of education by and with the advice and consent of the Senate, whose term of office shall be four years, and whose qualifications, compensation, and duties, shall be prescribed by law: Provided, That the Legislature shall have power to make the office of county school superintendent of the several counties elective, or may otherwise provide for the discharge of the duties of county superintendent, or abolish said office.

SOURCES: 1869 art VIII § 4.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

Qualifications of officers, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

County superintendents of education generally, see § 37-5-61 et seq.

JUDICIAL DECISIONS

1. In general.
2. Power of legislature.

1. In general.

Allegations that party elected as county superintendent of education was not resident citizen of State and county for required time was allegations of facts. Wilkins v. Large, 163 Miss. 279, 141 So. 585 (1932).

2. Power of legislature.

The legislature has constitutional power under this section to fix the qualifications for a person to be eligible to hold the office of county superintendent of education. State ex rel. Patterson v. Lee, 218 So. 2d 434 (Miss. 1969).

This section vests in the legislature, as to county superintendents of education, the full legislative power of the state which is granted by Mississippi Const. § 33. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

Since this section otherwise provides for the appointment, or election, or abolition of the office of county superintendent of education, and vests in the legislature power to prescribe qualifications, compensation and duties of the office, Mississippi Const. § 250 does not affect the legislature's power in prescribing the qualifications for the office. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

Section 9, chapter 10, Laws of 1953 (Code 1942, § 6271-09), prescribing additional qualification requirements for county superintendents of education, is constitutional. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

The term of office cannot be extended by the legislature. Burnham v. Sumner, 50 Miss. 517 (1874).

RESEARCH REFERENCES

CJS. C.J.S. Schools and School Districts § 93.

§ 205. Repealed

Repealed by Laws, 1987, ch. 671, eff December 4, 1987.

[1869, art. VIII, § 5]

Editor's Note — Former Section 205 empowered the Legislature to establish and maintain free public schools and the term or terms thereof in each county of the state.

The repeal of Section 205 of Article 8 of the Mississippi Constitution of 1890 was proposed by Laws, 1987, Ch. 671 (House Concurrent Resolution No. 9), and upon ratification by the electorate on November 3, 1987, was deleted from the Constitution by proclamation of the Secretary of State on December 4, 1987.

§ 206. State common-school fund; additional tax levy by district

There shall be a state common-school fund, to be taken from the General Fund in the State Treasury, which shall be used for the maintenance and support of the common schools. Any county or separate school district may levy an additional tax, as prescribed by general law, to maintain its schools. The state common-school fund shall be distributed among the several counties and separate school districts in proportion to the number of educable children in each, to be determined by data collected through the office of the State Superintendent of Education in the manner to be prescribed by law.

SOURCES: 1869 art VIII § 6. See amendment No. 2, 1904 ch 173; Laws, 1989, ch. 589, eff August 1, 1989.

Editor's Note — The 1989 amendment to Section 206 of Article 8 of the Constitution of 1890 was proposed by House Concurrent Resolution No. 9 (Chapter 589, Laws, 1989) and, upon ratification by the electorate on June 20, 1989, was inserted as part of the Constitution by proclamation of the Secretary of State on August 1, 1989.

Cross References — Funds for schools failing to meet accreditation standards, see § 37-17-6.

Tax levy for support of minimum education program, see § 37-57-1 et seq.

Expenditures of school funds and school budgets generally, see § 37-61-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. History.
3. Provision for school funds.
4. Distribution of school funds.

1. Construction and application.

The language of this section is not a limitation on the power of the legislature but is an admonition, injunction or command to the legislature to make sufficient appropriation to maintain the public schools in each county for the four months' period. St. Louis & S.F. Ry. v. Benton County, 132 Miss. 325, 96 So. 689 (1923).

This section is mandatory in requiring the legislature to provide at least four months school funds distributed on a per capita basis of educable children. Miller v. State, 130 Miss. 564, 94 So. 706 (1923).

2. History.

The section abrogated § 6 art 8, Constitution of 1869, by which fines were devoted to the common-school fund. Foote v. Farmer, 71 Miss. 148, 14 So. 445 (1893).

3. Provision for school funds.

Statute authorizing bond issue for building program by agricultural high school held not to violate constitutional provision against local laws for common school system. Humphreys v. Hinds County Agric. High Sch.-Junior College, 177 Miss. 1, 170 So. 530 (1936); Wyatt v. Harrison-Stone-Jackson Agric. High Sch.-Junior College, 177 Miss. 13, 170 So. 526 (1936).

Statute empowering counties to levy an ad valorem tax to support common schools, before, during, and after the expiration of, the four months' term did not contravene this section. St. Louis & S.F. Ry. v. Benton County, 132 Miss. 325, 96 So. 689 (1923).

Statute providing for the appropriation of a sum of money, in addition to that appropriated for the support and maintenance of the public schools of the state, for the purpose of equalizing public school terms, in the light of the positive duty of the legislature to encourage and promote public education in the state, did not contravene this section, since this section does not prohibit aid to the schools for a term in excess of the four months' period named therein. Miller v. State, 130 Miss. 564, 94 So. 706 (1923).

Each educable child is the unit upon which the state distributes its bounty to the county, and the legislature is not authorized to adopt another or different basis which ignores the constitutional unit. For this reason c 5 Laws 1912, creating a supplemental common school fund for the use of counties which had exhausted state common school funds and could not complete the four months' term, is void. State Bd. of Educ. v. Pridgen, 106 Miss. 219, 63 So. 416 (1913).

4. Distribution of school funds.

Equity will not grant preventative injunction if school equalizing funds have been unlawfully appropriated prior to filing bill. Hodges v. Trantham, 171 Miss. 374, 157 So. 715 (1934); Haniel v. Rice, 176 Miss. 462, 169 So. 687 (1936), § 205, supra.

Bill by taxpayers to enjoin issuance of pay certificates and warrants on equalizing fund, held not to state cause of action. Hodges v. Trantham, 171 Miss. 374, 157 So. 715 (1934).

The provision for per capita distribution hereunder refers solely to the funds provided for the four months' term named in this section; it was not intended that the per capita distribution should apply to any school funds outside of the funds necessary to carry on the schools for the four months. Miller v. State, 130 Miss. 564, 94 So. 706 (1923).

For proper distribution of the poll tax funds see City of Jackson v. Hinds County, 104 Miss. 199, 61 So. 175 (1913).

RESEARCH REFERENCES

CJS. C.J.S. Schools and School Districts § 9.

§ 206A. Establishment of education improvement trust fund

There is hereby created and established in the State Treasury a trust fund which may be used, as hereinafter provided, for the improvement of education within the State of Mississippi. There shall be deposited in such trust fund:

(a) The state's share of all oil severance taxes and gas severance taxes derived from oil and gas resources under state-owned lands or from severed state-owned minerals;

(b) Any and all monies received by the state from the development, production and utilization of oil and gas resources under state-owned lands or from severed state-owned minerals, except for the following portions of such monies:

(i) All mineral leasing revenues specifically reserved by general law in effect at the time of the ratification of this amendment for the following purposes: (A) management of a state leasing program; (B) clean-up, remedial or abatement actions involving pollution as a result of oil or gas exploration or production; (C) management or protection of state waters, land and wildlife; or (D) acquisition of additional waters and land; and

(ii) Monies derived from sixteenth section lands and lands held in lieu thereof or from minerals severed from sixteenth section lands and lands held in lieu thereof; and

(iii) Monies derived from lands or minerals administered in trust for any state institution of higher learning or administered therefor by the head of any such institution;

(c) Any gift, donation, bequest, trust, grant, endowment or transfer of money or securities designated for said trust fund; and

(d) All such monies from any other source whatsoever as the Legislature shall, in its discretion, so appropriate or shall, by general law, so direct.

The principal of the trust fund shall remain inviolate and shall be invested as provided by general law. Interest and income derived from investment of the principal of the trust fund may be appropriated by the Legislature by a majority vote of the elected membership of each house of the Legislature and expended exclusively for the education of the elementary and secondary school students and/or vocational and technical training in this state.

SOURCES: Laws, 1985, ch. 546, eff November 20, 1986.

Editor's Note — The insertion of Section 206A in Article 8 of the Mississippi Constitution of 1890 was proposed by Laws, 1985, Ch. 546 (House Concurrent Resolution No. 35), and upon ratification by the electorate on November 4, 1986, was inserted as part of the Constitution by proclamation of the Secretary of State on November 20, 1986.

Laws, 1986, ch. 399, § 2, effective July 1, 1986, provides as follows:

"Upon the effective date of this act, any funds, including interest earned thereon, to the credit of the special fund for the administration of the Mineral Lease Division of the Department of Natural Resources and to the credit of the Gulf and Wildlife Protection Fund, which are in excess of the amounts set forth in Section 29-7-3 to be used for the purposes prescribed therein, shall be transferred into the Education Trust Fund created in Section 206A, Mississippi Constitution of 1890."

Cross References — Investment of the Education Improvement Trust Fund, see § 7-9-101 et seq.

Amounts to be credited to trust fund created by this section out of oil and gas severance taxes collected, see § 27-25-506.

JUDICIAL DECISIONS

1. In general.

Miss. Const. art. 8, § 206A does not require the state or its political subdivisions to pay oil and gas severance taxes on its sixteenth-section royalty interests, nor does it exempt them from such taxes. Jones County Sch. Dist. v. Miss. Dep't of Revenue, 111 So. 3d 588 (Miss. 2013).

RESEARCH REFERENCES

CJS. C.J.S. Schools and School Districts § 10.

C.J.S. Taxation §§ 1655, 1691.

§ 207. Repealed

Repealed by Laws, 1977, ch. 587, eff December 22, 1978.

Editor's Note — Former Section 207 provided that separate schools be maintained for "children of the white and colored races."

The repeal of Section 207 of Article 8 of the Constitution of 1890 was proposed by Laws, 1977, Ch. 587 (Senate Concurrent Resolution No. 557) and upon ratification by the electorate on November 7, 1978, was deleted from the Constitution by proclamation of the Secretary of State on December 22, 1978.

§ 208. Control of funds by religious sect; certain appropriations prohibited

No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.

SOURCES: 1869 art VIII § 9.

Cross References — Textbooks generally, see § 37-43-1 et seq.

Transportation of school pupils generally, see § 37-41-1 et seq.

Financial assistance to children attending nonsectarian private schools, see § 37-51-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. School.
3. Funds.
4. Loaning textbooks.

1. Construction and application.

Hospital's contract with state commission on hospital care involving state grants of aid and providing for maintenance of teaching facilities, such training being an incident and overall plan to render the hospital an efficient aid in its duty to furnish hospital care, the expense to be borne solely by the hospital but under the control and supervision of commission, does not violate the constitutional prohibition against the appropriation of funds towards support of sectarian schools. Craig v. Mercy Hospital-Street Mem., 209 Miss. 427, 45 So. 2d 809 (1950), error overruled, 209 Miss. 490, 47 So. 2d 867 (1950).

Legislature's power to establish colleges and universities does not rest on constitutional grant. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).

2. School.

Word "school" is constitutional provision prohibiting appropriation of funds to sectarian schools or schools not conducted as free schools does not include State owned and supported schools. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).

3. Funds.

"Funds" in constitutional provision prohibiting appropriation of funds to sectarian schools or schools not conducted as free schools, means public funds of some character. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374 (1932).

4. Loaning textbooks.

The loaning of free textbooks under a statute so providing irrespective of whether the school was public or private, under circumstances wherein the state retained full control and ownership over such books and their preservation was fostered by the exaction of suitable compensation for their loss or damage, did not constitute a direct or indirect aid to the respective schools which the pupils attended, although school attendance should be compulsory. Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

Appropriation to create a fund for the purchase of free textbooks to be distributed and loaned to pupils of elementary schools, whether private or public, sectarian or non-sectarian, was not a use or diversion of school or other educational funds within the prohibition of this section, in view of the fact that such fund was to be used for the benefit of the pupils themselves and in keeping with the duty of the state to educate the children. Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

The privilege of requisition by qualified private or sectarian schools for the loan of such books to its pupils does not place in such schools the "control [of] any part of the school or other educational funds" of the state. Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

ATTORNEY GENERAL OPINIONS

RIDES program grants may be offered to private schools without violating state law. The program, developed by the University of Mississippi, uses 80% federal and 20% state funds. Brown, Oct. 6, 2006, A.G. Op. 06-0410.

RESEARCH REFERENCES

ALR. Schools: free textbooks and other school supplies for individual use of pupils. 67 A.L.R. 1196.

Right of school authorities to release pupils during school hours for purpose of attending religious education classes. 2 A.L.R.2d 1371.

Sectarianism in schools. 45 A.L.R.2d 742.

Furnishing free textbooks to sectarian school or student therein. 93 A.L.R.2d 986.

Constitutionality, under state constitutional provision forbidding financial aid to religious sects, of public provision of school bus service for private school pupils. 41 A.L.R.3d 344.

Giving of invocation with religious content at public-school-sponsored events to which public is invited or admitted as violation of establishment clause of First Amendment. 98 A.L.R. Fed. 206.

Validity and construction of public school regulation of student distribution of religious documents at school. 136 A.L.R. Fed. 551.

CJS. C.J.S. Schools and School Districts §§ 809, 810.

Lawyers' Edition. Establishment and free exercise of religion clauses of Federal Constitution's first Amendment as applied to public schools-Supreme Court Cases. 96 L. Ed. 2d 828.

Law Reviews. McMillan, With Religious Speech, Funding is Fundamental: Rosenberger v. Rector and Visitors of University of Virginia, 115 S. Ct. 2510 (1995), 17 Miss. C. L. Rev. 149, Fall, 1996.

§ 209. Institutions for education of deaf, dumb and blind

It shall be the duty of the Legislature to provide by law for the support of institutions for the education of the deaf, dumb, and blind.

SOURCES: 1869 art XII § 27.

Cross References — Appointment of interpreters for deaf persons in judicial proceedings and custodial situations, see § 13-1-301 et seq.

Vocational rehabilitation for the blind generally, see § 37-33-51 et seq.

Schools for the blind and deaf generally, see § 43-5-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Schools and School Districts §§ 700 to 702, 717, 719.

§ 210. Sale of public school supplies

No public officer of this State, or any district, county, city, or town thereof, nor any teacher or trustee of any public school, shall be interested in the sale, proceeds, or profits of any books, apparatus, or furniture to be used in any public school in this state. Penalties shall be provided by law for the violation of this section.

Editor's Note — Senate Concurrent Resolution No. 514, enacted as Chapter 655, Laws, 1984, adopted by the Senate on April 26, 1984, and the House of Representatives on April 25, 1984, proposed to repeal Section 210 of the Mississippi Constitution of 1890. The proposed repeal was submitted to the electorate on November 6, 1984, but was rejected.

Cross References — Prohibitions against public officers having interest in public contracts, see MS Const Art. 4, §§ 107 and 109.

RESEARCH REFERENCES

CJS. C.J.S. Schools and School Districts §§ 393, 394, 399.

§ 211. Sixteenth section lands

(1) The Legislature shall enact such laws as may be necessary to ascertain the true condition of the title to the sixteenth section lands in this State, or lands granted in lieu thereof, in the Choctaw Purchase, and shall provide that the sixteenth section lands reserved for the support of township schools, except as hereinafter provided, shall not be sold nor shall they be leased for a longer term than ten (10) years for lands situated outside municipalities and for lands situated within municipalities for a longer term than ninety-nine (99) years, for a gross sum; provided further, that existing leases of the sixteenth section lands situated in the municipalities of the State may, for a gross sum, be extended for a term of years not exceeding ninety-nine (99) years from the date of such extension, but the Legislature may provide for the lease of sixteenth section lands for a term of years not exceeding twenty-five (25) years for forest and agricultural lands and not exceeding forty (40) years for all other classifications of such lands for a ground rental, payable annually, and in the case of uncleared lands may lease them for such short terms as may be deemed proper in consideration of the improvement thereof, with right thereafter to lease for a term or to hold on payment of ground rent; provided however, that land granted in lieu of sixteenth section lands in this state and situated outside of the county holding or owning same may be sold and the proceeds from such sale may be invested in a manner to be prescribed by the Legislature; but provided further, however, that the Legislature, for industrial development thereon, may authorize the sale, in whole or in part for a gross sum or

otherwise, of sixteenth section lands, or lands granted in lieu thereof situated within the county; and the Legislature shall either provide for the purchase of other lands within the county to be held for the benefit of the township schools in lieu of the lands sold or shall provide for the investment of the proceeds of such sale for the benefit of the township schools, or the Legislature may provide for both purchase of other lands to be so held and investment of proceeds for the benefit of the township schools; and the Legislature, for industrial development thereon, may authorize the granting of leases on sixteenth section lands, or lands granted in lieu thereof, in whole or in part, for a gross sum or otherwise, for terms not to exceed ninety-nine (99) years, and the Legislature shall provide for the investment of the proceeds of such leases for the benefit of the township schools. The Legislature may authorize the lease of not more than three (3) acres of sixteenth section lands or lands granted in lieu thereof for a term not exceeding ninety-nine (99) years for a ground rental, payable annually, to any church, having its principal place of worship situated on such lands, which has been in continuous operation at that location for not less than twenty-five (25) years at the time of the lease.

(2) Notwithstanding any limitation on the terms of leases provided in subsection (l) of this section, the Legislature may provide, by general law, for leases on liquid, solid or gaseous minerals with terms coextensive with the operations to produce such minerals.

SOURCES: 1817 art VI Sec 20; Laws, 1942, ch 329; Laws, 1944, ch 343; Laws, 1961, 1st Ex Sess ch 10; Laws, 1986, ch. 643; Laws, 1992, ch. 730, eff December 8, 1992.

Editor's Note — The 1961 amendment to Section 211 of the Constitution was proposed by Laws 1961, 1st Ex ch 10, and, upon ratification by the electorate on Oct. 3, 1961, was inserted by Proclamation of the Secretary of State on Oct. 16, 1961, by virtue of the authority vested in him by Section 273 of the Constitution.

The 1986 amendment to Section 211 of Article 8 of the Constitution of 1890 was proposed by Senate Concurrent Resolution No. 537 (Chapter 643) of the 1986 regular session of the Legislature and, upon ratification by the electorate on November 4, 1986, was inserted as a part of the Constitution by proclamation of the Secretary of State on November 20, 1986.

The 1992 amendment of Section 211 in Article 8 of the Mississippi Constitution of 1890, was proposed by Laws, 1992, ch. 591 (Senate Concurrent Resolution No. 552), and upon ratification by the electorate on November 3, 1992, was inserted as part of the Constitution by proclamation of the Secretary of State on December 8, 1992.

Cross References — Sixteenth sections and lieu lands generally, see § 29-3-1 et seq.

Lease of school trust lands for ground rental, see § 29-3-69.

Acquisition and disposition of school district property generally, see § 37-7-401 et seq.

Provisions of Coastal Wetlands Protection Act inapplicable to wetlands conveyed by state for industrial development, see § 49-27-7.

JUDICIAL DECISIONS

1. Construction and application.
2. Lease duration.
3. Rights of way.
4. Appropriation of lands.
5. Sale for taxes.
6. Sale or lease of minerals, timber, and the like.
7. Exchange of school lands.
8. Improvements to leased property.
9. Accretions.

1. Construction and application.

Miss. Code Ann. ch. II, tit. 37, and Miss. Code Ann. §§ 37-7-471 through 37-7-483, do not apply to sixteenth section lands. School districts do not hold title to sixteenth section lands, title resides in the State; where the record was insufficient as to whether the school district had title to a historical mansion on such land, which had been leased for decades to a foundation, and the record was also unclear as to whether there was adequate consideration for renewal of the lease, a remand was required for development of said issues, and summary judgment for the foundation, and against the State, was reversed. Clark v. Stephen D. Lee Found., 887 So. 2d 798 (Miss. 2004).

Prior to the adoption of this constitutional provision, the legislature had authority to execute a trust as to sixteenth section lands for school purposes in its discretion. Lambert v. State, 211 Miss. 129, 51 So. 2d 201 (1951).

The phrase "in the Choctaw Purchase" was used to distinguish sixteenth sections of all lands in the state from sixteenth sections in the Chickasaw Cession and to refer to all lands in the state outside the Chickasaw Cession. Smith v. McCullen, 195 Miss. 34, 13 So. 2d 319 (1943).

Section 6613, Code 1942, conferring jurisdiction upon chancery courts to determine what school lands are subject to lease, does not vest power in the chancery court to make a lease of sixteenth section lands, since such power is vested by this section of the Constitution in the legislature, and the legislature has already enacted laws pursuant to this section of the Constitution. Smith v. McCullen, 195 Miss. 34, 13 So. 2d 319 (1943).

This section prohibits the state from parting with the possession and control of 16th section lands, except for a definite and comparatively short period of time. Mutual Life Ins. Co. v. Nelson, 184 Miss. 632, 186 So. 636 (1939).

2. Lease duration.

Miss. Const. § 211, as amended February 4, 1944, to increase the lease duration limit of Sixteenth Section lands reserved for the support of township schools from 25 years to 99 years, is not self-executing and, therefore, had no effect until 1946 when the legislature amended the Mississippi Code to conform to the provisions mandated by § 211. Thus, a 99-year lease of Sixteenth Section land executed in 1945 was void. Oktibbeha County Bd. of Educ. v. Town of Sturgis, 531 So. 2d 585 (Miss. 1988).

3. Rights of way.

Mississippi Legislature did not violate supremacy clause or any provision of state constitution in granting title to right-of-way over Sixteenth Section School land to railroad pursuant to 1882 charter, and railroad and its successor in interest, rather than county board of education, owned right-of-way; state law placed no binding trust obligation or other burden on Sixteenth Section lands such as would bar legislature from enacting charter in 1882. Madison County Bd. of Educ. v. Illinois Cent. R.R., 939 F.2d 292 (5th Cir. 1991).

An uncompensated grant by the state of an easement or right of way across a sixteenth section would be in violation of the constitution. Willmut Gas & Oil Co. v. Covington County, 221 Miss. 613, 71 So. 2d 184 (1954), appeal dismissed, 348 U.S. 891, 75 S. Ct. 215, 99 L. Ed. 700 (1954), overruled on other grounds, State v. Michigan Wis. Pipline Co., 360 So. 2d 684 (Miss. 1978).

The Railroad Company acquired no vested right of the right of way over sixteenth section lands where its right of way had not been surveyed and laid out prior to the enactment of § 211 of the Constitution. Yazoo & Miss. V. Ry. v. Sunflower County, 125 Miss. 92, 87 So. 417 (1921).

4. Appropriation of lands.

The provisions of this section were not designed to prevent laying out highways through sixteenth sections, and no means of compensation has been specifically provided therefor; and it was the intention, as it has been practiced, to permit highways to be laid through sixteenth sections for the general good and for the special benefit of the inhabitants without the necessity of condemnation proceedings. Bailey v. Pierce, 194 So. 743 (Miss. 1940).

Constitutional prohibition of sale of sixteenth section school land did not take from legislature power to appropriate such land to levee purposes, with or without compensation to township school fund, under constitutional mandate to construct system of levees. Washington County v. Board of Miss. Levee Comm'rs, 171 Miss. 80, 156 So. 872 (1934).

5. Sale for taxes.

Sale of leasehold estate of sixteenth section lands to the state for nonpayment of taxes merged the unexpired term thereof in the greater fee simple title of the state and extinguished it, so that the state land commissioner was without power to sell such leasehold and issue a patent therefor. McCullen v. Mercer, 192 Miss. 547, 6 So. 2d 465 (1942).

All attempts to sell Chickasaw school lands for taxes were void as such lands have never been subject to tax. Edwards v. Butler, 89 Miss. 179, 42 So. 381 (1906).

6. Sale or lease of minerals, timber, and the like.

A chancellor's ruling that the 25-year limitation of Mississippi Constitution Article VIII § 211 had no application to an oil or gas lease, which was based on the economic reality that a mineral lessee must be allowed to maintain a lease for an indefinite period of time to maximize profits and was an attempt to redress perceived economic hardships with equitable principles, would be reversed since § 211 clearly limits 16th section land leases (including mineral leases) to a maximum term of 25 years, and it the judiciary's responsibility to interpret the law, not institute economic policies. Should the perceived economic hardships of § 211 be real, the onus is upon the legislature to redress such economic inadequacies, and Mississippi Constitution Article XV, § 273 provides the exclusive means for amendment. Additionally, § 29-3-63, which provides the holder of a lease of 16th section land with a prior right, exclusive of all other persons, to re-lease or extend an existing lease, diminishes the perceived harsh consequences which might result from the enforcement of § 211 against all oil, gas and mineral leases of 16th section land. Chevron U.S.A., Inc. v. State, 578 So. 2d 644 (Miss. 1991).

Statutes providing for the lease by county authorities upon approval of the state of sixteenth section school lands for oil, gas and mineral exploration and development and for entry on such lands for such purposes, were not unconstitutional as authorizing a sale of minerals in situ, as a part of the realty, in violation of this section, since the constitutional prohibition extended only to lands, using the term in the restricted sense as meaning only the soil and not the soil and everything above and below it. Pace v. State ex rel. Rice, 191 Miss. 780, 4 So. 2d 270 (1941).

The objection that statutory provision permitting lease of sixteenth section lands for oil, gas and mineral exploration and development, and for entry upon such lands for such purposes, was unconstitutional because the lease might under its terms remain in force so long as oil and gas should be produced from the land and therefore longer than the 25 years prescribed by this section, is obviated by the statute providing that conveyances purporting to convey or pass a greater estate in the grantor might lawfully convey or pass, shall operate and pass such a right or estate as the grantor might lawfully convey. Pace v. State ex rel. Rice, 191 Miss. 780, 4 So. 2d 270 (1941).

The board of supervisors may permit purchaser of timber on school lands to enter the land to remove the timber and to burden the land with the support thereof until removed, but they cannot grant him an indefinite time. L.N. Dantzler Lumber Co. v. State, 97 Miss. 355, 53 So. 1 (1910); State ex rel. Att'y Gen. v. Dunnam, 67 So. 461 (Miss. 1915); State ex rel. Att'y Gen. v. Blodgett, 110 Miss. 768, 70 So. 710 (1915).

7. Exchange of school lands.

Statutes (§ 6781, Code 1930) providing for the exchange of school lands for other lands is plainly obnoxious to this section, as against the contention that this section of the Constitution should be construed as prohibiting a sale for a cash consideration but not an exchange of land. Mutual Life Ins. Co. v. Nelson, 184 Miss. 632, 186 So. 636 (1939).

8. Improvements to leased property.

Where sixteenth section lands, partly located in a municipality, were leased by the board of supervisors to a nonprofit corporation, and under a contract with the power company, the nonprofit corporation undertook the construction of a reservoir on the leased premises and the power company was to use the water therein in connection with the operation of his electric generating plant, and the capitalized value of the leased land per acre upon the completion of the proposed improvements would greatly exceed the present capitalized value per acre, and there was no taking or removing of the soil from the premises, the construction of the reservoir would not constitute waste; nor did the fact that the leased lands were formerly used almost exclusively for agricultural purposes mean that it would be unlawful to construct the proposed improvements, or that the land should be used for commercial or residential purposes, especially in view of the fact that there had been no development of the lands, so that the chancellor's action in refusing to enjoin the construction of the proposed improvements and in confirming the lease was proper. Dodds v. Sixteenth Section Dev. Corp., 232 Miss. 524, 99 So. 2d 897 (1958).

9. Accretions.

Where accretions washed against and on and became attached to school land in lieu of sixteenth section and to the plantation abutting on Mississippi River, and where the owners of the plantation and board of county supervisors entered into contracts fixing the lines and apportioning accretions between them this was not a sale of sixteenth section or new lands. Board of Supvrs. v. Giles, 219 Miss. 245, 68 So. 2d 483 (1953).

RESEARCH REFERENCES

CJS. C.J.S. Schools and School Districts § 8.

§ 212. Interest rate on Chickasaw School Fund and other educational trust funds

The rate of interest on the fund known as the "Chickasaw School Fund," and other trust funds for educational purposes for which the State is responsible, shall be fixed, and remain as long as said funds are held by the State, at six per centum per annum from and after the close of the fiscal year A.D. 1891; and the distribution of said interest shall be made semi-annually, on the first of May and November of each year.

JUDICIAL DECISIONS

1. In general.

This section is not self-executing; there must be a legislative appropriation. State ex rel. Barron v. Cole, 81 Miss. 174, 32 So. 314 (1902).

Claim that sale of Chickasaw Cession School Lands and unwise investment of proceeds had abrogated state's trust obligation to hold those lands for benefit of school children in perpetuity are barred by Eleventh Amendment, however, allegation that state's unequal distribution of benefits of school lands is denial of equal protection is not so barred, as essence of equal protection claim is present disparity in distribution of benefits of state held assets and not state's past actions, and alleged differential treatment violates equal protection only if not rationally related to legitimate state interest; differential financing resulting from disparity and distribution of benefits of state held assets is attributable to state decision to divide state resources unequally among school districts, and if not rationally related to legitimate state interests is unconstitutional and resolution of this question is dependent upon whether federal law requires state to allocate economic benefits of school lands to schools and townships in which those lands are located and whether such federal law is itself constitutional. Papasan v. Allain, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986).

RESEARCH REFERENCES

CJS. C.J.S. Schools and School Districts § 13.

§ 213. Agricultural and mechanical colleges

The State having received and appropriated the land donated to it for the support of agricultural and mechanical colleges by the United States, and having, in furtherance of the beneficent design of Congress in granting said land, established the Agricultural and Mechanical College of Mississippi and the Alcorn Agricultural and Mechanical College, it is the duty of the State to sacredly carry out the conditions of the Act of Congress upon the subject, approved July 2, A.D. 1862, and the Legislature shall preserve intact the endowments to and support said colleges.

Editor's Note — Section 37-121-1 changed the name of Alcorn Agricultural and Mechanical College to Alcorn State University.

Cross References — Interest on and distribution of trust funds for educational purposes, see MS Const Art. 8, § 212.

Mississippi State University of Agriculture and Applied Science generally, see § 37-113-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Colleges and Universities § 7.

Law Reviews. Adams, Through the looking glass and what the Supreme Court finds there: the political setting of United States v. Fordice. 62 Miss. L. J. 263, Winter, 1993.

Connell, The road to United States v. Fordice: what is the duty of public colleges and universities in former de jure states to desegregate? 62 Miss. L. J. 285, Winter, 1993.

Dunaway and Mills, United States v. Fordice: A summary of the parties' arguments. 62 Miss. L. J. 361, Winter, 1993.

Davis, The quest for equal education in Mississippi: the implications of United States v. Fordice. 62 Miss. L. J. 405, Winter, 1993.

§ 213A. State institutions of higher learning

The State institutions of higher learning in Mississippi, to wit: University of Mississippi, Mississippi State University of Agriculture and Applied Science, Mississippi University for Women, University of Southern Mississippi, Delta State University, Alcorn State University, Jackson State University, Mississippi Valley State University, and any others which may be organized or established by the State of Mississippi, shall be under the management and control of a board of trustees to be known as the Board of Trustees of State Institutions of Higher Learning. The Governor shall appoint the members of the board with the advice and consent of the Senate. The Governor shall appoint only persons who are qualified electors residing in the district from which each is appointed, and at least twenty-five (25) years of age, and of the highest order of intelligence, character, learning and fitness for the performance of such duties, to the end that such board shall perform its high and honorable duties to the greatest advantage of the people of the State and such educational institutions, uninfluenced by any political considerations. The board of trustees shall be composed of twelve (12) members. The members of the board of trustees as constituted on January 1, 2004, shall continue to serve until expiration of their respective terms of office. Appointments made to fill vacancies created by expiration of members' terms of office occurring after January 1, 2004, shall be as follows: The initial term of the members appointed in 2004 shall be for eleven (11) years; the initial term of the members appointed in 2008 shall be for ten (10) years; and the initial term of the members appointed in 2012 shall be for nine (9) years. After the expiration of the initial terms, all terms shall be for nine (9)years. Four (4) members of the board of trustees shall be appointed from each of the three (3) Mississippi Supreme Court districts and, as such vacancies occur, the Governor shall make appointments from the Supreme Court district having the smallest number of board members until the membership includes four (4) members from each district. In case of a vacancy on the board by death or resignation of a member, or from any cause other than the expiration of such member's term of office, the board shall elect his successor, who shall hold office until the end of the next session of the Legislature. During such term of the session of the Legislature, the Governor shall appoint the successor member of the board from the district from which his predecessor was appointed, to hold office for the balance of the unexpired term for which such original trustee was appointed, to the end that one-third (⅓) of such trustees' terms will expire each three (3) years.

The Legislature shall provide by law for the appointment of a trustee for the La Bauve Fund at the University of Mississippi and for the perpetuation of such fund.

Such board shall have the power and authority to elect the heads of the various institutions of higher learning, and contract with all deans, professors and other members of the teaching staff, and all administrative employees of the institutions for a term not exceeding four (4) years; but the board may terminate any such contract at any time for malfeasance, inefficiency or contumacious conduct, but never for political reasons.

Nothing herein contained shall in any way limit or take away the power the Legislature had and possessed, if any, at the time of the adoption of this amendment, to consolidate, abolish or change the status of any of the above named institutions.

SOURCES: Laws, 1942, ch. 342; Laws, 1944, ch. 344; Laws, 1987, ch. 673, eff December 4, 1987; Laws, 2002, ch. 703, eff December 4, 2003.

Editor's Note — The 1944 amendment of this section of the Constitution was duly inserted by the Legislature in House Concurrent Resolution No. 13, Laws 1944, ch 344.

The 1987 amendment of Section 213 A in Article 8 of the Mississippi Constitution of 1890, was proposed by Laws, 1987, Ch. 673 (House Concurrent Resolution No. 19), and upon ratification by the electorate on November 3, 1987, was inserted as part of the Constitution by proclamation of the Secretary of State on December 4, 1987.

The 2002 amendment of Section 213 A was proposed by Laws, 2002, ch. 703 (Senate Concurrent Resolution No. 522), and upon ratification by the electorate on November 4, 2003, was inserted as part of the Constitution by proclamation of the Secretary of State on December 4, 2003.

Cross References — Board of trustees of state institutions of higher learning generally, see § 37-101-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Board of trustees.
3. Open meeting act.
4. Actions and proceedings.
5. Employment of counsel.

1. In general.

Grant of summary judgment in favor of the university, Board, and others was proper because the professor failed to wait for a final decision by the Board regarding approval of her application for tenure prior to filing suit; her claims based on tortious conduct, tortious breach of contract, and breach of an implied contractual term or warranty were foreclosed by her failure to adhere to the requirement of the Mississippi Tort Claims Act, Miss Code Ann. § 11-46-1 et seq., that all administrative remedies be exhausted prior to filing suit. Whiting v. Univ. of S. Miss., 62 So. 3d 907 (Miss. 2011).

State institutions do not include an armory, or property occupied for the storage and repair of county school busses. In re City of Hazlehurst, 247 Miss. 527, 153 So. 2d 809 (1963).

2. Board of trustees.

Former state university student's 42 U.S.C.S. §§ 1981, 1983 race discrimination claims against the university, a state board of trustees, and several professors were barred under the U.S. Const. Amend. XI doctrine of sovereign immunity; both the university and the board were arms of the State of Mississippi where the board was created pursuant to Miss. Const. Art. 8, § 213 A, the Mississippi Legislature granted further authority to the board via Miss. Code Ann. § 37-101-1, and the university was a public university created by statute and placed under the auspices of the board via Miss. Code Ann. §§ 37-125-1 et seq. and 37-101-1. Washington v. Jackson State Univ., 532 F. Supp. 2d 804 (S.D. Miss. Mar. 15, 2006), appeal dismissed by 244 Fed. Appx. 589, 2007 U.S. App. LEXIS 18811 (5th Cir. Miss. 2007).

The Board of Trustees of State Institutions of Higher Learning is part of the executive branch of government rather than an autonomous branch of government, and thus does not constitute a fourth branch of government inconsistent with the Mississippi Constitution. Van Slyke v. Board of Trustees of State Insts. of Higher Learning, 613 So. 2d 872 (Miss. 1993).

The appointment of members to the Board of Trustees of State Institutions of Higher Learning does not violate the principle of "one-man, one-vote"; the "one-man, one-vote" rule does not apply to appointed positions, and therefore is not applicable to appointed members of the Board of Trustees. Van Slyke v. Board of Trustees of State Insts. of Higher Learning, 613 So. 2d 872 (Miss. 1993).

The Board of Trustees of State Institutions of Higher Learning is an executive rather than a legislative body as indicated by the enumeration of the Board of Trustees' powers and duties contained within the Mississippi Constitution and applicable statutes; thus, appointment of the Board of Trustees by the Governor rather than the legislature is not an encroachment upon the powers of the legislative branch of the government. Van Slyke v. Board of Trustees of State Insts. of Higher Learning, 613 So. 2d 872 (Miss. 1993).

3. Open meeting act.

Board of trustees of state institution of higher learning is not exempt from Open Meeting Act (§§ 25-41-1 et seq.) under either Mississippi Constitution (§ 213 A) or its companion statute (§§ 37-101-1 et seq.). Board of Trustees of State Insts. of Higher Learning v. Mississippi Publishers Corp., 478 So. 2d 269 (Miss. 1985).

4. Actions and proceedings.

In an action by faculty and staff employees of Mississippi State University and Jackson State University to challenge the voting rights of the La Bauve Trustee, the chancellor erred in granting the defendants' general demurrer and the action would be remanded to resolve the issues of the complainants' standing to sue and the proper manner of appeal from the action of the Board of Trustees of State Institutions of Higher Learning. Williams v. Stevens, 390 So. 2d 1012 (Miss. 1980).

In a proceeding instituted by the state building commission to enjoin the board of trustees of state institutions of higher learning from using self-generated funds, as distinguished from legislatively appropriated funds, to construct facilities at the institutions under its supervision without the approval of and control by the building commission, the chancery court properly dissolved a temporary injunction and dismissed the bill of complaint although it should have relied upon Miss Const § 213 A, which gives the board of trustees management and control of the institutions under its supervision, as well as upon § 37-101-15, which sets out the general powers and duties of the board. The powers and duties granted to the building commission under § 31-11-3 apply only to management and control of funds legislatively appropriated to both agencies, while the management and control of self-generated funds remain with the constitutionally organized board of trustees. State ex rel. Allain v. Board of Trustees of Insts. Of Higher Learning, 387 So. 2d 89 (Miss. 1980).

5. Employment of counsel.

Neither § 213 A of the Mississippi Constitution nor Code 1972 § 37-101-7 confer upon the Board of Trustees of State Institutions of Higher Learning the authority to engage private counsel over the objection of the Attorney General in a case of statewide interest. Wade v. Mississippi Coop. Extension Serv., 392 F. Supp. 229 (N.D. Miss. 1975).

RESEARCH REFERENCES

CJS. C.J.S. Colleges and Universities §§ 15 to 18.

Law Reviews. Slyke & Rushing, Sunshine in Mississippi: The Open Meetings Act. 60 Miss. L. J. 283, Fall 1990.

Adams, Through the looking glass and what the Supreme Court finds there: the political setting of United States v. Fordice, 62 Miss. L. J. 263, Winter, 1993.

Connell, The road to United States v. Fordice: what is the duty of public colleges and universities in former de jure states to desegregate? 62 Miss. L. J. 285, Winter, 1993.

Dunaway and Mills, United States v. Fordice: A summary of the parties' arguments. 62 Miss. L. J. 361, Winter, 1993.

Davis, The quest for equal education in Mississippi: the implications of United States v. Fordice. 62 Miss. L. J. 405, Winter, 1993.

§ 213B. Repealed

Repealed by Laws, 1987, ch. 671, eff December 4, 1987.
[Laws, 1954, Ex Sess ch. 39; 1955 Ex Sess ch. 132]

Editor's Note — Former Section 213-B provided that by vote of the Legislature public schools of the State could be abolished; the counties and school districts could be authorized to abolish their public schools; the Legislature could dispose of school buildings, land and property by lease, sale or otherwise; and, authorized the legislature and governmental subdivisions and districts to appropriate funds to aid educable children in the state to secure an education.

The repeal of Section 213-B of Article 8 of the Mississippi Constitution of 1890 was proposed by Laws, 1987, ch. 671 (House Concurrent Resolution No. 9), and upon ratification by the electorate on November 3, 1987, was deleted from the Constitution by proclamation of the Secretary of State on December 4, 1987.

ARTICLE 9.

MILITIA.

Sec.	
214.	Persons subject to military duty
215.	Organization of militia by Legislature
216.	Appointment and removal of militia officers
217.	Governor as Commander-in-Chief
218.	Major-general; brigadier-general
219.	Adjutant-general
220.	Exemption of militia from arrest for certain offenses
221.	Appropriations for Mississippi National Guard
222.	Support of Mississippi national guard by county boards of supervisors

§ 214. Persons subject to military duty

All able-bodied male citizens of the State between the ages of eighteen and forty-five years shall be liable to military duty in the militia of this State, in such manner as the Legislature may provide.

SOURCES: 1869 art IX § 1.

Cross References — Military affairs generally, see § 33-1-1 et seq.

JUDICIAL DECISIONS

1. Enlistment.

Even where the consent of his parents was not obtained for enlistment, a minor over eighteen years of age is bound by his enlistment in the military service of the state. Birdsong v. Blackman, 127 Miss. 693, 90 So. 441 (1922).

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Military, and Civil Defense §§ 29-39.

CJS. C.J.S. Armed Services §§ 288, 289.

Law Reviews. Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

§ 215. Organization of militia by Legislature

The Legislature shall provide for the organizing, arming, equipping, and discipline of the militia, and for paying the same when called into active service.

SOURCES: 1817 art "Militia" § 1; 1832 art "Militia" § 1; 1869 art IX § 2.

Cross References — Military affairs generally, see § 33-1-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Armed Services §§ 341, 342.

Law Reviews. Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

§ 216. Appointment and removal of militia officers

All officers of militia, except noncommissioned officers, shall be appointed by the Governor, by and with the consent of the Senate, or elected, as the Legislature may determine; and no commissioned officer shall be removed from office except by the Senate on suggestion of the Governor, stating the ground on which such removal is recommended, or by the decision of a court-martial pursuant to law, or at his own request.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.
Military officers, see Miss. Const. Art. 9, §§ 218 and 219.
Qualifications of officers, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.
Military affairs generally, see § 33-1-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Armed Services §§ 341-343.

§ 217. Governor as Commander-in-Chief

The Governor shall be Commander-in-Chief of the militia, except when it is called into the service of the United States, and shall have power to call forth the militia to execute the laws, repel invasion and to suppress riots and insurrections.

SOURCES: 1817 art "Militia" § 4; 1832 art "Militia" § 4; 1869 art IX § 5.

Cross References — Arms in aid of civil power, see Miss. Const. Art. 3, § 12.
Governor as commander-in-chief of the militia and navy, see Miss. Const. Art. 5, § 119 and § 33-3-1 et seq.
Governor to see that laws are faithfully executed, see Miss. Const. Art. 5, § 123.
Governor generally, see § 7-1-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Governor as commander in chief.
3. Search and seizure.

1. In general.

Proclamation of Governor ordering out militia need not contain any particular recitals. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Governor's decision as to whether exigency justifies calling out militia are subject to judicial review. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

2. Governor as commander in chief.

Where Governor unsuccessfully seeks law enforcement through local officers for length of time which makes it clearly apparent that no dependence can be placed in local officers, then, duty arises to send militia, not to supersede but to enforce law. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

What Governor does in execution of laws, and acts of militia under his authority, must be as civil officers, and in strict subordination to the general law of the land. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

3. Search and seizure.

National guardsmen, acting under an executive order of the governor, and a search warrant issued by the county judge directed to any officer of the county, had authority to make a search of the accused's premises wherein a slot machine was found. Brady v. State, 229 Miss. 677, 91 So. 2d 751 (1957).

Where the recitals in the executive order, empowering the adjutant general to order out national guardsmen for the purpose of seeing that laws were faithfully executed in Jones County, made out a prima facie case justifying the governor's actions, the duty of showing that there was not such breakdown of law enforcement conditions as to justify this action was upon the accused, who was complaining of the search of his premises wherein a slot machine was found. Brady v. State, 229 Miss. 677, 91 So. 2d 751 (1957).

Evidence obtained by the National Guardsmen under a search warrant issued by a county judge was admissible in prosecution for contempt for violation of temporary injunction where wide-spread violation of liquor nuisance justified the calling of the National Guard by the Governor. McBride v. State, 221 Miss. 508, 73 So. 2d 154 (1954).

In view of the authority given by this section to the Governor to use the militia in the execution or enforcement of the laws, as well as the repelling of invasion and suppression of riots and insurrection, a search of defendant's premises under a search warrant and arrest of the defendant for unlawful possession of intoxicating liquors by members of the National Guard were not invalid, and evidence secured by such search was not void by reason thereof. Seaney v. State, 188 Miss. 367, 194 So. 913 (1940).

Member of militia who by rank has any executive authority may receive, and as lawful officer execute warrant, or have it done under his supervision, and make return upon it as sheriff or constable. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

Evidence procured under search warrant issued by justice of peace and executed by officer of militia was admissible in prosecution to abate liquor nuisance. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Military, and Civil Defense §§ 31, 32.

CJS. C.J.S. Armed Services §§ 288, 289.

Law Reviews. Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

§ 218. Major-general; brigadier-general

The Governor shall nominate, and, by and with the consent of the Senate, commission one major-general for the State, who shall be a citizen thereof, and also one brigadier-general for each congressional district, who shall be a resident of the district for which he shall be appointed, and each district shall constitute a militia division.

SOURCES: 1869 art IX § 6.

Cross References — Officers of the militia, see Miss. Const. Art. 9, § 216.
Commander-in-chief, military department, and Governor's staff generally, see § 33-3-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Armed Services §§ 341-343.

§ 219. Adjutant-general

The adjutant-general, and other staff officers to the commander-in-chief, shall be appointed by the Governor, and their appointment shall expire with the Governor's term of office, and the Legislature shall provide by law a salary for the adjutant-general commensurate with the duties of said office.

SOURCES: 1869 art IX § 7.

Cross References — Officers of the militia, see Miss. Const. Art. 9, § 216.
Major general, brigadier general, see Miss. Const. Art. 9, § 218.
Commander-in-chief, military department, and governor's staff generally, see § 33-3-1 et seq.

JUDICIAL DECISIONS

1. Retirement pay.
Where plaintiff had served in the rank of colonel in the army and also as Brigadier General in Adjutant General's Department, when he was federally recognized as the Adjutant General of Mississippi since his appointment to the rank of Brigadier General expired along with his term of office as State Adjutant General, his appointment as Brigadier General was temporary, and plaintiff was entitled to the retired pay of that rank. Grayson v. United States, 149 F. Supp. 183 (Ct. Cl. 1957).

ATTORNEY GENERAL OPINIONS

Once a "senior full-time Assistant Adjutant General" is properly appointed and in place, he may perform all the duties of the Adjutant General in cases of death, absence, or inability of the Adjutant General to act, and this includes inability of the Adjutant General to act due to a vacancy in that office, including a vacancy caused by the Senate's failure to confirm an appointment; however, a recommendation from the Adjutant General is required in order for the Governor to appoint Assistant Adjutants General and, therefore, by necessity, there must first be an Adjutant

General holding office in order to make a recommendation for appointment of an Assistant. Johnson, July 5, 2000, A.G. Op. #2000-0275.

RESEARCH REFERENCES

CJS. C.J.S. Armed Services §§ 341-343.

§ 220. Exemption of militia from arrest for certain offenses

The militia shall be exempt from arrest during their attendance on musters, and in going to and returning from the same, except in case of treason, felony, or breach of the peace.

SOURCES: 1869 art IX § 8.

Cross References — Privilege from arrest, see Miss. Const. Art. 4, §§ 48 and 102.

Militia and state guard generally, see § 33-5-1 et seq.

Apprehension and restraint under Mississippi Code of Military Justice generally, see §§ 33-13-17 through 33-13-29.

Criminal arrests generally, see § 99-3-1 et seq.

RESEARCH REFERENCES

ALR. Immunity of public officer from criminal arrest. 1 A.L.R. 1156.

Civil and criminal liability of soldiers, sailors and militiamen. 135 A.L.R. 10; 147 A.L.R. 1429; 151 A.L.R. 1463; 153 A.L.R. 1432; 154 A.L.R. 1457; 158 A.L.R. 1462.

CJS. C.J.S. Arrest §§ 6, 10, 11.

§ 221. Appropriations for Mississippi National Guard

The Legislature is hereby required to make an annual appropriation for the efficient support and maintenance of the Mississippi National Guard, which shall consist of not less than one hundred men for each Senator and Representative to which this state may be entitled in the Congress of the United States; but no part of such funds shall be used in the payment of said guard except when in actual service.

SOURCES: 1817 art "Militia," § 3; 1832 art "Militia," § 3; 1869 art IX § 4.

Cross References — National guard generally, see § 33-7-1 et seq.

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Military, and Civil Defense §§ 33, 34.

CJS. C.J.S. Armed Services §§ 341, 342.

§ 222. Support of Mississippi national guard by county boards of supervisors

The Legislature shall empower the board of supervisors of each county in the state to aid in supporting a military company or companies of the Mississippi national guard within its borders, under such regulations, limitations, and restrictions as may be prescribed by law.

RESEARCH REFERENCES

CJS. C.J.S. Armed Services §§ 341, 342.

ARTICLE 10.

THE PENITENTIARY AND PRISONS.

SEC.	
223.	Repealed.
224.	Employment of convicts on public roads, public works or public levee projects
225.	Placement of convicts on state farms; prison industries; reformatory schools; good behavior
226.	Hire or lease of county jail inmates

§ 223. Repealed

Repealed by Laws, 1990, ch. 599, eff December 19, 1990.

Editor's Note — Former Section 223 provided that no lease or hiring of penitentiary convicts after December 31, 1894, be undertaken unless in compliance with section 224 and that prior lease arrangements not extend beyond that date.

The repeal of Section 223 of Article 10 of the Mississippi Constitution of 1890 was proposed by Laws, 1990, Ch. 599 (House Concurrent Resolution No. 99, Part II), and upon ratification by the electorate on November 6, 1990, was deleted from the Constitution by proclamation of the Secretary of State on December 19, 1990.

§ 224. Employment of convicts on public roads, public works or public levee projects

The Legislature may authorize the employment under state supervision and the proper officers and employees of the state, of convicts on public roads or other public works, or by any levee board on any public levees, under such provisions and restrictions as it may from time to time see proper to impose; but said convicts shall not be let or hired to any contractors under said board, nor shall the working of the convicts on public roads, or public works, or by any levee board ever interfere with the preparation for or the cultivation of any crop which it may be intended shall be cultivated by the said convicts, nor interfere with the good management of the state farm, nor put the state to any expense.

Cross References — Work by prisoners, see Miss. Const. Art. 4, § 85 and Art. 10, § 226.

Prisons and prisoners generally, see § 47-1-1 et seq.

ATTORNEY GENERAL OPINIONS

A private corporation may not employ state inmates in a county jail to provide food services for the jail in which such prisoners are incarcerated. McWilliams, July 25, 1997, A.G. Op. #97-0437.

RESEARCH REFERENCES

CJS. C.J.S. Convicts §§ 13 to 15.

§ 225. Placement of convicts on state farms; prison industries; reformatory schools; good behavior

The Legislature may place the convicts on a state farm or farms and have them worked thereon or elsewhere. It may also provide for the creation of a nonprofit corporation for the purpose of managing and operating a state prison industries program which may make use of state prisoners in its operation. It may establish a reformatory school or schools, and provide for keeping of juvenile offenders from association with hardened criminals. It may provide for the commutation of the sentence of convicts for good behavior, and for the constant separation of the sexes, and for religious worship for the convicts.

SOURCES: 1869 art XII § 28; Laws, 1990, ch. 599, eff December 19, 1990.

Editor's Note — The 1990 amendment to Section 225 of Article 10 of Mississippi Constitution of 1890 was proposed by Laws, 1990, Ch. 599 (House Concurrent Resolution No. 99, Part I), was ratified by the electorate on November 6, 1990, and was inserted as a part of the Constitution by proclamation of the Secretary of State on December 19, 1990.

Cross References — Work by prisoners, see Miss. Const. Art. 10, § 225.

Prisons and prisoners generally, see § 47-1-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Juveniles.
3. Pardon and commutation of sentence.

1. In general.

State prison regulations effectively preventing Muslim inmates from attending weekly congregational service do not violate First Amendment's free exercise of religion clause. O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987), on remand, 829 F.2d 32 (3rd Cir. N.J. 1987).

Convicts may be worked on a farm leased for that purpose. State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152 (1906).

2. Juveniles.

There was no impropriety in the act of the youth court in committing a juvenile, adjudged to be a delinquent, to a racially segregated institution, for the reason that prison authorities have the right to take into account tensions in maintaining security, discipline and good order in prisons and like institutions. Love v. State, 221 So. 2d 92 (Miss. 1969).

3. Pardon and commutation of sentence.

Under the Constitution the governor is vested with the exclusive power to pardon with the sole exception that the Legislature may provide for the commutation of sentence of convicts for good behavior and that the power to pardon includes the power to commute sentences in criminal cases and this power may not be infringed upon by legislative enactment. Whittington v. Stevens, 221 Miss. 598, 73 So. 2d 137 (1954).

A pardon is an act of grace proceeding from the power entrusted with the execution of the laws and a pardon relieves the person named from legal consequences of a specific crime, while a commutation of sentence is the change of the punishment to which a person is sentenced to less severe punishment. Whittington v. Stevens, 221 Miss. 598, 73 So. 2d 137 (1954).

Statutes which authorize the board of supervisors to commute one-half of the term of imprisonment of a prisoner who was crippled or incapacitated was unconstitutional as an infringement upon the pardoning power vested in the governor. Whittington v. Stevens, 221 Miss. 598, 73 So. 2d 137 (1954).

RESEARCH REFERENCES

ALR. Constitutionality of statutes in relation to treatment or discipline of convicts. 50 A.L.R. 104.

Withdrawal, forfeiture, modification, or denial of good time allowance to prisoner. 95 A.L.R.2d 1265.

Am Jur. 60 Am. Jur. 2d, Penal and Correctional Institutions §§ 2, 52 et seq., 51.

CJS. C.J.S. Convicts §§ 13 to 15.

Lawyers' Edition. Supreme Court's views as to prisoner's right to free exercise of religion under Federal Constitution's First Amendment. 96 L. Ed. 2d 736.

§ 226. Hire or lease of county jail inmates

Convicts sentenced to the county jail shall not be hired or leased to any person or corporation outside of the county of their conviction after the first day of January, A. D. 1893, nor for a term that shall extend beyond that date.

Cross References — Work by prisoners, see Miss. Const. Art. 4, § 85.
Prisons and prisoners generally, see § 47-1-1 et seq.

ARTICLE 11.

LEVEES.

SEC.	
227.	Maintenance of levee system
228.	Levee districts
229.	Boards of levee commissioners
230.	Commissioner qualifications and bond
231.	Election of commissioners
232.	Duties and powers of commissioners
233.	Appropriation of private property
234.	Bills changing district boundaries or taxes
235.	Report by levee board
236.	Levee taxes

237. System of levee taxation
238. Property exempt from levee taxation
239. Publication of itemized account

§ 227. Maintenance of levee system

A levee system shall be maintained in the state as provided in this article.

JUDICIAL DECISIONS

1. In general.

Outside of the constitutional powers bestowed upon the board of levee commissioners by Miss. Const. Art. XI, § 227 et seq., the board is subject to the supervision and control of the legislature and can exercise, unless the constitution otherwise provides, only such powers as may be delegated to it by the legislature; similarly, board funds are properly considered subject to legislative control absent constitutional provisions otherwise. State v. Bd. of Levee Comm'rs, 932 So. 2d 12 (Miss. 2006).

The classification of the alluvial delta lands from other lands of the state is neither unreasonable nor unconstitutional. Delta & Pine Land Co. v. Board of Supvrs., 228 So. 2d 893 (Miss. 1969).

The Levee Board is not the owner of the fee of land acquired, cannot remove the timber therefrom to make way for necessary levy work unless the owner fails or refuses to do so after notice, and has no authority to refuse an offer by the owner to remove the timber after notice. White v. State, 34 So. 2d 679 (Miss. 1948).

Constitutional prohibition of sale of sixteenth section school land did not take from legislature power to appropriate such land to levee purposes, with or without compensation to township school fund, under constitutional mandate to construct system of levees. Washington County v. Board of Miss. Levee Comm'rs, 171 Miss. 80, 156 So. 872 (1934).

The statute authorizing the organization of swamp land drainage districts by the board of supervisors is not violative of this section of the Constitution. Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911).

RESEARCH REFERENCES

ALR. Constitutionality of levee and flood control acts. 70 A.L.R. 1274.

CJS. C.J.S. Levees and Flood Control § 5.

§ 228. Levee districts

The division heretofore made by the Legislature of the alluvial land of the state into two levee districts — viz., the Yazoo-Mississippi Delta Levee District and the Mississippi Levee District, as shown by the laws creating the same, and the amendments thereto — is hereby recognized, and said districts shall so remain until changed by law; but the legislature may hereafter add to either of said districts any other alluvial land in the state.

JUDICIAL DECISIONS

1. In general.

The classification of the alluvial delta lands from other lands of the state is neither unreasonable nor unconstitutional. Delta & Pine Land Co. v. Board of Supvrs., 228 So. 2d 893 (Miss. 1969).

Constitutional prohibition of sale of 16th sections did not deprive legislature of power to appropriate such lands to levee purposes. Washington County v. Board of Miss. Levee Comm'rs, 171 Miss. 80, 156 So. 872 (1934).

Lands within the Mississippi levee district, as recognized by this section, and not between the levee and the river (exempted by § 238 infra) are liable to levee taxes, although they be damaged rather than benefited by the construction of the levees. Smith v. Willis, 78 Miss. 243, 28 So. 878 (1900).

RESEARCH REFERENCES

CJS. C.J.S. Levees and Flood Control § 24.

§ 229. Boards of levee commissioners

There shall be a board of levee commissioners for the Yazoo-Mississippi delta levee district which shall consist of two members from each of the counties of Coahoma and Tunica, and one member from each of the remaining counties, or parts of counties now or hereafter embraced within the limits of said district.

And there shall also be a board of levee commissioners for the Mississippi levee district which shall consist of two members from each of the counties of Bolivar and Washington and one from each of the counties of Issaquena, Sharkey, and from that part of Humphreys county now embraced within the limits of said district. In the event of the formation of a new county, or counties out of the territory embraced in either or both of said levee districts, each new county shall each be entitled to representation and membership in the proper board or boards.

And in the counties having two judicial districts and from which said counties two levee commissioners are to be elected, at least one of the commissioners shall reside in the judicial districts through which the line of levee runs.

SOURCES: Laws, 1928, ch 357.

Editor's Note — Section 1 of Laws, 1982, ch. 310, effective March 1, 1982, provides as follows:

"The Board of Mississippi Levee Commissioners is hereby authorized to join the Lower Mississippi Valley Flood Control Association and pay dues annually. The board is also authorized to join any association or make contributions to any organization which, in its opinion, can contribute to the completion of the flood control projects on the rivers in its district."

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Levees and Flood Control § 24.

§ 230. Commissioner qualifications and bond

All of said commissioners shall be qualified electors of the respective counties or parts of counties from which they may be chosen, except the one selected for the Louisville, New Orleans and Texas Railway Company; and the legislature shall provide that they shall each give bond for the faithful performance of his duties, and shall fix the penalty thereof; but the penalty of such bond in no instance shall be fixed at less than ten thousand dollars, and the sureties thereon shall be freeholders of the district.

Cross References — Qualifications of officers, see Miss. Const. Art. 12, § 250 and Art. 14, § 265.

RESEARCH REFERENCES

CJS. C.J.S. Levees and Flood Control § 24.

§ 231. Election of commissioners

The levee commissioners shall be elected by the qualified electors of the respective counties, or parts of counties, from which they may be chosen, said election to be held in the manner and at the time as may be prescribed by law.

The term of office of said commissioners shall be four years.

SOURCES: Laws, 1928, ch 356.

Editor's Note — Section 1 of Laws, 1983, ch. 317, effective from and after April 15, 1983 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965), provides as follows:

"Section 2, Chapter 85, Laws of 1930, as amended by Section 1, Chapter 574, Laws of 1968, is amended as follows:

"Section 2. (a) Except as may be herein otherwise provided, the general laws for the election of county officers shall apply to and govern the election of the commissioners of said levee district from their respective counties and parts of counties.

"(b) The County Election Commissioners shall have printed on the ballot for any election provided for hereunder the name of any candidate who shall have been requested to be a candidate for the office of commissioner from his county by a petition filed not less than thirty (30) days previous to the date of the election and signed by not less than fifty (50) qualified electors of the county and of the levee district wherein the candidate resides.

"(c) Notwithstanding the provisions of subsections (a) and (b) of this section, if ten (10) days prior to the date of the election, only one (1) person shall have qualified as a candidate for the office of levee commissioner, the County Election Commissioners shall certify to the Board of Levee Commissioners that there is but one (1) candidate. Thereupon, the County Election Commissioners shall dispense with the election and appoint that one (1) candidate in lieu of an election. The clerk of the board shall certify to the Secretary of State the fact of such appointment in lieu of an election, and the person so appointed shall be commissioned by the Governor."

Laws of 2010, ch. 438, § 1 provides:

"SECTION 1. Section 3, Chapter 85, Laws of 1930, as amended by Section 3, Chapter 574, Laws of 1968, is amended as follows:

"Section 3. The elections to be held as provided for in Section 4 and Section 5 of Chapter 85, Laws of 1930, shall be general elections, and runoff general elections shall be held three (3) weeks thereafter. Any candidate who receives a majority of all the votes cast for that office in the general election shall thereby be elected. If no candidate receives such majority of popular votes in the general election then the two (2) candidates who receive the highest popular vote for such office shall have their names submitted as such candidates to the runoff general election, and the candidate who leads in such runoff general election shall thereby be elected to the office. When there is a tie in the first general election of those receiving next highest vote, these two (2) shall be decided by lot, fairly and publicly drawn under the supervision of the commissioners and with the aid of two (2) or more respectable electors, and the candidate determined by lot and the one (1) receiving the highest vote, neither having received a majority, shall go into the runoff general election and whoever leads in such runoff general election shall thereby be elected. The provisions of this chapter shall in no way amend any chapter regulating the Yazoo Mississippi Delta Levee District."

Laws of 2010, ch. 438, §§ 3 and 4 provides:

"SECTION 3. The Attorney General of the State of Mississippi shall submit this act, immediately upon approval by the Governor, or upon approval by the Legislature subsequent to a veto, to the Attorney General of the United States or to the United States District Court for the District of Columbia in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended.

"SECTION 4. This act shall take effect and be in force from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended."

As of July 20, 2010, preclearance for Laws of 2010, ch. 438, has not been received and a 60-day review period recommenced on that date.

JUDICIAL DECISIONS

1. Validity of statute.
2. Vacancy in office.

1. Validity of statute.

Law 1922, ch 166, providing for nomination of election commissioners of levee district and for filling vacancies held to violate this section. State ex rel. Denman v. Cato, 131 Miss. 719, 95 So. 691 (1923).

2. Vacancy in office.

Vacancy in office of levee commissioner occurs on failure of successor in office to qualify. State ex rel. Jones v. Lyon, 145 Miss. 163, 110 So. 243 (1926).

Failure of person appointed levee commissioner to qualify creates vacancy. State ex rel. Hairston v. Baggett, 145 Miss. 142, 110 So. 240 (1926).

RESEARCH REFERENCES

CJS. C.J.S. Levees and Flood Control § 24.

§ 232. Duties and powers of commissioners

The commissioners of said levee districts shall have supervision of the erection, repair, and maintenance of the levees in their respective districts, and shall have power to cede all their rights of way and levees and the maintenance, management and control thereof to the government of the United States.

SOURCES: Laws, 1900, ch 200.

JUDICIAL DECISIONS

1. Powers and functions of levee board.
2. Liability.

1. Powers and functions of levee board.

Bill requiring a board of levee commissioners to transfer funds to a state budget contingency fund was unconstitutional because it mandated that the board's funds be used for non-levee purposes, which plainly conflicted with the clear language of Miss. Const. Art. XI, § 232 and Miss. Const. Art. XI, § 236 requiring board funds to be used only to erect, maintain, and repair the levee system. State v. Bd. of Levee Comm'rs, 932 So. 2d 12 (Miss. 2006).

The Board of Levee Commissioners had full authority and power to enter into contract whereby cattle were grazed on the levee right of way at proper times and under proper control, so that an adjacent property owner had no right to have the contract set aside. Reynolds v. Refuge Planting Co., 231 Miss. 585, 97 So. 2d 101 (1957).

Express power of Board of Mississippi Levee Commissioners to condemn land for levee purposes held to imply power to acquire by conveyance at least as large an interest in land for levee purposes as it could acquire by condemnation. Nicholson v. Myres, 170 Miss. 441, 154 So. 282 (1934).

State alone could question right of Board of Mississippi Levee Commissioners to hold land for levee purposes in fee, but neither State nor purchaser from heirs of board's grantor could question title of purchaser from board. Nicholson v. Myres, 170 Miss. 441, 154 So. 282 (1934).

Deed conveying land to Board of Mississippi Levee Commissioners "for levee purposes," without more, held not to create "condition subsequent" for breach of which land reverted to grantor's heirs. Nicholson v. Myres, 170 Miss. 441, 154 So. 282 (1934).

Mississippi levee commissioners could condemn land and riparian rights for use of Mississippi Flood Control Commission fleets aiding flood control work. Archer v. Board of Miss. Levee Comm'rs, 158 Miss. 57, 130 So. 55 (1930).

Levee board empowered to build levees was authorized to contract for construction of levee, and, though exceeding powers in amending contract and providing for increased compensation to contractor because of change in economic conditions, acted within general jurisdiction. National Sur. Co. v. Miller, 155 Miss. 115, 124 So. 251 (1929).

2. Liability.

Members of levee board held not individually liable for increased compensation unlawfully paid contractors under amended contract, respecting subject matter within board's general jurisdiction. National Sur. Co. v. Miller, 155 Miss. 115, 124 So. 251 (1929).

RESEARCH REFERENCES

ALR. Constitutionality of levee and flood control acts. 70 A.L.R. 1274.

CJS. C.J.S. Levees and Flood Control §§ 2-16, 36.

§ 233. Appropriation of private property

The levee boards shall have, and are hereby granted, authority and full power to appropriate private property in their respective districts for the purpose of constructing, maintaining, and repairing levees therein; and when any owner of land, or any other person interested therein, shall object to the location or building of the levee thereon, or shall claim compensation for any land that may be taken, or for any damages he may sustain in consequence thereof, the president, or other proper officer or agent of such levee board, or owner of such land, or other person interested therein, may forthwith apply for an assessment of the damages to which said person claiming the same may be entitled; whereupon the proceedings as now provided by law shall be taken, viz.: In the Mississippi levee district, in accordance with the terms and provisions of section three of an act entitled "An act to amend an act to incorporate the board of levee commissioners for Bolivar, Washington, and Issaquena counties, and for other purposes, approved November 27, A. D. 1865, and to revise acts amendatory thereof," approved March 13, A. D. 1884; and in the Yazoo-Mississippi Delta Levee District, in accordance with the terms and provisions of section three of an act entitled "An act to incorporate the board of levee commissioners for the Yazoo-Mississippi Delta, and for other purposes," approved February 28, A. D. 1884, and the amendments thereto; but the legislature shall have full power to alter and amend said several acts, and to provide different manners of procedure.

JUDICIAL DECISIONS

1. Appropriation of property—In general.
2. Easement rights, appropriation of property.
3. Contesting appropriation of property.

1. Appropriation of property—In general.

Levee board's claim of profit a'prendre which amounts to right of complete control of property is actually claim of title of land in fee, such that board must have complied with requirements of adverse possession, however, as board does not claim ownership to subject property, nor does board have statutory power to acquire title to land and therefore could not acquire fee title by adverse possession. McDonald v. Board of Miss. Levee Comm'rs, 646 F. Supp. 449 (N.D. Miss. 1986), aff'd, 832 F.2d 901 (5th Cir. 1987).

The Board of Levee Commissioners for the Yazoo-Mississippi Delta has the statutory right in proper cases to condemn a fee simple title. Board of Levee Comm'rs v. Wineman, 222 So. 2d 683 (Miss. 1969).

The Board of Levee Commissioners for the Yazoo-Mississippi Delta is vested with lawful power to take by eminent domain the complete fee to land for use in connection with a levee construction project, and the determination of the commissioners to take the entire fee, rather than a lesser interest in the land is essentially legislative in character, and courts will interfere with such a determination only in cases of fraud or where it is established that there has been a clear or manifest abuse of power. Bailey v. Board of Levee Comm'rs, 204 So. 2d 468 (Miss. 1967).

The legislature has the power to define the quantum of interest or estate which may be taken, whether an easement or the fee or some estate intermediate these two, but the power is limited to the express terms or clear implication of the statute; if the statute does not define the quantum of the estate to be taken, no greater estate can be taken than the particular public use requires. Nicholson v. Board of Miss. Levee Comm'rs, 203 Miss. 71, 33 So. 2d 604 (1948).

Constitutional prohibition of sale of 16th sections did not deprive legislature of power to appropriate such lands to levee purposes. Washington County v. Board of Miss. Levee Comm'rs, 171 Miss. 80, 156 So. 872 (1934); Nicholson v. Myres, 170 Miss. 441, 154 So. 282 (1934), supra, § 232.

Mississippi levee commissioners could condemn land and riparian rights for use of Mississippi Flood Control Commission fleets aiding flood control work. Archer v. Board of Miss. Levee Comm'rs, 158 Miss. 57, 130 So. 55 (1930).

A person whose land is damaged by the taking of the land of another is entitled to compensation and may maintain proceedings, as if his land had been taken, therefor. Richardson v. Board of Miss. Levee Comm'rs, 77 Miss. 518, 26 So. 963 (1899).

2. Easement rights, appropriation of property.

Levee board's acquisition of easement over property did not grant board control of grazing rights, such that board's grant of grazing rights on property to others without compensation to property owner resulted in unlawful taking. McDonald v. Board of Miss. Levee Comm'rs, 646 F. Supp. 449 (N.D. Miss. 1986), aff'd, 832 F.2d 901 (5th Cir. 1987).

There was no manifest abuse of discretion by the Board of Levee Commissioners of the Yazoo-Mississippi Delta, in its decision to take by eminent domain the fee simple title through certain land rather than an easement, for the purpose of obtaining soil to improve and enlarge the levees and for their reinforcement. Board of Levee Comm'rs v. Wineman, 222 So. 2d 683 (Miss. 1969).

The Levee Board is not the owner of the fee of land acquired, cannot remove the timber therefrom to make way for necessary levy work unless the owner fails or refuses to do so after notice, and has no authority to refuse an offer by the owner to remove the timber after notice. Board of Miss. Levee Comm'rs v. Roberts, 34 So. 2d 679 (Miss. 1948).

The commissioners of the Mississippi Levee District in exercising the power of eminent domain may acquire an easement only, not a fee simple title. Nicholson v. Board of Miss. Levee Comm'rs, 203 Miss. 71, 33 So. 2d 604 (1948).

3. Contesting appropriation of property.

An application for a writ of prohibition may test whether the action of the Board of Levee Commissioners for the Yazoo-Mississippi Delta in taking a complete fee simple title is a clear abuse of power. Board of Levee Comm'rs v. Wineman, 222 So. 2d 683 (Miss. 1969).

The chancery court is not the proper forum in which landowners could restrain a levee board from taking, by eminent domain proceedings, the complete fee simple title to certain real estate for use in connection with a levee construction project, for the landowners had a plain, complete, and adequate remedy at law under the provisions of Code 1942, § 2782. Bailey v. Board of Levee Comm'rs, 204 So. 2d 468 (Miss. 1967).

RESEARCH REFERENCES

ALR. Constitutionality of levee and flood control acts. 70 A.L.R. 1274.

Am Jur. 26 Am. Jur. 2d, Eminent Domain §§ 17, 18, 65.

CJS. C.J.S. Eminent Domain § 46.

C.J.S. Levees and Flood Control §§ 10, 36.

§ 234. Bills changing district boundaries or taxes

No bill changing the boundaries of the district, or affecting the taxation or revenue of the Yazoo-Mississippi Delta Levee District, or the Mississippi levee district, shall be considered by the Legislature unless said bill shall have been published in some newspaper in the county in which is situated the domicile of the board of levee commissioners of the levee district to be affected thereby, for four weeks prior to the introduction thereof into the Legislature; and no such bill shall be considered for final passage by either the Senate or House of representatives, unless the same shall have been referred to, and reported on, by an appropriate committee of each house in which the same may be pending; and no such committee shall consider or report on any such bill unless publication thereof shall have been made as aforesaid.

JUDICIAL DECISIONS

1. Change in mode of administration.
2. Publication of bill.

1. Change in mode of administration.

Chapter 97 Laws 1908 changing the mode of administration of the affairs of the levee board does not violate this section of the Constitution. Bobo v. Board of Levee Comm'rs, 92 Miss. 792, 46 So. 819 (1908).

2. Publication of bill.

Presumption that statute respecting levee district taxation was published as required by Constitution held conclusive. Interstate Trust & Banking Co. v. Dejean Packing Co., 134 So. 847 (Miss. 1931).

The burden is on the attacking party to prove that the change of privilege taxes by the levee commissioners was not published before enactment as required by the Constitution. Postal Tel.-Cable Co. v. Robertson, 116 Miss. 204, 76 So. 560 (1917).

RESEARCH REFERENCES

ALR. Constitutionality of levee and flood control acts. 70 A.L.R. 1274.

CJS. C.J.S. Levees and Flood Control § 30.

§ 235. Report by levee board

Each levee board shall make, at the end of each fiscal year, to the Governor of this state, a report showing the condition of the levees and recommending such additional legislation on the subject of the system as shall be thought necessary, and showing the receipts and expenditures of the board, so that each item, the amount and consideration therefor, shall distinctly appear, together with such other matters as it shall be thought proper to call to the attention of the Legislature.

RESEARCH REFERENCES

CJS. C.J.S. Levees and Flood Control § 24.

§ 236. Levee taxes

The Legislature shall impose for levee purposes, in addition to the levee taxes heretofore levied or authorized by law, a uniform tax of not less than two nor more than five cents an acre per annum upon every acre of land now or hereafter embraced within the limits of either or both of said levee districts. The taxes so derived shall be paid into the treasury of the levee board of the district in which the land charged with the same is situated; and the Legislature, by the act imposing said tax, shall authorize said levee boards to fix the annual rate of taxation per acre within the limits aforesaid, and thereby require said levee boards, whenever a reduction is made by them in their other taxes, to make a proportionate reduction in the acreage tax hereinbefore mentioned; but said acreage tax shall not be reduced below two cents an acre per annum; and all reductions in such taxation shall be uniform in each of said districts; but the rate of taxation need not be the same in both of them; and such specific taxes shall be assessed on the same assessment roll, and collected under the same penalties, as ad valorem taxes for levee purposes, and shall be paid at the same time with the latter. And no levee board shall ever be permitted to buy lands when sold for taxes; but the State shall have a prior lien for taxes due thereto. The Legislature may provide for the discontinuance of the tax on cotton, but not in such manner as to affect outstanding bonds based on it, and on the discontinuance of the tax on cotton, shall impose another tax in lieu thereof; but the Legislature may repeal the acreage tax required to be levied hereby after the first day of January, A. D. 1895.

JUDICIAL DECISIONS

1. Power of legislature.
2. Proportionate reduction in taxes.

1. Power of legislature.

Bill requiring a board of levee commissioners to transfer funds to a state budget contingency fund was unconstitutional because it mandated that the board's funds be used for non-levee purposes, which plainly conflicted with the clear language of Miss. Const. Art. XI, § 232 and Miss. Const. Art. XI, § 236 requiring board funds to be used only to erect, maintain, and repair the levee system. State v. Bd. of Levee Comm'rs, 932 So. 2d 12 (Miss. 2006).

The legislature is not required, if indeed it has the power, to restrict the Mississippi levee district to raising its revenue from an attachment of benefits. Yazoo & Miss. V. Ry. v. Board of Miss. Levee Comm'rs, 188 Miss. 889, 195 So. 704 (1940), appeal dismissed, 311 U.S. 607, 61 S. Ct. 21, 85 L. Ed. 384 (1940).

2. Proportionate reduction in taxes.

Constitutional provision requiring proportionate reduction in taxes in levee district applies only to action of levee boards when reducing acreage taxes. Interstate Trust & Banking Co. v. Dejean Packing Co., 134 So. 847 (Miss. 1931).

Statute reducing levee taxes on railroads not owning in excess of twenty-five miles of railroad in district does not violate constitutional provision respecting proportionate reduction in taxes. Interstate Trust & Banking Co. v. Dejean Packing Co., 134 So. 847 (Miss. 1931).

ATTORNEY GENERAL OPINIONS

The tax on acreage provided for in Section 236 of the Mississippi Constitution is not an ad valorem tax, and the lands of those who qualify for the over-65 or disability exemption located within a levee district are subject to any such acreage tax; the millage or ad valorem tax levied for the benefit of the levee district is an ad valorem tax and lands of those who qualify for the over-65 or disability exemption are exempt therefrom. Sherard, Oct. 13, 2000, A.G. Op. #2000-0614.

RESEARCH REFERENCES

CJS. C.J.S. Levees and Flood Control § 51.

§ 237. System of levee taxation

The legislature shall have full power to provide such system of taxation for said levee districts as it shall, from time to time, deem wise and proper.

JUDICIAL DECISIONS

1. In general.

The legislature is not required, if indeed it has the power, to restrict the Mississippi levee district to raising its revenue from an attachment of benefits. Yazoo & Miss. V. Ry. v. Board of Miss. Levee Comm'rs, 188 Miss. 889, 195 So. 704 (1940), appeal dismissed, 311 U.S. 607, 61 S. Ct. 21, 85 L. Ed. 384 (1940).

Statutes imposing State taxes on building and loan associations held to exclude all other taxes, except real estate taxes and levee district privilege taxes. Clarksdale Bldg. & Loan Ass'n v. Board of Levee Comm'rs, 168 Miss. 326, 150 So. 783 (1933).

RESEARCH REFERENCES

CJS. C.J.S. Levees and Flood Control §§ 52-64.

§ 238. Property exempt from levee taxation

No property situated between the levee and the Mississippi river shall be taxed for levee purposes, nor shall damage be paid to any owner of land so situated because of its being left outside a levee.

JUDICIAL DECISIONS

1. Property.
2. Liability to tax.
3. Right to damages.

1. Property.

The word "property" herein does not cover any species of intangible property. It refers to real estate or property having the fixed location of real estate. Watson v. State, 81 Miss. 700, 33 So. 491 (1903).

"Property" does not apply to license to a dramshop keeper doing business between the levee and the river. Watson v. State, 81 Miss. 700, 33 So. 491 (1903).

2. Liability to tax.

Lands within the Mississippi levee district, as recognized by Const. 1890, § 228 (and not between the levee and the river, exempted by Const. 1890, § 238), are liable to levee taxes, although they be damaged rather than benefited by the construction of the levees. The doctrine of comparative benefits and graduation of servitudes will not be recognized by the courts in respect to levee taxes. Carlisle v. Gunn, 68 Miss. 243, 8 So. 743 (1891).

3. Right to damages.

On a condemnation of land for levee purposes, the owner is not entitled under the section, to damage because a part of his land is left outside of the levee; but is entitled to damage caused by the levee itself, such as the obstruction of drainage on land so situate. Duncan v. Board of Miss. Levee Comm'rs, 74 Miss. 125, 20 So. 838 (1896).

RESEARCH REFERENCES

CJS. C.J.S. Levees and Flood Control §§ 30, 54.

§ 239. Publication of itemized account

The Legislature shall require the levee boards to publish at each of their sessions an itemized account embracing their respective receipts since the prior session, and such appropriations as have been made or ordered by them respectively, in some newspaper or newspapers of the district.

RESEARCH REFERENCES

CJS. C.J.S. Levees and Flood Control § 24.

Article 12.

Franchise.

Sec.	
240.	Elections to be by ballot
241.	Qualifications for electors
241A.	Repealed.
242.	Voter registration
243.	Repealed.
244.	Repealed.
244A.	Additional qualifications for voter registration
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249.	Registration required to vote
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250.	Qualified electors eligible for office
251.	Time of registration
252.	Terms of office; general election dates
253.	Restoration of right of suffrage after crime

§ 240. Elections to be by ballot

All elections by the people shall be by ballot.

SOURCES: 1869 art VII § 1.

RESEARCH REFERENCES

CJS. C.J.S. Elections § 155.

Law Reviews. Mississippi and the Voting Rights Act: 1965-1982. 52 Miss. L. J. 803, December 1982.

Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

§ 241. Qualifications for electors

Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector, except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector.

SOURCES: Laws, 1935, ch 117; Laws, 1950, ch 569; Laws, 1952, ch 441; Laws, 1968, ch 614; Laws, 1972, ch 626, eff November 22, 1972.

Editor's Note — The 1968 amendment to Section 241 of Article 11 of the Constitution of 1890 was proposed by House Concurrent Resolution No. 5 of the 1968 regular session of the Legislature, and upon ratification by the electorate on June 4, 1968, was inserted by a proclamation of the Secretary of State on June 13, 1968, by virtue of the authority vested in him by Section 273 of the Constitution.

The 1972 amendment to Section 241 of Article 11 of the Constitution of 1890 was proposed by Laws, 1972, ch. 626, being Senate Concurrent Resolution No. 502 of the 1972 regular session of the Legislature, and upon ratification by the electorate on November 7, 1972, was inserted by proclamation of the Secretary of State on November 22, 1972.

Cross References — Legislature authorized to prescribe and enforce additional elector qualifications, see Miss. Const. Art. 12, § 244A.

Application of this section to statutory provisions relative to elections, see §§ 23-15-11, 23-15-19, and 23-15-151.

JUDICIAL DECISIONS

1. Constitutionality.
2. Construction and application.
3. Residence.
4. Registration.
5. Payment of taxes.
6. Disqualification for conviction of crime.

1. Constitutionality.

The section is not unconstitutional, even though it was originally enacted with the intent to disfranchise blacks, since it was later amended in a manner not intended to discriminate against blacks. Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998).

Those residence requirements for a qualified elector which require a residence of one year in the state, one year in the county, and 6 months in the precinct, or municipality, clearly violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and those requirements as contained in § 241 of the Mississippi Constitution and Code 1942, § 3235 are clearly not necessary to further a compelling state interest, are violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and are null and void. Graham v. Waller, 343 F. Supp. 1 (S.D. Miss. 1972).

Residence requirements for qualified elector which require a residence of one year in the state, one year in the county, and 6 months in the precinct or municipality clearly violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States; nor do they further a compelling state interest. Graham v. Waller, 343 F. Supp. 1 (S.D. Miss. 1972).

The grant of discretion to certain officers which can be used to the abridgement of the right of colored persons to vote and serve on juries cannot be said to deny the equal protection of the laws when it is not shown that the actual administration is evil, but only that evil is possible. Williams v. Mississippi, 170 U.S. 213, 18 S. Ct. 583, 42 L. Ed. 1012 (1898), aff'g, 73 Miss. 820, 19 So. 826 (1896).

This section does not violate the fourteenth amendment to the United States Constitution because of discrimination on account of race, color, or previous condition of servitude. Williams v. Mississippi, 73 Miss. 820, 20 So. 826 (1896); Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892), overruled on other grounds, O'Neal v. Simpson, 350 So. 2d 998 (Miss. 1997); Dixon v. State, 74 Miss. 271, 20 So. 839 (1896).

2. Construction and application.

This section formerly applied to "every male inhabitant"; and with respect to payment of taxes as a qualification, it designated "all taxes which may have been legally required." State ex rel. Dist. Att'y v. Jones, 177 Miss. 598, 171 So. 678 (1937).

This section and § 242, post, have no application to elections under stock laws; the legislature having plenary power over the subject. Board of Supvrs. v. State, 70 Miss. 769, 12 So. 904 (1893).

3. Residence.

Candidate was a qualified candidate for the position of justice court judge, even though the candidate did not live within the election subdistrict where the candidate wished to run for office. Montgomery v. Lowndes County Democratic Exec. Comm., 969 So. 2d 1 (Miss. 2007).

Town marshal was properly removed from office as result of quo warranto proceedings, where he failed to show residence in town as required by §§ 241, 250 of Constitution, and Code 1942, § 3762. Jones v. State ex rel. McFarland, 207 Miss. 208, 42 So. 2d 123 (1949).

That is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning. Smith v. Deere, 195 Miss. 502, 16 So. 2d 33 (1943).

A domicile continues until another is acquired; before a domicile can be considered lost or changed, a new domicile must be acquired by removal to a new locality with intent to remain there, and the old domicile must be abandoned without intent to return thereto. Smith v. Deere, 195 Miss. 502, 16 So. 2d 33 (1943).

Person, residing in Louisiana when he purchased land in this state, with intention of building his home thereon, more than two years before general election at which his vote was protested, but actual removal to this state was less than two years before such election, was not a qualified elector. Smith v. Deere, 195 Miss. 502, 16 So. 2d 33 (1943).

Successful candidate for county school superintendent, having subsequent to election married man not resident of State and having removed therefrom, was not "inhabitant" of State and therefore disqualified to hold office. Weisinger v. McGehee, 160 Miss. 424, 134 So. 148 (1931).

This section forbids the legislature to add to the qualifications of a municipal voter, residence for one year in the municipality before registering. State v. Kelly, 81 Miss. 1, 32 So. 909 (1902).

4. Registration.

In determining who may vote at a local option election (code 1892 § 1610; code 1906 § 1777), the board of supervisors should reject from the petition the names of persons who are not registered, and who, if registered, have not the other qualifications prescribed by the section. The registration books merely show the possible qualified voters. Ferguson v. Board of Supvrs., 71 Miss. 524, 14 So. 81 (1893).

Payment of taxes is not a condition of registration. Bew v. State, 71 Miss. 1, 13 So. 868 (1893).

This section was necessarily suspended as regards the necessity of registration as a qualification to serve as a juror until the legislature should provide therefor under this section. Nail v. State, 70 Miss. 32, 11 So. 793 (1892).

5. Payment of taxes.

A Negro citizen, originally denied the right to register because of discrimination, subsequently registered pursuant to a federal court order, who would be denied the right to vote in municipal elections for failure to pay poll taxes as required by law and because her registration took place after the legal deadline, has standing to bring a class action on behalf of all the Negro voters similarly situated to enjoin the election, and where the federal district court refused to grant the injunction the cause was remanded with directions to set aside the election which was held, to devise a plan for a new election, set a new cut-off date for registration, and to provide that persons otherwise entitled to vote should not be denied that right for failure to pay poll taxes if required taxes were tendered to tax collector within 45 days prior to election. Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966), cert. denied, 385 U.S. 851, 87 S. Ct. 76, 17 L. Ed. 2d 79 (1966).

To require Negroes desiring to pay poll taxes qualifying them to vote to produce verification of the correctness of their voting precincts, not required of other taxpayers, and to see the sheriff personally when others were not required to do so, constitutes a violation of the Federal Civil Rights Act. United States v. Dogan, 314 F.2d 767 (5th Cir. 1963).

The provision that no person shall be a grand or petit juror unless he is a qualified elector, and the provision setting forth requirements for qualified electors, including payment of poll taxes, except in certain cases, do not contravene the Constitution of the United States and do not operate to discriminate between races. Wheeler v. State, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

Election contestee's plea that votes of named individuals were invalid because they had not paid their poll taxes as required by this section was insufficient, even assuming that failure to have paid their poll taxes disqualified these voters, where the plea failed to set forth for whom these alleged illegal votes were cast, so that trial court committed no error in striking therefrom all of its allegations relative thereto, and contestee would not be permitted to amend his plea where he stated therein that he did not know and could not ascertain for whom these alleged illegal votes were cast until proof thereof was made at the trial. Simmons v. Crisler, 197 Miss. 547, 20 So. 2d 85 (1944).

In quo warranto proceedings to declare member elected to board of commissioners of levee district to be ineligible to hold office, fact that member's property taxes were allegedly delinquent at time of election held not to require member's removal, where before proceeding was brought constitutional amendment was adopted withdrawing previous disqualification of electors because of nonpayment of property tax. State ex rel. Dist. Att'y v. Jones, 177 Miss. 598, 171 So. 678 (1937).

Juror who had paid one-half of his taxes on or before February 1, remaining half not being due under statute of time of murder trial was, as respects payment of taxes, qualified juror. Myers v. State, 167 Miss. 76, 147 So. 308 (1933).

In quo warranto proceeding, in determining whether person holding office had paid taxes, assessment roll was only prima facie evidence of ownership of property assessed. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

In quo warranto proceeding challenging right of defendant to hold office, evidence offered to show delinquency in payment of taxes made prima facie case, requiring answer. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

Payment of taxes by check on February 1, was sufficient payment within this section. Tonnar v. Wade, 153 Miss. 722, 121 So. 156 (1929).

Legatees and distributees are not legally required to pay taxes on lands of estate being administered in order to qualify as electors. Tonnar v. Wade, 153 Miss. 722, 121 So. 156 (1929).

One who had not, at the time of election, paid taxes as required by the section is not eligible to office, and a mistaken belief, however honestly entertained, that he has paid in due time "all taxes legally required of him," will not relieve the delinquent. Roane v. Matthews, 75 Miss. 94, 21 So. 665 (1897).

Since qualified voters alone are qualified petitioners, the section requires that the taxes of petitioners for license to retail intoxicating liquors must have been paid for two years preceding the year in which they sign. Ferguson v. Brown, 75 Miss. 214, 21 So. 603 (1897).

Payment of taxes is not a condition of registration. Bew v. State, 71 Miss. 1, 13 So. 868 (1893).

This section was suspended by § 276, post, so far as concerns the payment of a poll tax as a qualification for a juror

(§ 264, post); and was further suspended of necessity so far as registration was concerned as such qualification until the legislature provided therefor. Nail v. State, 70 Miss. 32, 11 So. 793 (1892).

6. Disqualification for conviction of crime.

Felons' action, claiming that the state violated the Fourteenth Amendment and the National Voter Registration Act when it denied them the right to vote in a presidential election, was properly dismissed because the final clause of Miss. Const. Art. 12, § 241 was not an exception to the preceding bar on felon voting; there was no principled reason that the presidential election clause would grant only felons the right to vote in presidential elections while leaving the other qualifications of Miss. Const. Art. 12, § 241 intact, and accepting the state's longstanding, commonsense interpretation of the provision both avoided the constitutional issue and demonstrated respect for the state's interpretation of its own laws. Young v. Hosemann, 598 F.3d 184 (5th Cir. 2010).

The final clause of Miss. Const. Art. 12, § 241 is not an exception to the preceding bar on voting by convicted felons, but rather, means that for presidential elections, a voter must meet the requirements established by Congress in addition to being otherwise a qualified elector under § 241. There is no principled reason that the presidential election clause in § 241 would grant only felons the right to vote in presidential elections while leaving the other qualifications of § 241 intact. Young v. Hosemann, 598 F.3d 184 (5th Cir. 2010).

This section disfranchises those convicted of armed robbery, even though such crime is not specifically enumerated in the section, since such crime is the highest category of theft, which is so enumerated. Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998).

Only conviction of crimes committed under jurisdiction of State disqualify one from holding office. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

Evidence regarding defendant's plea of guilty to indictment for perjury, in Federal Court, was inadmissible on issue of defendant's qualification to hold county office. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

A person convicted in the Federal court for Mississippi of embezzlement of federal funds and pardoned by the President of the United States before the expiration of his term of imprisonment was entitled to be registered as a voter of this state. Jones v. Board of Registrars, 56 Miss. 766, 31 Am. R. 385 (1879).

ATTORNEY GENERAL OPINIONS

A conviction for timber larceny is a disqualifying crime pursuant to Section 241 of the Mississippi Constitution. Vowell, April 30, 1999, A.G. Op. #99-0186.

A conviction for prescription forgery does not disqualify one as a registered voter. Salazar, April 7, 2000, A.G. Op. #2000-0169.

The name of one convicted of the crime of receiving stolen property must be removed from the voter rolls. Dill, Apr. 1, 2005, A.G. Op. 05-0145.

Only convictions of disenfranchising crimes committed under the jurisdiction of this State affect one's right to vote; therefore, convictions in federal courts are not disenfranchising. Wiggins, Apr. 26, 2005, A.G. Op. 05-0193.

Since one convicted of the crime of looting may or may not have taken property, looting does not necessarily constitute theft and is not a disenfranchising crime. Loftin, Sept. 6, 2006, A.G. Op. 06-0386.

RESEARCH REFERENCES

ALR. Constitutionality of statutes in relation to registration before voting at election or primary. 91 A.L.R. 349.

Constitutionality, construction, and application of constitutional or statutory provisions which make payment of poll tax condition of right to vote. 139 A.L.R. 561.

Governing law as to existence or character of offense for which one has been convicted in a Federal court, or court of another state, as bearing upon disqualification to vote, hold office, practice profession, sit on jury, or the like. 175 A.L.R. 784.

Elections: effect of conviction under federal law, or law of another state or country, on right to vote or hold public office. 39 A.L.R.3d 303.

Residence of students for voting purposes. 44 A.L.R.3d 797.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period. 65 A.L.R.3d 1048.

Voting rights of persons mentally incapacitated. 80 A.L.R.3d 1116.

Validity of college or university regulation of political or voter registration activity in student housing facilities. 39 A.L.R.4th 1137.

Validity, construction, and application of state criminal disenfranchisement provisions. 10 A.L.R.6th 31.

Am Jur. 25 Am. Jur. 2d, Elections §§ 51 et seq.

CJS. C.J.S. Elections §§ 1 to 13.

Lawyers' Edition. Validity, under Federal Constitution, of state residency requirements for voting in elections. 31 L. Ed. 2d 861.

Law Reviews. Mississippi and the Voting Rights Act: 1965-1982. 52 Miss. L. J. 803, December 1982.

§ 241A. Repealed

Repealed by Laws, 1965 Ex Sess, ch. 40.

Editor's Note — Former Section 241A read as follows:

"Section 241A. In addition to all other qualifications required of a person to be entitled to register for the purpose of becoming a qualified elector, such person shall be of good moral character.

"The Legislature shall have the power to enforce the provisions of this section by appropriate legislation."

Former section 241A was proposed as an additional section to Article 12 of the Constitution by Laws 1960, Ch 550, and, upon ratification by the electorate on Nov. 8, 1960, was inserted in the Constitution by proclamation of the Secretary of State on Nov. 23, 1960. The proposal for the repeal of the former section was made by Laws 1965 Ex Sess, Ch 40, and upon the repeal being ratified by the electorate on the third Tuesday of August, 1965, the Secretary of State, pursuant to authority vested in him by Section 273 of the Constitution, issued his proclamation setting out the fact that former section 241A stood repealed.

§ 242. Voter registration

The Legislature shall provide by law for the registration of all persons entitled to vote at any election and shall prescribe an oath or affirmation as to the truthfulness of the statements of every applicant concerning his or her qualifications to be registered to vote. Any wilful and corrupt false statement in said affidavit shall be perjury.

SOURCES: 1869 art VII § 3; Laws, 1965 Ex Sess, ch 40, eff August 31, 1965.

Editor's Note — The 1965 amendment to Section 242 of the Constitution to provide that the legislature shall prescribe the form of oath to be taken by persons offering to register to vote was proposed by Laws 1965 Ex Sess, Ch 40, and upon ratification by the electorate on the third Tuesday in August, 1965, was inserted by proclamation of the

Secretary of State on August 31, 1965, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

Cross References — Election crimes generally, see § 97-13-1 et seq.

JUDICIAL DECISIONS

1. Constitutionality.
2. Construction and application.
3. Residence.

1. Constitutionality.

The section is not obnoxious to the fourteenth amendment to the United States Constitution, because of discrimination on account of race, color, or previous condition of servitude. Williams v. Mississippi, 73 Miss. 820, 20 So. 826 (1896); Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892), overruled on other grounds, O'Neal v. Simpson, 350 So. 2d 998 (Miss. 1997); Dixon v. State, 74 Miss. 271, 20 So. 839 (1896).

2. Construction and application.

Both §§ 241 and 242 apply to municipal as well as state and county elections. State v. Kelly, 81 Miss. 1, 32 So. 909 (1902).

Payment of taxes is not a condition of registration. Bew v. State, 71 Miss. 1, 13 So. 868 (1893).

This section and § 241 have no application to elections under stock laws, the legislature having plenary power over the subject. Board of Supvrs. v. State, 70 Miss. 769, 12 So. 904 (1893).

3. Residence.

This section contains the same inhibition as Section 241, forbidding the legislature to add to the qualifications of a municipal voter residence in the municipality for one year before registering. State v. Kelly, 81 Miss. 1, 32 So. 909 (1902).

RESEARCH REFERENCES

ALR. Residence of students for voting purposes. 44 A.L.R.3d 797.

Am Jur. 25 Am. Jur. 2d, Elections §§ 92 et seq.

CJS. C.J.S. Elections §§ 13, 36 to 52.

Lawyers' Edition. Racial discrimination in voting, and validity and construction of remedial legislation. 27 L. Ed. 2d 885.

Validity, under Federal Constitution, of state residency requirements for voting in elections. 31 L. Ed. 2d 861.

Law Reviews. Mississippi and the Voting Rights Act: 1965-1982. 52 Miss. L. J. 803, December 1982.

§ 243. Repealed

Repealed by Laws, 1975, ch. 524, eff December 8, 1975.
[Laws, 1922, ch. 156]

Editor's Note — Former Section 243 provided for a uniform poll tax to be used solely in aid of common schools.

The repeal of Section 243 of Article 12 of the Constitution of 1890 was proposed by Laws, 1975, Ch. 524 (House Concurrent Resolution No. 46), and upon ratification by the electorate on November 4, 1975, was deleted from the Constitution by proclamation of the Secretary of State on December 8, 1975.

§ 244. Repealed

Repealed by Laws, 1975, ch. 523, eff December 8, 1975.
[Laws, 1965, Ex. Sess. ch. 40]

Editor's Note — Former Section 244 provided that, in addition to any other qualifications, every elector must be able to read and write.

An amendment to Section 244 of the Constitution, which eliminated and amended certain qualifications for voting, was proposed by Laws 1965 Ex Sess, Ch 40, and upon ratification by the electorate on the third Tuesday in August, 1965, was inserted by proclamation of the Secretary of State on August 31, 1965, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

The repeal of Section 244 of Article 12 of the Constitution of 1890 was proposed by Laws, 1975, Ch. 523 (House Concurrent Resolution No. 45), and upon ratification by the electorate on November 4, 1975, was deleted from the Constitution by proclamation of the Secretary of State on December 8, 1975.

§ 244A. Additional qualifications for voter registration

The Legislature shall have the power to prescribe and enforce by appropriate legislation qualifications to be required of persons to vote and to register to vote in addition to those set forth in this Constitution.

SOURCES: Laws, 1965 Ex Sess, ch 40, eff. August 31, 1965.

Editor's Note — The amendment to Article 12 of the Constitution, adding Section 244A, to confer upon the legislature power to prescribe and enforce additional qualifications to be required of persons to register and vote in addition to those set forth in the Constitution, was proposed by Laws 1965 Ex Sess, ch 40, and upon ratification by the electorate on the third Tuesday in August, 1965, was inserted by proclamation of the Secretary of State on August 31, 1965, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

JUDICIAL DECISIONS

1. In general.

The trial court improperly denied relief in a suit to enjoin the use of certain county election districts on the ground that they perpetuated dilution of black voting strength where the unresponsiveness of officials to the needs of black citizens and the residual effects of past discrimination were evidenced by, inter alia, the poll tax, the literacy requirement, the property requirement for county officers, and the electoral mechanism of majority vote requirements. United States v. Board of Supvrs., 571 F.2d 951 (5th Cir. 1978).

RESEARCH REFERENCES

CJS. C.J.S. Elections §§ 13, 15 to 34.

Lawyers' Edition. Racial discrimination in voting, and validity and construction of remedial legislation. 27 L. Ed. 2d 885.

Cross References — Elector qualifications, including minimum age, citizenship, residency, and felony conviction status, see Miss. Const. Art. 12, § 241.

Law Reviews. Mississippi and the Voting Rights Act: 1965-1982. 52 Miss. L. J. 803, December 1982.

§ 245. Elector qualifications in municipal elections

Electors in municipal elections shall possess all the qualifications herein prescribed, and such additional qualifications as may be provided by law.

JUDICIAL DECISIONS

1. Construction and application.

This section authorizes the legislature to provide that voters in a municipal election should vote in the wards of their residence. State v. Kelly, 81 Miss. 1, 32 So. 909 (1902).

The section makes the provisions of § 241 applicable to municipal electors. Roane v. Matthews, 75 Miss. 94, 21 So. 665 (1897).

RESEARCH REFERENCES

CJS. C.J.S. Elections §§ 15 to 34.

Law Reviews. Mississippi and the Voting Rights Act: 1965-1982. 52 Miss. L. J. 803, December 1982.

§ 246. Regulation of elections

Prior to the first day of January, A.D. 1896, the elections by the people in this state shall be regulated by an ordinance of this convention.

§ 247. Securing fairness in party primary elections and conventions

The Legislature shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates.

JUDICIAL DECISIONS

1. In general.

This section authorizes nomination of public officers by primary election exclusively. McInnis v. Thames, 80 Miss. 617, 32 So. 286 (1902).

RESEARCH REFERENCES

ALR. Constitutionality of corrupt practices Acts. 69 A.L.R. 377.

Am Jur. 25 Am. Jur. 2d, Elections §§ 131 et seq.

§ 248. Remedies for illegal or improper registration

Suitable remedies by appeal or otherwise shall be provided by law, to correct illegal or improper registration and to secure the elective franchise to those who may be illegally or improperly denied the same.

Cross References — Registration and elections, see MS Const Art. 12, § 251.

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. 2d, Elections §§ 112, 113.

CJS. C.J.S. Elections § 48.

§ 249. Registration required to vote

No one shall be allowed to vote for members of the Legislature or other officers who has not been duly registered under the Constitution and laws of this State, by an officer of this State, legally authorized to register the voters thereof. And registration under the Constitution and laws of this state by the proper officers of this state is hereby declared to be an essential and necessary qualification to vote at any and all elections.

Cross References — Qualified elector, see Miss. Const. Art. 12, § 241.

JUDICIAL DECISIONS

1. In general.

Payment of taxes is not a condition of registration. Bew v. State, 71 Miss. 1, 13 So. 868 (1893).

An elector must be registered. Bew v. State, 71 Miss. 1, 13 So. 868 (1893).

RESEARCH REFERENCES

CJS. C.J.S. Elections §§ 36, 38.

§ 249A. Government issued photo identification required to vote.

(1)(a) Except as provided in subsection (2), A qualified elector who votes in a primary or general election, either in person at the polls or in person in the office of the circuit clerk, shall present a government issued photo identification before being allowed to vote.

(b) A qualified elector who does not have a government issued photo identification and who cannot afford such identification may obtain a state issued photo identification free of charge from the Mississippi Department of Public Safety. The elector must show appropriate identifying documents required by the Mississippi Department of Public Safety as provided by law.

(2)(a) An elector living and voting in a state-licensed care facility shall not be required to show a government issued photo identification before being allowed to vote.

(b) An elector who has a religious objection to being photographed will be allowed to cast an affidavit ballot, and the elector, within five days after the election, shall execute an affidavit in the appropriate circuit clerk's office affirming that the exemption applies.

(c) An elector who has a government issued photo identification, but is unable to present that identification when voting, shall file an affidavit ballot, and the elector, within five days after the election, shall present the government issued photo identification to the appropriate circuit clerk.

(3) This provision shall not be construed to require photo identification to register to vote. This provision only requires government issued photo identification for casting a ballot.

(4) The Legislature shall enact legislation to implement the provisions of this section of the constitution.

Editor's Note — During the November 8, 2011, election, a citizen-initiated Constitutional amendment, Initiative # 27 - Voter Identification, was approved by a majority of the electors of Mississippi. The Governor, by Executive Order No. 1074, dated January 9, 2012, directed the Secretary of State to insert Initiative # 27 in the Mississippi Constitution as Article 12, § 249A. The Secretary of State certified the November 8, 2011, election on December 8, 2011.

The United States Supreme Court, in the case of Shelby County v. Holder (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Because of the Shelby County decision, the United States Attorney General is not making any determinations under Section 5 on voting or election changes made by states. The Supreme Court did not strike down Section 5, so it is still in effect. Section 249A was submitted to the United States Attorney General before the Shelby County decision was rendered. In a letter dated August 5, 2013, the United States Attorney General responded that he is not making determinations on the merits of any measure that is submitted under Section 5, so Section 249A became effective on the date of the response letter from the United States Attorney General, August 5, 2013.

Executive Order No. 1074, signed by Governor Haley Barbour on January 9, 2012, provides:

"To the Secretary of State

"State of Mississippi:

"WHEREAS, Three (3) Constitutional Initiatives proposed Amendments to the Mississippi Constitution and met the requirements of the Mississippi Constitution and the laws of this State to be placed on the November 8, 2011 ballot, as follows: Initiative # 26 - Definition of "Person"; Initiative # 27 - Voter Identification; and Initiative # 31 - Eminent Domain; and

"WHEREAS, The Constitution requires that the Initiatives "receive a majority of the votes thereon and not less than forty percent (40%) of the total votes cast at the election at which the measure was submitted to be approved." Miss. Const. Art. 15, § 273(7).

"WHEREAS, Initiative # 27 and Initiative # 31 were approved by the electors of Mississippi in accordance with Miss. Const. Art. 15, § 273(7); and

"WHEREAS, Art. 15, § 273 further provides that initiatives approved by the electors take effect thirty (30) days from the date of the official declaration of the vote by the Secretary of State. Miss. Const. Art. 15, § 273(10). The Secretary of State certified the November 8, 2011, election results on December 8, 2011; and

"WHEREAS, Unlike Initiative # 26, which failed to pass the electorate, Initiative # 27 and Initiative # 31 were both silent as to where the proposed Amendments to the Mississippi Constitution would be placed; furthermore, the Mississippi Constitution, as well as statutory law, is silent as to who has the administrative and/or ministerial authority to insert the initiatives of the people of Mississippi, passed by the electorate, as part of the Constitution; and

"WHEREAS, Article 5, § 123 of the Mississippi Constitution grants the Governor of the State of Mississippi the authority to "see that the laws are faithfully executed"; and

"WHEREAS, Section 7-1-5 of the Mississippi Code Annotated sets forth the powers of the Governor of the State of Mississippi, including, but not limited to, serving as the supreme executive officer of the State, seeing that the laws are faithfully executed, and supervising the official conduct of executive and ministerial officers; and

"WHEREAS, in the absence of constitutional and/or statutory provision providing otherwise, the Governor has the authority to provide direction for carrying out all lawful administrative and ministerial functions of state government; and

"NOW, THEREFORE, I, Haley Barbour, Governor of the State of Mississippi, under, and by virtue of the authority vested in me by the Constitution and Laws of this State, do hereby direct the Secretary of State C. Delbert Hosemann, Jr., as follows:

"To insert Initiative # 31 in the Mississippi Constitution as Art. 3, § 17A, to follow Art. 3, § 17, where the constitutional requirements for the taking of property for public use are located;

"To insert Initiative # 27 in the Mississippi Constitution as Art. 12, § 249A, to follow Art. 12, § 249, where the constitutional requirements to vote in the State of Mississippi are located;

"I do authorize and direct you, upon receipt of this Executive Order, to take notice and be governed accordingly.

"IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed.

"DONE at the Capitol, in the City of Jackson, this the 9th day of January, in the year of our Lord two thousand and twelve, and of the two hundred and thirty-sixth year of the United States of America."

§ 250. Qualified electors eligible for office

All qualified electors and no others shall be eligible to office, except as otherwise provided in this Constitution; provided, however, that as to an office where no other qualification than that of being a qualified elector is provided by this Constitution, the Legislature may, by law, fix additional qualifications for such office.

SOURCES: Laws, 1962, ch. 640, eff November 16, 1962.

Editor's Note — The 1962 amendment to Section 250 of the Constitution was proposed by Laws 1962, ch 640, and, upon ratification by the electorate at an election held on the first Tuesday after the first Monday in November, 1962, was inserted by Proclamation of the Secretary of State on November 16, 1962, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

Cross References — Impeachment, see Miss. Const. Art. 4, § 50 et seq.

Qualified electors, see Miss. Const. Art. 12, § 241.

Qualifications of officers, see Miss. Const. Art. 14, §§ 265 and 266.

Public officers generally, see § 25-1-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Power of legislature to prescribe additional qualifications.
3. Offices subject to constitutional qualifications.
4. Time of qualification—In general.
5. Payment of taxes, time of qualification.
6. Change in residence.
7. Write-in ballots.
8. Evidence of qualification.
9. Removal from office.

1. Construction and application.

Only conviction of crimes committed under jurisdiction of the state disqualify one from holding office. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

As to meeting qualification requirements with respect to payment of taxes by check, see Tonnar v. Wade, 153 Miss. 722, 121 So. 156 (1929); Wylie v. Cade, 174 Miss. 426, 164 So. 579 (1935), supra 1.

A person who fails to register is not eligible to office. Andrews v. State, 69 Miss. 740, 13 So. 853 (1892).

2. Power of legislature to prescribe additional qualifications.

Since Mississippi Const. § 204 otherwise provides for the filling of the office of county superintendent of education, as well as the abolition thereof, and vests in the legislature power to prescribe qualifications, compensation and duties, this section does not affect the legislature's power to prescribe qualifications for the office. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764 (1957), error overruled 231 Miss. 529, 96 So. 2d 828.

Chapter 222 of the Laws of 1938, in so far as it required school trustees to be patrons of the school of which they were trustees, was violative of this section; but the unconstitutionality of that particular provision did not affect the balance of the statute. Lacey v. State ex rel. Morgan, 187 Miss. 292, 192 So. 576 (1940).

Constitutional provisions as to qualification of officers forbids legislature to prescribe additional qualifications. McCool v. State, 149 Miss. 82, 115 So. 121 (1928).

Part of code 1906 § 3430 that "in case of an increase of indebtedness not so authorized, the mayor and aldermen shall not succeed themselves or each other," is unconstitutional. McCool v. State, 149 Miss. 82, 115 So. 121 (1928).

3. Offices subject to constitutional qualifications.

Candidate was a qualified candidate for the position of justice court judge, even though the candidate did not live within the election subdistrict where the candidate wished to run for office. Montgomery v. Lowndes County Democratic Exec. Comm., 969 So. 2d 1 (Miss. 2007).

Municipal and statutory offices created by legislature are subject to constitutional qualifications. McCool v. State, 149 Miss. 82, 115 So. 121 (1928).

A person is not eligible to a municipal office (§§ 241, 245) who is not qualified (state and county) elector. Roane v. Matthews, 75 Miss. 94, 21 So. 665 (1897).

4. Time of qualification—In general.

Qualifications prescribed for holding office relate to time of election or selection. State ex rel. Plunkett v. Miller, 162 Miss. 149, 137 So. 737 (1931).

A person who is not a qualified elector at the time of his election cannot maintain a quo warranto to obtain possession of an office. Andrews v. State, 69 Miss. 740, 13 So. 853 (1892).

5. Payment of taxes, time of qualification.

Where taxpayer's check is unconditionally delivered on or before February 1 to tax collector who accepts check which in due course is deposited with reasonable promptness and paid by drawee bank on its first presentation, payment will relate back to date of delivery of check to tax collector so as to qualify taxpayer as elector. Wylie v. Cade, 174 Miss. 426, 164 So. 579 (1935).

Where taxpayer delivered check to tax collector on January 31, 1934, with request to hold check until March and check was not presented for payment until May 7, 1934, but tax receipt issued April 30, 1934, was dated February 1, 1934, taxpayer held not qualified elector and hence not eligible for election to office of alderman in December, 1934. Wylie v. Cade, 174 Miss. 426, 164 So. 579 (1935).

Failure of public officer to pay taxes after election to office does not create "vacancy," nor does officer as result thereof lose right to hold office, where, at time of election, he was qualified elector. State ex rel. Plunkett v. Miller, 162 Miss. 149, 137 So. 737 (1931).

Payment of taxes by check on February 1 was sufficient payment to qualify for holding public office, although check was not cashed until later. Tonnar v. Wade, 153 Miss. 722, 121 So. 156 (1929).

6. Change in residence.

Successful candidate for county school superintendent, having subsequent to election married man not resident of State and having removed therefrom, was not "inhabitant" of State and, therefore, disqualified to hold office. Weisinger v. McGehee, 160 Miss. 424, 134 So. 148 (1931).

7. Write-in ballots.

Marking of ballots by writing in name of ineligible candidate held not "distinguishing mark" which voided entire ballot, where voters made honest effort to vote for such candidate, and not to indicate who voted ballots; hence ballots were improperly rejected as to candidates properly on ballots. Wylie v. Cade, 174 Miss. 426, 164 So. 579 (1935).

Statute providing for the writing in of name of candidate of voter's choice only in the event of death of candidate whose name is printed on ballot, did not violate this section, since it is within the authority of the legislature to make reasonable regulations for the conduct of elections, and to prescribe reasonable conditions under which electors may vote. McKenzie v. Boykin, 111 Miss. 256, 71 So. 382 (1916).

As to the right of electors to write in the name of a candidate, who was the party nominee, but whose name was omitted from the ballot, see State ex rel. Att'y Gen. v. Ratliff, 108 Miss. 242, 66 So. 538 (1914).

Chapter 120 Laws 1912, with reference to the manner of holding an election in cities having a commission form of government, providing for placing of candidates on official ballots by nomination of a party primary, does not thereby restrict the constitutional right of a voter to vote for whomsoever he please, and, therefore, is not violative of this section. Mayor of City of Jackson v. State, 102 Miss. 663, 59 So. 873, Am. Ann. Cas. 1915A,1213 (1912).

8. Evidence of qualification.

Evidence regarding defendant's plea of guilty to indictment for perjury, in Federal court, was inadmissible on issue of defendant's qualification to hold county office. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

In quo warranto proceeding, in determining whether person holding office had paid taxes, assessment roll was only prima facie evidence of the ownership of the property assessed. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

In quo warranto proceeding challenging right of defendant to hold office, evidence offered to show delinquency in payment of taxes made prima facie case, requiring answer. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

9. Removal from office.

Town marshal was properly removed from office as result of quo warranto proceedings, where he failed to show residence in town as required by §§ 241, 250 of Constitution, and § 3762 Code 1942. Jones v. State ex rel. McFarland, 207 Miss. 208, 42 So. 2d 123 (1949).

ATTORNEY GENERAL OPINIONS

A justice court judge must generally reside in the district he or she intends to serve, but in the Tenth Circuit Court District of Mississippi, a justice court judge is only required to be a qualified elector of the county in which he or she intends to serve. Williamson, Aug. 29, 1997, A.G. Op. 97-0503.

Proposed amendment to municipal charter regarding residency requirements for candidates for office would not be consistent with state laws or the state Constitution. McFatter, May 30, 2003, A.G. Op. 03-0247.

In order to be a qualified elector of a supervisor district one must reside within the boundaries of that district; therefore, one may not be certified as a candidate for supervisor of a district in which he does not reside. McMullin, Apr. 18, 2003, A.G. Op. #03-0171.

RESEARCH REFERENCES

ALR. Nonregistration as affecting one's qualification to hold public office. 128 A.L.R. 1117.

CJS. C.J.S. Officers and Public Employees §§ 21, 22.

§ 251. Time of registration

Electors shall not be registered within four months next before any election at which they may offer to vote; but appeals may be heard and determined and revision take place at any time prior to the election; and no person who, in respect to age and residence, would become entitled to vote within the said four months, shall be excluded from registration on account of his want of qualification at the time of registration.

Cross References — Remedies to secure franchise, see MS Const Art. 12, § 248.

JUDICIAL DECISIONS

1. Constitutionality.
2. Construction and application.

1. Constitutionality.

The provisions of § 251 of the Mississippi Constitution and of Code § 3235 that prescribe a period of 4 months' registration for qualified electors before voting in elections are unconstitutional, void, and of no effect, as contrary to the equal protection clause of the Fourteenth Amendment of the United States Constitution. Ferguson v. Williams, 343 F. Supp. 654 (N.D. Miss. 1972).

2. Construction and application.

This section applies to all elections. One who will have resided in a municipality one year before the election is entitled to register and vote, if he applies to register four months before the election. State v. Kelly, 81 Miss. 1, 32 So. 909 (1902).

The section has reference to elections contemplated by the Constitution and does not apply to local option elections under (code 1892 § 1610; code 1906 § 1777) the statute. Bew v. State, 71 Miss. 1, 13 So. 868 (1893).

An elector may register at any time, but cannot vote until he has been registered four months. Bew v. State, 71 Miss. 1, 13 So. 868 (1893).

RESEARCH REFERENCES

CJS. C.J.S. Elections § 39.

§ 252. Terms of office; general election dates

The term of office of all elective officers under this Constitution shall be four years, except as otherwise provided herein. A general election for all elective officers shall be held on the Tuesday next after the first Monday of November, A.D. 1895, and every four years thereafter; Provided, The Legislature may change the day and date of general elections to any day and date in October, November or December.

Cross References — General elections, see Miss. Const. Art. 4, § 102.

Term of office, see Miss. Const. Art. 5, § 136.

Election of governor, see Miss. Const. Art. 5, § 140.
Public officers generally, see § 25-1-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. De facto officers.

1. In general.

The section relates only to state and county officers. State v. Williams, 49 Miss. 640 (1873).

The terms of elective officers are fixed, commencing and ending after general elections. Smith v. Halfacre, 7 Miss. (6 Howard) 582 (1842); Thornton v. Boyd, 25 Miss. 598 (1852).

2. De facto officers.

If highway commissioners are not de jure officers because not elected at time required by Constitution, they are de facto officers whose acts are valid so long as not challenged in legal manner. Trahan v. State Hwy. Comm'n, 169 Miss. 732, 151 So. 178 (1933).

RESEARCH REFERENCES

ALR. Power of Legislature to extend term of public office. 97 A.L.R. 1428.

CJS. C.J.S. Officers and Public Employees §§ 66 to 70.

§ 253. Restoration of right of suffrage after crime

The Legislature may, by a two-thirds vote of both houses, of all members elected, restore the right of suffrage to any person disqualified by reason of crime; but the reasons therefor shall be spread upon the journals, and the vote shall be by yeas and nays.

Cross References — Qualified electors, see MS Const Art. 12, § 241.

RESEARCH REFERENCES

ALR. Validity, construction, and application of state criminal disenfranchisement provisions. 10 A.L.R.6th 31.

CJS. C.J.S. Elections § 33.

ARTICLE 13.

APPORTIONMENT.

SEC.
254. Senatorial and representative districts
255. Repealed.
256. Repealed.

§ 254. Senatorial and representative districts

The Legislature shall at its regular session in the second year following the 1980 decennial census and every ten (10) years thereafter, and may, at any other time, by joint resolution, by majority vote of all members of each house, apportion the state in accordance with the Constitution of the state and of the United States into consecutively numbered senatorial and representative districts of contiguous territory. The Senate shall consist of not more than fifty-two (52) Senators, and the House of Representatives shall consist of not more than one hundred twenty-two (122) Representatives, the number of members of each house to be determined by the Legislature. Should the Legislature adjourn without apportioning itself as required hereby, the Governor by proclamation shall reconvene the Legislature within thirty (30) days in special apportionment session which shall not exceed thirty (30) consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the Legislature to adopt a joint resolution of apportionment. Should a special apportionment session not adopt a joint resolution of apportionment as required hereby, a five-member commission consisting of the Chief Justice of the Supreme Court as chairman, the Attorney General, the Secretary of State, the speaker of the House of Representatives and the president pro tempore of the Senate shall immediately convene and within one hundred eighty (180) days of the adjournment of such special apportionment session apportion the Legislature, which apportionment shall be final upon filing with the office of the Secretary of State. Each apportionment shall be effective for the next regularly scheduled elections of members of the Legislature.

SOURCES: Laws, 1962, 2d Ex. Sess., ch. 57, eff February 13, 1963; Laws, 1977, 2d Ex Sess, ch. 27, eff November 30, 1979.

Editor's Note — Chapter 18, Laws of 1962 1st Extraordinary Session, which proposed the repeal of this section of the constitution, was not approved by the electorate.

The 1962 amendment to Section 254 of the Constitution was proposed by Laws, 1962, 2d Ex Sess ch 57, and, upon ratification by the electorate on Feb. 15, 1963, was inserted by a proclamation of the Secretary of State on Feb. 13, 1963, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

Laws, 1962, 2d Ex Sess, ch 57, also provides as follows: "Be it further resolved, that it is the intent of this Resolution to provide by constitutional amendment for the apportionment of Senators and Representatives to be elected in 1963 to take office the first Tuesday after the first Monday of January, 1964, and thereafter, and nothing contained herein shall serve to or be construed to shorten or otherwise affect the term of office of any Senator or Representative presently serving in that capacity. The constitutional amendments submitted herewith shall, if approved, be self-executing for the purpose of providing for senatorial and legislative representation to be elected in 1963 in the event implementing legislation is not enacted and approved."

In a 1966 decision of a three-judge federal court, Connor v. Johnson, 256 F Supp 962, supp op 265 F Supp 492, the provisions of this section, as amended, were declared to be unconstitutional and invalid for all future elections of members of the House of Representatives.

The 1977 amendment to Section 254 of the Mississippi Constitution of 1890 was proposed by Laws, 1977, 2d Extra Session ch. 27 (Senate Concurrent Resolution No. 507), and upon ratification by the electorate on November 6, 1979, was inserted by the Secretary of State on November 30, 1979.

See Editor's Notes in §§ 5-1-1 and 5-1-3 for 2012 redistricting of House of Representatives and Senate.

Cross References — Apportionment of representatives, see § 5-1-1.

Legislature generally, see § 5-1-1 et seq.

Apportionment of senators, see § 5-1-3.
Standing joint legislative committee on reapportionment, see § 5-3-91 et seq.

JUDICIAL DECISIONS

1. Validity—In general.
2. Federal law, validity.
3. Court-ordered reapportionment.
4. Mandamus.

1. Validity—In general.

All of the provisions of §§ 254 [amended] and 255 [repealed] of the Mississippi Constitution of 1890, as amended, and as they existed prior to amendment, and Code 1942, §§ 3326 and 3327, as amended, have been declared to be unconstitutional and invalid for all future elections of members of the House of Representatives and the Senate of the Mississippi Legislature, under the decision in Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691, which enunciated the "one person-one vote" rule and required legislative reapportionment where it was necessary to secure compliance with the rule. Connor v. Johnson, 256 F. Supp. 962 (S.D. Miss. 1966), supplemented, 265 F. Supp. 492 (1967).

2. Federal law, validity.

Multimember state legislative districts impaired ability of black voters to elect representatives in violation of § 2 of Voting Rights Act (42 USCS § 1973), where state had diluted black voting strength by enacting redistricting plan for state legislature which included multimember districts having substantial majorities of white voters in areas where there were sufficient concentrations of black voters to form single-member districts with black majorities. Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986).

3. Court-ordered reapportionment.

Given the limit of 122 representatives in the state legislature, the fact that the population norm for a House seat is 18,171 (based on Mississippi's 1970 population of 2,216,912), and the fact that 38 of Mississippi's 82 counties have less than 18,171 people, the standard of one representative per county would have to be abandoned by the district court carrying out reapportionment; to follow the standard would be to impair the right of each citizen to cast an adequately weighted vote. Reapportionment would be accomplished by setting up single member districts in such a way as to maximize preservation of county boundaries, providing that, except where two or more districts could be created within a county, no county would be split into more than two segments. Connor v. Finch, 419 F. Supp. 1072 (S.D. Miss. 1976), supplemented, 419 F. Supp. 1089 (S.D. Miss. 1976), supplemented, 422 F. Supp. 1014 (S.D. Miss. 1976), probable jurisdiction noted, 429 U.S. 1060, 97 S. Ct. 782, 50 L. Ed. 2d 775 (1977), rev'd on other grounds, 431 U.S. 407, 97 S. Ct. 1828, 52 L. Ed. 2d 465 (1977).

Where, after declaring invalid a State legislative act reapportioning the membership of the Senate and House of Representatives, a three-judge Federal District Court ordered into effect its own plan of reapportionment, the court-formulated plan need not be approved by the United States Attorney General or the United States District Court for the District of Columbia; for a decree of a United States District Court is not within reach of § 5 of the Voting Rights Act of 1965, 42 USC § 1973c. Connor v. Johnson, 402 U.S. 690, 91 S. Ct. 1760, 29 L. Ed. 2d 268 (1971), reh'g denied, 403 U.S. 924, 91 S. Ct. 2220, 29 L. Ed. 2d 702 (1971), on remand, 330 F. Supp. 521 (S.D. Miss. 1971).

Observing that when Federal District Courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter, the District Court for the Southern District of Mississippi was instructed, absent insurmountable difficulties, to devise and put into effect a single-member district plan for Hinds County in the general election of 1971. Connor v. Johnson, 402 U.S. 690, 91 S. Ct. 1760, 29 L. Ed. 2d 268 (1971), reh'g denied, 403 U.S. 924, 91 S. Ct. 2220, 29 L. Ed. 2d 702 (1971), on remand, 330 F. Supp. 521 (S.D. Miss. 1971). (Subsequently the District Court found the difficulties insurmountable).

4. Mandamus.

The United States Supreme Court granted leave to file a petition for a writ of mandamus to compel the district court to hold a hearing on proposed reapportionment plans, holding that there was no justification for further delay in that it had decided two of the three apportionment cases for which the district court had deferred its hearing and the third case presented no question pertinent to the case at bar, which had been in litigation for ten years; consideration of the writ was continued for 29 days to give the district court an opportunity to schedule a hearing and enter final judgment embodying a permanent plan. Connor v. Coleman, 425 U.S. 675, 96 S. Ct. 1814, 48 L. Ed. 2d 295 (1976).

RESEARCH REFERENCES

Am Jur. 9 Am. Jur. Pl & Pr Forms (Rev), Elections, Forms 11 et seq. (voting districts and apportionment).

CJS. C.J.S. States § 51.

§ 255. Repealed

Repealed by Laws, 1977, 2d Ex Sess., ch. 27, eff November 30, 1979. [Laws, 1916, ch. 160; 1962, 2d Ex Sess, ch. 57]

Editor's Note — Former Section 255, as amended effective February 13, 1963, provided that there were 52 senators, enumerated and described the senatorial districts, and provided for further reapportionment following the Federal Census of 1970.

Chapter 18, Laws of 1962 1st Extraordinary Session, which also proposed to amend this section of the constitution, was not approved by the electorate.

The 1962 amendment to Section 255 of the Constitution was proposed by Laws, 1962, 2d Ex Sess ch 57, and, upon ratification by the electorate on Feb. 5, 1963, was inserted by a proclamation of the Secretary of State on Feb. 13, 1963, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

Laws, 1962, 2d Ex Sess, ch 57, also provides as follows: "Be it further resolved, that it is the intent of this Resolution to provide by constitutional amendment for the apportionment of Senators and Representatives to be elected in 1963 to take office the first Tuesday after the first Monday of January, 1964, and thereafter, and nothing contained herein shall serve to or be construed to shorten or otherwise affect the term of office of any Senator or Representative presently serving in that capacity. The constitutional amendments submitted herewith shall, if approved, be self-executing for the purpose of providing for senatorial and legislative representation to be elected in 1963 in the event implementing legislation is not enacted and approved."

In a 1966 decision of a three-judge federal court, Connor v. Johnson, 256 F Supp 962, supp op 265 F Supp 492, the provisions of this section, as amended, were declared to be unconstitutional and invalid for all future elections of members of the Senate.

The repeal of Section 255 of Article 13 of the Mississippi Constitution of 1890 was proposed by Laws, 1977, 2d Ex Sess ch. 27, being Senate Concurrent Resolution No. 57 of the second extraordinary session of the 1977 Legislature, and upon ratification by the electorate on November 6, 1979, was deleted from the Constitution by proclamation of the Secretary of State on November 30, 1979.

§ 256. Repealed

Repealed by Laws, 1962, 2d Ex Sess, ch. 57, eff February 13, 1963.

Editor's Note — Former Section 256 read as follows:

"Section 256. The legislature may, at the first session after the Federal census of 1900, and decennially, thereafter, make a new apportionment of senators and representatives. At each apportionment each county then organized shall have at least one representative. The counties of Tishomingo, Alcorn, Prentiss, Lee, Itawamba, Tippa, Union, Benton, Marshall, Lafayette, Pontotoc, Monroe, Chickasaw, Calhoun, Yalobusha, Grenada, Carroll, Montgomery, Choctaw, Webster, Clay, Lowndes and Oktibbeha, or the territory now composing them, shall together never have less than forty-four representatives. The counties of Attala, Winston, Noxubee, Kemper, Leake, Neshoba, Launderdale, Newton, Scott, Rankin, Clarke, Jasper, Smith, Simpson, Copiah, Franklin, Lincoln, Lawrence, Covington, Jones, Wayne, Greene, Perry, Marion, Pike, Pearl River, Hancock, Harrison, and Jackson, or the territory now composing them, shall together never have less than forty-four representatives; nor shall the remaining counties of the state, or the territory now composing them, ever have less than forty-four representatives. A reduction in the number of senators and representatives may be made by the legislature if the same be uniform in each of the three said divisions; but the number of representatives shall not be less than one hundred, nor more than one hundred and thirty-three, nor the number of senators less than thirty, nor more than forty-five, provided that new counties hereafter created shall be given at least one representative until the next succeeding apportionment."

The repeal of Section 256 of the Constitution was proposed by Laws, 1962, 2d Ex Sess ch 57, and the repeal became effective upon ratification of the proposal by the electorate on Feb. 5, 1963, and the certification thereof by a proclamation by the Secretary of State on Feb. 13, 1963.

Chapter 57, Laws, 1962, 2d Ex Sess, also provides as follows:

"Be it further resolved, that it is the intent of this Resolution to provide by constitutional amendment for the apportionment of Senators and Representatives to be elected in 1963 to take office the first Tuesday after the first Monday of January, 1964, and thereafter, and nothing contained herein shall serve to or be construed to shorten or otherwise affect the term of office of any Senator or Representative presently serving in that capacity. The constitutional amendments submitted herewith shall, if approved, be self-executing for the purpose of providing for senatorial and legislative representation to be elected in 1963 in the event implementing legislation is not enacted and approved."

Chapter 18, Laws of 1962 1st Extraordinary Session, which proposed to amend former § 256 of the Constitution, was not approved by the electorate.

ARTICLE 14.

GENERAL PROVISIONS.

SEC.	
257.	Commencement of political year
258.	Credit of State
259.	Removal of county seat
260.	Formation of new county; changing judicial districts
261.	Expenses of criminal prosecutions; fines, forfeitures and costs
262.	Asylums for the aged or infirm
263.	Repealed.
263A.	Marriage defined as only between a man and a woman
264.	Qualifications of grand and petit jurors
265.	Denial of Supreme Being disqualification to hold office
266.	Holding office under federal or foreign government
267.	Devotion of time to office
268.	Oath of office

269. Repealed.
270. Repealed.
271. Consolidation of counties
272. Repealed.
272A. Retirement systems

§ 257. Commencement of political year

The political year of the state of Mississippi shall commence on the first Monday of January in each year.

SOURCES: 1869 art IV § 6, and art XII § 1.

Cross References — General elections, see Miss. Const. Art. 4, § 102.
Fiscal year, see Miss. Const. Art. 4, § 115.
Term of office, see Miss. Const. Art. 12, § 252.

JUDICIAL DECISIONS

1. Term of elective office.

The terms of all state and county elective officers must begin on this date. State v. Williams, 49 Miss. 640 (1873).

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees § 68.

§ 258. Credit of State

The credit of the State shall not be pledged or loaned in aid of any person, association, or corporation; and the State shall not become a stockholder in any corporation or association, nor assume, redeem, secure, or pay any indebtedness or pretended indebtedness alleged to be due by the State of Mississippi to any person, association, or corporation whatsoever, claiming the same as owners, holders, or assignees of any bond or bonds, now generally known as "Union Bank" bonds and "Planters Bank" bonds.

SOURCES: 1832 art VII § 9; 1869 art XII § 5 and amendment 1.

Cross References — State taxation and finance generally, see § 27-1-1 et seq.
Public business, bonds and obligations generally, see § 31-1-1 et seq.

JUDICIAL DECISIONS

1. State aid.
2. Bond payments.
3. Relief of unemployment.
4. Free textbooks in schools.

1. State aid.

Laws 1948, ch 430, § 1, amending Laws 1946, ch 363, § 6 (Code 1942, § 7146-06), providing for state aid to nonprofit hospitals subject to supervision by a state agency in connection with a state-wide hospital plan does not violate this section. Craig v. North Miss. Community Hosp., 206 Miss. 11, 39 So. 2d 523 (1949).

2. Bond payments.

Constitutional amendment prohibiting state from making payment on certain precivil war bonds did not toll statute of limitations for bringing claim on bonds, as enactment did not prohibit bondholder from bringing suit. Grant v. State, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

Although state procured passage of constitutional amendment prohibiting payment of certain precivil war bonds, state was not equitably estopped from asserting that bondholders' action to recover on bonds was barred by statute of limitations, as amendment did not prohibit bondholders from bringing claim on bonds and, therefore, state did not induce bondholders to abstain from filing suit to protect their rights and collect duly owed debts. Grant v. State, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

Amendment to State Constitution prohibiting payment on certain precivil war bonds did not violate bondholders' due process rights, as amendment did not prohibit bondholders from filing suit to protect their rights or to attack constitutionality of amendment, and, even if amendment did prohibit such suits, bondholders had ample notice that state was repudiating bonds but did not bring suit. Grant v. State, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

Statute of limitations for filing suit to collect on precivil war bonds began to run in favor of state when bondholders first had right to make demand on officer authorized by state to allow or disallow claims, even though constitutional amendment precluded payment on bonds, and, therefore, there was no state officer who could authorize claims. Grant v. State, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

Since bondholders' action against state to recover on precivil war bonds was barred by statute of limitations, chancellor did not need to rule on constitutionality of constitutional amendment prohibiting payment on bonds, and chancellor's ruling that amendment was unconstitutional was impermissible advisory opinion. Grant v. State, 686 So. 2d 1078 (Miss. 1996), cert. denied, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1047 (1997).

3. Relief of unemployment.

This section is inapplicable to a statute which, for the avowed purpose of relieving unemployment and aiding agriculture and industry, authorized municipalities to raise funds by taxation for the acquisition of lands and the construction of factories to be leased to individuals and private corporations on terms which would insure their continued operation. Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), appeal dismissed, 303 U.S. 627, 58 S. Ct. 766, 82 L. Ed. 1088 (1938).

4. Free textbooks in schools.

The appropriation of funds for the purchase of free textbooks to be distributed and loaned to pupils in elementary schools, including qualified private schools, did not constitute a pledging or loaning of the credit of the state in aid of any person, association, or corporation in contravention of the constitutional prohibition in that respect, in view of the facts that the books belonged to and were controlled by the state, that they were merely loaned to the individual pupils therein designated, that their preservation was fostered by exaction of suitable compensation for their loss of damage, and that the duty of protection through fumigation against contagion by use was assumed by the state. Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

ATTORNEY GENERAL OPINIONS

The University of Mississippi Medical Center comes within the provisions of Section 258 and is prohibited from owning stock in a corporation; however, the Ole Miss Alumni Association is not an agency of the state but a private corporation or association and does not come within the prohibition of the section. Conerly, July 9, 1999, A.G. Op. #99-0328.

A community hospital could not make a capital contribution to a Mississippi limited liability company in return for a membership therein, when such limited liability company had or would have members in addition to the hospital. Williamson, Feb. 4, 2000, A.G. Op. #2000-0021.

County hospital may not effect the issuance of an irrevocable letter of credit by a bank in favor of the insurance carrier in any amount. Yarborough, June 6, 2003, A.G. Op. 03-0255.

RESEARCH REFERENCES

ALR. Constitutionality of statute or ordinance authorizing use of public funds, credit, or power of taxation for restoration or repair of privately owned public utility. 13 A.L.R. 313.

Constitutionality of statute authorizing state to loan money or engage in business of a private nature. 14 A.L.R. 1151, 115 A.L.R. 1456.

Constitutionality of levee and flood control acts. 70 A.L.R. 1274.

Constitutionality of statutes providing for refund of taxes illegally or erroneously exacted. 98 A.L.R. 284.

Constitutional or statutory provisions prohibiting municipalities or other subdivisions of the state from subscribing to, or acquiring stock of, private corporation. 152 A.L.R. 495.

CJS. C.J.S. States §§ 158-168.

§ 259. Removal of county seat

No county seat shall be removed unless such removal be authorized by two-thirds of the electors of the county voting therefor; but when the proposed removal shall be toward the center of the county, it may be made when a majority of the electors participating in the election shall vote therefor.

Cross References — County boundaries and county seats generally, see § 19-1-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Application to judicial districts.
3. Action to remove county seat.
4. Right of taxpayer to object.

1. Construction and application.

County seat within the meaning of this provision has reference to removing the seat of the county government from one geographical location to another in the county, and this provision is not therefore applicable to prevent a change of the site of a courthouse from one place in a municipality to another nearby location therein. Jackson County Historical Soc. v. Board of Supvrs., 214 Miss. 156, 58 So. 2d 379 (1952).

By the terms of this section county seats throughout the state became fixed at the place where they were then located. They must remain until removed as prescribed in this section. Board of Supvrs. v. Buckley, 85 Miss. 713, 38 So. 104 (1905).

2. Application to judicial districts.

The creation of a second judicial district in a county does not violate this section.

Carter v. Harrison County Election Comm'n, 183 So. 2d 630 (Miss. 1966).

The section has no application to an act which provides for an election to determine the question of removal of the seat of justice of a county judicial district. Hinton v. Board of Supvrs., 84 Miss. 536, 36 So. 565 (1904).

This section probably has no application to a statute providing for an election to determine the question of removal of a seat of justice of one of the judicial districts of a county having two such districts. Hinton v. Board of Supvrs., 84 Miss. 536, 36 So. 565 (1904).

If applicable to judicial districts it requires a two-thirds vote unless the removal be towards the center of the district, in which case a majority vote is sufficient. Hinton v. Board of Supvrs., 84 Miss. 536, 36 So. 565 (1904).

3. Action to remove county seat.

Where the removal of a county seat did not receive two-thirds of the vote cast, and where it is not shown the removal was toward the center of the county the removal failed. Burns v. Board of Supvrs., 102 Miss. 390, 59 So. 796 (1912).

Whether the legislature can restrict the voters in the selection of a county site to a designated point. Board of Supvrs. v. Buckley, 85 Miss. 713, 38 So. 104 (1905).

4. Right of taxpayer to object.

This section authorizes any taxpayer to enjoin violation of its provisions, although the attorney-general and district attorney, either or both, may have refused to intervene. Board of Supvrs. v. Buckley, 81 Miss. 474, 33 So. 650 (1903).

ATTORNEY GENERAL OPINIONS

The relocation of a county courthouse to another building within the county seat does not invoke the requirements of the section. Stone, Aug. 31, 2001, A.G. Op. #01-0538.

RESEARCH REFERENCES

CJS. C.J.S. Counties § 49.

§ 260. Formation of new county; changing judicial districts

No new county shall be formed unless a majority of the qualified electors voting in each part of the county or counties proposed to be dismembered and embraced in the new county, shall separately vote therefor; nor shall the boundary of any judicial district in a county be changed, unless, at an election held for that purpose, two-thirds of those voting assent thereto. The elections provided for in this and the section next preceding shall not be held in any county oftener than once in four years. No new county shall contain less than four hundred square miles; nor shall any existing county be reduced below that size.

SOURCES: 1817 art VI § 19; 1832 art VII § 17; 1869 art IV § 37.

Cross References — Consolidation of counties, see Miss. Const. Art. 14, § 271. County boundaries generally, see § 19-1-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Formation of new counties.
3. Change in judicial districts.
4. Quo warranto.

1. Construction and application.

The section has no application to changes in the boundaries of counties. Lindsley v. Board of Supvrs., 69 Miss. 815, 11 So. 336 (1892).

The last clause of the section limits legislative discretion only as to area. Portwood v. Board of Supvrs., 52 Miss. 523 (1876).

2. Formation of new counties.

It is only necessary that the voters in the territory of the proposed new county vote upon the election to form the new county. Hatten v. Bond, 112 Miss. 590, 73 So. 612 (1917).

The act creating Jefferson Davis County, c 166 Laws of 1906, complies with the provisions of this section of the Constitution. Conner v. Gray, 88 Miss. 489, 41 So. 186, 9 Am. Ann. Cas. 120 (1906).

3. Change in judicial districts.

Constitutional provision governing change of boundary of judicial districts in county is applicable only to relocation of line between districts. Mulliner v. Bouldin, 159 Miss. 212, 131 So. 364 (1930).

Constitutional provision requiring two-thirds vote to change boundary of judicial districts in county was inapplicable to election to abolish districts. Mulliner v. Bouldin, 159 Miss. 212, 131 So. 364 (1930).

The section has no application to an act which provides for an election to determine the question of removal of the seat of justice of a county judicial district. Hinton v. Board of Supvrs., 84 Miss. 536, 36 So. 565 (1904).

The act of 1902, p 172, providing for an election to determine the question of the removal of the seat of justice of the first judicial district of Perry county does not violate this section. Hinton v. Board of Supvrs., 84 Miss. 536, 36 So. 565 (1904).

The acts of 1902 which provided for an election to determine the question of removal of the courthouse in the first judicial district of Perry county, does not violate this section. Hinton v. Board of Supvrs., 84 Miss. 536, 36 So. 565 (1904).

This section expressly recognizes that there may be separate judicial districts in a county. Lindsley v. Board of Supvrs., 69 Miss. 815, 11 So. 336 (1892).

This section does not prevent the legislature from dividing a county into two judicial districts. Alfred v. State, 37 Miss. 296 (1859).

4. Quo warranto.

A proceeding in quo warranto is proper to test the validity of the formation of a county under a legislative act providing therefor. State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1 (1919).

RESEARCH REFERENCES

ALR. Constitutionality of statutes for formation or change of political districts or municipal corporations as affected by objection that they confer nondelegable powers, or impose nonjudicial functions, on a court. 69 A.L.R. 266.

CJS. C.J.S. Counties §§ 19, 24, 25.

§ 261. Expenses of criminal prosecutions; fines, forfeitures and costs

The expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun; and all fines and forfeitures shall be paid into the treasury of such county. Defendants, in cases of conviction, may be taxed with the costs.

SOURCES: Laws, 1966, ch. 732, eff June 20, 1966.

Editor's Note — The 1966 amendment to Section 261 of the Constitution was proposed by Laws, 1966, ch. 732 (Senate Concurrent Resolution No. 115), adopted at the Regular Session of 1966, and, upon ratification by the electorate at an election held on June 7, 1966, was inserted by Proclamation of the Secretary of State on June 20, 1966, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

Cross References — Provision for additional cost to create court education and training fund, see § 37-26-1 et seq.

Costs in criminal proceedings generally, see § 99-1-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Forfeitures.

1. Construction and application.

The fines provided for by statute (code 1880 § 1050; code 1892 § 3552; code 1906 § 4050; Hemingway's code 1927 § 7900), to be imposed on railroads for failure to maintain signs at road crossings are not within the section. Foote v. Farmer, 71 Miss. 148, 14 So. 445 (1893).

The section took effect on the adoption of the Constitution, November 1, 1890, and was not suspended by § 274. State ex rel. Warren County v. Stone, 69 Miss. 375, 11 So. 4 (1892).

2. Forfeitures.

When a forfeiture is adjudicated in conjunction with criminal proceedings, the contraband money should be deposited into the county's general fund pursuant to Art 14 § 261 of the Mississippi Constitution and is subject to the usual accounting and audit procedures of the county and/or State; in those instances where criminal proceedings are never brought, or in cases where the forfeiture proceedings are not adjudicated in conjunction with a criminal trial, the statutory provisions of §§ 41-29-176 through 41-29-181 will prevail. Bell v. State, 623 So. 2d 267 (Miss. 1993).

The forfeitures provided for in §§ 41-29-176 through 41-29-185 are civil in nature, rather than criminal, and therefore do not conflict with Article 14, § 261 of the Mississippi Constitution. State ex rel. Miss. Bureau of Narcotics v. Lincoln County, 605 So. 2d 802 (Miss. 1992).

ATTORNEY GENERAL OPINIONS

Jury costs may be assessed against a defendant that is convicted. Based on Section 25-7-63, jurors summoned for justice court jury duty are entitled to the per diem established by statute only if they are chosen for the jury or as alternates. Jurors are only entitled to the authorized per diem and not a per diem plus meals. Riley, June 6, 2003, A.G. Op. 03-0260.

RESEARCH REFERENCES

ALR. Items of costs of prosecution for which defendant may be held. 65 A.L.R.2d 854.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 A.L.R.3d 515.

CJS. C.J.S. Counties §§ 175, 177, 178.

§ 262. Asylums for the aged or infirm

The board of supervisors shall have power to provide homes or farms as asylums for those persons who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of society; and the Legislature shall enact suitable laws to prevent abuses by those having the care of such persons.

SOURCES: 1869 art XII § 29.

Cross References — State farms for convicts, see Miss. Const. Art. 10, § 225.
County property and facilities generally, see § 19-7-1 et seq.
State institutions for the aged or infirm generally, see § 43-11-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.

A county home for paupers, for which poverty was the indispensable prerequisite for admission and from which the non-indigent aged or ill were excluded, was not an institution "primarily engaged in the care of the sick, the aged, the mentally ill or defective" within the meaning of federal legislation extending minimum wage legislation to the employees of such institutions, even though many of the residents of said home were old or ill. Brennan v. Harrison County, 505 F.2d 901 (5th Cir. 1975).

While the legislature could impose reasonable limitations upon the amount levied by a Board of Supervisors, it could not destroy the power of the Board to make a levy for the support of the poor of the county, for the reason that the Constitution confers power upon the Board of Supervisors by this section to provide homes or farms as asylums for those persons who by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the public. Board of Supvrs. v. Illinois Cent. R. Co., 186 Miss. 294, 190 So. 241 (1939).

ATTORNEY GENERAL OPINIONS

A county has a duty to provide for it's destitute aged citizens. Shepard, Aug. 23, 2004, A.G. Op. 04-0322.

§ 263. Repealed

Repealed by Laws, 1987, ch. 672, eff December 4, 1987.

Editor's Note — Former Section 263 declared a marriage void between a white person and negro or mulatto with one-eighth or more of negro blood.

The repeal of Section 263 of Article 14 of the Mississippi Constitution of 1890 was proposed by Laws, 1987, Ch. 672 (House Concurrent Resolution No. 13), and upon ratification by the electorate on November 3, 1987, was deleted from the Constitution by proclamation of the Secretary of State on December 4, 1987.

§ 263A. Marriage defined as only between a man and a woman

Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this State and is void and unenforceable under the laws of this State.

SOURCES: Laws, 2004, ch. 620.

Editor's Note — The 2004 addition of Section 263A in Article 14 of the Mississippi Constitution of 1890, was proposed by Laws, 2004, ch. 620 (House Concurrent Resolution No. 56), and upon ratification by the electorate on November 2, 2004, was inserted as part of the Constitution by proclamation of the Secretary of State on December 11, 2004.

§ 264. Qualifications of grand and petit jurors

The Legislature shall, by law, provide for the qualifications of grand and petit jurors. The Legislature shall provide, by law, for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors. After February 1, 1973, grand jurors may serve both in termtime and vacation and any circuit judge may empanel a grand jury in termtime or in vacation.

SOURCES: Laws, 1960, ch. 502; Laws, 1972, ch. 538, eff November 22, 1972.

Editor's Note — The 1960 amendment to Section 264 of the Constitution was proposed by Laws 1960, ch 502, and, upon ratification by the electorate on Nov. 8, 1960, was inserted by Proclamation of the Secretary of State on Nov. 23, 1960, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

The 1972 amendment to Section 264 of Article 14 of the Constitution of 1890 was proposed by Laws, 1972, ch. 538, being House Concurrent Resolution No. 4 of the 1972 regular session of the Legislature, and upon ratification by the electorate, was inserted by proclamation of the Secretary of State on November 22, 1972.

Cross References — Qualification of officers, see Miss. Const. Art. 12, § 250.

Juries generally, see §§ 13-5-1 et seq.

JUDICIAL DECISIONS

1. Constitutionality.
2. Construction and application.
3. Purpose.
4. Time of determination of qualification.
5. Effect of want of qualification of juror on indictment or verdict.
6. Exclusion based on gender.
7. Exclusion based upon race.

1. Constitutionality.

The provision that no person shall be a grand or petit juror unless he is a qualified elector, and the provision setting forth requirements for qualified electors, including payment of poll taxes, except in certain cases, do not contravene the Constitution of the United States and do not operate to discriminate between races. Wheeler v. State, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

The section does not discriminate between the races, nor does it violate the Constitution of the United States. Gibson v. Mississippi, 162 U.S. 565, 16 S. Ct. 904, 40 L. Ed. 1075 (1896); Williams v. Mississippi, 170 U.S. 213, 18 S. Ct. 583, 42 L. Ed. 1012 (1898), aff'g, 73 Miss. 820, 19 So. 826 (1896).

2. Construction and application.

Laws respecting listing, drawing, summoning, and impaneling juries are directory; unless there is radical departure from statutory scheme of selecting juries, court will not reverse because trial court excused certain jurors for cause and filled their places with others. Sullivan v. State, 155 Miss. 629, 125 So. 115 (1929).

The section, construed with § 244 of the Constitution, requires a juror to be able to read any section of the Constitution.

Mabry v. State, 71 Miss. 716, 14 So. 267 (1894).

This section was suspended in its operation by § 274. Nail v. State, 70 Miss. 32, 11 So. 793 (1892).

3. Purpose.

The object of this section was to provide a method whereby duly qualified jurors might be procured, but the details of the plan were committed to the judgment of the legislature. Posey v. State, 86 Miss. 141, 38 So. 324, 4 Am. Ann. Cas. 221 (1905).

4. Time of determination of qualification.

After jury has been accepted, but before evidence is introduced, court may examine juror as to alleged disqualification not previously known; if examination of juror before evidence is introduced, but after jury has been accepted, leaves qualification in doubt, court may stand him aside or sustain challenge for cause; court's setting aside of juror or sustaining challenge for cause before evidence is introduced does not require reversal, absent abuse of discretion. Sullivan v. State, 155 Miss. 629, 125 So. 115 (1929).

Court on discharging juror before evidence is introduced, and after jury is sworn, need not discharge entire jury, absent legal objection to remaining jurors. Sullivan v. State, 155 Miss. 629, 125 So. 115 (1929).

Indictment returned at special term by grand jury impaneled and sworn at regular term was void. Perkins v. State, 148 Miss. 608, 114 So. 392 (1927).

Juries should be drawn and impaneled at terms of circuit court for which they serve; juries of one term of circuit court cannot be held over for succeeding term. Walton v. State, 147 Miss. 851, 112 So. 790 (1927).

Indictment by grand jury impaneled at former term of court, when another term has intervened, is void. Walton v. State, 147 Miss. 851, 112 So. 790 (1927).

5. Effect of want of qualification of juror on indictment or verdict.

Verdict of jury in prosecution for unlawful possession of intoxicating liquor is not invalid because one of the jurors, who was not drawn but was summoned by mistake, was not a qualified elector. Serio v. City of Brookhaven, 208 Miss. 620, 45 So. 2d 257 (1950).

That juror was not in fact a qualified elector did not vitiate verdict of guilty. Freeman v. State, 167 Miss. 737, 148 So. 625 (1933).

Verdict will not be reversed because some of jurors had not paid taxes on 1st of February. Pan Am. Petro. Corp. v. Pate, 162 Miss. 638, 138 So. 349 (1931).

That the juror was not a qualified elector is not ground for reversal of the case in which he sat as juror. Bowman v. State, 141 Miss. 115, 106 So. 264 (1925).

The language expressly negatives the idea that the validity of an indictment or verdict was to be dependent on the qualification of the jurors composing the panel. Posey v. State, 86 Miss. 141, 38 So. 324, 4 Am. Ann. Cas. 221 (1905).

An objection that a juror is an alien and therefor not a qualified elector cannot be made under this section after verdict. Valentine v. State, 35 So. 170 (Miss. 1903).

It is not cause for reversing a conviction of murder that it was discovered after verdict that one of the jurors was not a qualified elector, and had not been drawn on the venire, but had been summoned by mistake in place of a person of the same name who was drawn. Tolbert v. State, 71 Miss. 179, 14 So. 462, 42 Am. St. R. 454 (1893).

6. Exclusion based on gender.

Rule that exclusion of women from jury service violates state criminal defendant's Sixth and Fourteenth Amendment rights to impartial jury trial did not apply retroactively. Daniel v. Louisiana, 420 U.S. 31, 95 S. Ct. 704, 42 L. Ed. 2d 790 (1975), overruled on other grounds, Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

A state criminal defendant's right to an impartial jury trial under the Sixth and Fourteenth Amendments is violated by the operation of a state's constitutional and statutory provisions which operate to exclude women from jury service. Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

7. Exclusion based upon race.

A 17-year-old defendant pleading guilty to murder, could not thereafter urge that his plea was void on the theory that Negroes had been systematically excluded from jury service in the county, and that he had been deprived of his right to effective assistance of counsel, because his counsel failed to advise him of his right to challenge the indictment on the systematic exclusion of Negroes from the grand jury and of his right to trial by a jury from which Negroes had not been systematically excluded. Winters v. State, 244 So. 2d 1 (Miss. 1971).

Although in a criminal prosecution the selection of the jury list may have been somewhat haphazard, an imperfect system is not equivalent to purposeful discrimination based on race. Dorsey v. State, 243 So. 2d 550 (Miss. 1971).

Even assuming that defendant, who failed to show systematic exclusion of Negroes from jury service, made a prima facie case, the state met its burden of proof by showing that any former practice of discrimination had been abandoned. Dorsey v. State, 243 So. 2d 550 (Miss. 1971).

Proportional representation of the races on a jury is not required; what is required is that county officials must see to it that jurors are in fact and in good faith selected without regard to race. Dorsey v. State, 243 So. 2d 550 (Miss. 1971).

A wide disparity shown between percentage of Negro population in the district and the percentage of Negroes on jury lists during the period in question was a prima facie showing of purposeful discrimination on the part of the state which the state was required to rebut in proceedings on an accused's motion to quash the indictment, jury panel and venire. Caston v. State, 240 So. 2d 443 (Miss. 1970).

Evidence that a jury selection system was based on a list of registered voters coded as to race and sex of the individuals, that the names of persons registered by federal registrars, most of which persons were Negroes, were not included in the list, and that the jury list showed 2.97% Negro men and 4.31% Negro women in the year in which the defendant was indicted, tried and convicted, while the Negro population of the county was 36.2%, was sufficient to make a prima facie case of discrimination against Negroes, placing the burden on the state to show that the underrepresentation resulted from factors other than purposeful discrimination. Spencer v. State, 240 So. 2d 260 (Miss. 1970).

Where the state did not sustain burden of refuting the prima facie case made by the defendant that Negroes had been systematically excluded from juries of Chickasaw County, the defendant's conviction could not be allowed to stand and the indictment against him was quashed and the cause remanded to await the action of a qualified grand jury summoned from a proper jury list. Black v. State, 187 So. 2d 815 (Miss. 1966).

In order for the state to sustain the burden of refuting the defendant's prima facie case that Negroes had been systematically excluded from the juries of the county in which he was tried, it must be shown that the board of supervisors had abandoned its former practice of systematic exclusion and that Negroes were currently being selected for jury service as other qualified citizens. Black v. State, 187 So. 2d 815 (Miss. 1966).

Motion to quash indictment against negro on ground that there were no negro names listed or placed in jury-box from which Grand Jury was drawn is properly overruled when it appears that there were only two negroes in county who were qualified electors and who could have served on either grand or petit juries at time juries were impaneled. Flowers v. State, 209 Miss. 86, 41 So. 2d 352 (1949), cert. denied, 339 U.S. 946, 70 S. Ct. 800, 94 L. Ed. 1360 (1950).

Where murder indictment was quashed on ground that negroes were omitted from jury box from which grand jury was drawn, defendant could not complain of trial court's refusal to quash second indictment on ground that grand jury was drawn from registration books and not from jury box which had been quashed. Pearson v. State, 176 Miss. 9, 167 So. 644 (1936).

RESEARCH REFERENCES

ALR. Intelligence, character, religious, or loyalty tests of qualifications of juror. 126 A.L.R. 506.

Applicability of statute of frauds to promise to pay for medical, dental, or hospital services to another. 64 A.L.R.2d 1071.

Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters. 80 A.L.R.3d 869.

Am Jur. 38 Am. Jur. 2d, Grand Jury §§ 3-6.

47 Am. Jur. 2d, Jury.

CJS. C.J.S. Grand Juries §§ 20 to 34.

C.J.S. Juries §§ 269, 276, 283 to 304.

Lawyers' Edition. Group or class discrimination in selection of grand or petit jury as prohibited by Federal Constitution. 33 L. Ed. 2d 783.

§ 265. Denial of Supreme Being disqualification to hold office

No person who denies the existence of a Supreme Being shall hold any office in this State.

SOURCES: 1817 art VI § 6; 1832 art VII § 5; 1869 art XII § 3.

Cross References — Necessity of qualifying as elector in order to hold state office, see Miss. Const. Art. 12, § 250.

Disqualification to hold state office of person holding office under foreign government or under government of United States, see Miss. Const. Art. 14, § 266.

Public officers generally, see § 25-1-1 et seq.

JUDICIAL DECISIONS

1. Validity.

Provision of Mississippi Constitution which provides that no person who denies existence of supreme being may hold office in state is unconstitutional. Tirmenstein v. Allain, 607 F. Supp. 1145 (S.D. Miss. 1985).

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees § 34.

§ 266. Holding office under federal or foreign government

No person holding or exercising the rights or powers of any office of honor or profit, either in his own right or as a deputy, or while otherwise acting for or in the name or by the authority of another, under any foreign government, or under the government of the United States, shall hold or exercise in any way the rights and powers of any office of honor or profit under the laws or authority of this State, except notaries, commissioners of deeds, and United States commissioners.

SOURCES: 1817 art III § 27 and art VI § 15; 1832 art VII § 13; 1869 art XII § 3.

Cross References — Public officers generally, see § 25-1-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Contested offices.

1. Construction and application.

The only thing prohibited by this section is the actual holding of the two incompatible offices at the same time. State ex rel. Kiersky v. Kelly, 80 Miss. 803, 31 So. 901 (1902).

The office of city assessor is an office held within the authority of the state within this section. State ex rel. Kiersky v. Kelly, 80 Miss. 803, 31 So. 901 (1902).

2. Contested offices.

One kept out of the office by a contest for it is not holding the office. State ex rel. Kiersky v. Kelly, 80 Miss. 803, 31 So. 901 (1902).

ATTORNEY GENERAL OPINIONS

This Constitutional provision would prohibit a member of the county board of supervisors from also being employed as a mail carrier for the U.S. Postal Office. Abron, June, 21, 2004, A.G. Op. 04-0241.

An enlisted member of the National Guard does not hold a federal office within the meaning of this section. Weissinger, Apr. 8, 2005, A.G. Op. 05-0147.

RESEARCH REFERENCES

ALR. Other public offices or employment within prohibition as regards judicial officers of constitutional or statutory provisions against holding more than one office. 89 A.L.R. 1113.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 81 et seq.

42 Am. Jur. (1st ed), Public Officers §§ 58 et seq.

CJS. C.J.S. Officers and Public Employees §§ 37-45, 119, 120.

§ 267. Devotion of time to office

No person elected or appointed to any office or employment of profit under the laws of this state, or by virtue of any ordinance of any municipality of this state, shall hold such office or employment without personally devoting his time to the performance of the duties thereof.

Cross References — Public officers generally, see § 25-1-1 et seq.

JUDICIAL DECISIONS

1. Construction and application.
2. Validity of statutes.

1. Construction and application.

If all the time of the officer be not required for the complete and faithful execution of the office he shall give such time and devote such service as shall suffice for a full and faithful discharge of the duties of his office. Fairly v. Western Union Tel. Co., 73 Miss. 6, 18 So. 796 (1896); Miller v. Walley, 122 Miss. 521, 84 So. 466 (1920).

The section does not affect the right of the superintendent of the institute for the blind to recover upon a contract for professional services as a physician, rendered during a short absence in the summer vacation when all the pupils of the institution had been removed to their homes. Fairly v. Western Union Tel. Co., 73 Miss. 6, 18 So. 796 (1895).

2. Validity of statutes.

Act (Laws 1940, ch 287; Code 1942 §§ 3472-3494) providing for retirement benefits for firemen and policemen but making them available for supernumerary tasks after retirement does not violate this section. Mayor & Aldermen of Vicksburg v. Crichlow, 196 Miss. 259, 16 So. 2d 749 (1944).

Chapter 137, Laws 1910 providing that county treasurers shall deposit county money in depositories is not violative of this section. Magee v. Brister, 109 Miss. 183, 68 So. 77 (1915); Fidelity & Deposit Co. v. Wilkinson County, 109 Miss. 879, 69 So. 865 (1915).

ATTORNEY GENERAL OPINIONS

There is no statutory procedure for a Board of Aldermen to make the Mayor's position a full time job during the middle of the mayor's term, although any such action must be clearly reflected in the minutes of the meeting at which it was taken. Beckett, Jan. 31, 2003, A.G. Op. #03-0038.

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees §§ 234-245.

§ 268. Oath of office

All officers elected or appointed to any office in this State, except judges and members of the Legislature, shall, before entering upon the discharge of the duties thereof, take and subscribe the following oath: "I, ________ , do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and the Constitution of the State of Mississippi, and obey the laws thereof; that I am not disqualified from holding the office of ________ ; that I will faithfully discharge the duties of the office upon which I am about to enter. So help me God."

SOURCES: 1817 art VI § 1; 1832 art VII § 1; 1869 art XII § 26.

Cross References — Oath of judges, see Miss. Const. Art. 6, § 155.

Public officers generally, see § 25-1-1 et seq.

Requirement that notaries public take the oath prescribed by this section, see § 25-33-1.

Members of Mississippi Commission on Wildlife, Fisheries and Parks to take oath, see § 49-4-4.

Requirement that members of the state forestry commission take oath of office, see § 49-19-1.

Oath of members of board of commissioners of joint water management district, see § 51-8-25.

Requirement that members of board of directors of the Pearl River Valley Water Supply District take the oath prescribed by this section, see § 51-9-107.

Requirement that members of the board of directors of the Pearl River Basin Development District take the oath prescribed by this section, see § 51-11-5.

Requirements of the Board of Directors of the Tombigbee Valley Authority and Water Management District, see § 51-13-105.

Board of Directors of the Pat Harrison Waterway District, see § 51-15-105.

Requirement that members of temporary commission for the establishment of a drainage district take the oath prescribed by this section, see § 51-29-5.

Commissioners appointed within drainage districts, see § 51-29-15.

Requirement that members of the board of directors of urban flood and drainage control districts take the oath prescribed by this section, see § 51-35-317.

Oath by members of Board of Animal Health, see § 69-15-2.

Requirement that members of the Mississippi Board of Nursing take the oath prescribed by this section, see § 73-15-15.

Oath of office of members of state board of medical licensure, see § 73-43-9.

JUDICIAL DECISIONS

1. In general.

In defendant's capital murder case, while the prosecutor's comments to the jury regarding defendant having the protection of the constitution, while the victim did not, were condemned, they did not constitute reversible error where the argument likely did not influence the jury one way or the other. Evidence of defendant's callous indifference to human life was overwhelming, and the jury's sentence was well-supported by the record. Goodin v. State, 856 So. 2d 267 (Miss. 2003), writ of certiorari denied by 541 U.S. 947, 124 S. Ct. 1681, 158 L. Ed. 2d 375, 2004 U.S. LEXIS 2196, 72 U.S.L.W. 3598 (2004).

A prosecutor violated his oath when, in a capital murder prosecution, he instructed the jurors to ignore the defendant's constitutional rights; however, such error was harmless as his crude appeals likely did not influence the jury one way or the other. Goodin v. State, 787 So. 2d 639 (Miss. 2001), writ of certiorari denied by 535 U.S. 996, 122 S. Ct. 1558, 152 L. Ed. 2d 481, 2002 U.S. LEXIS 2500, 70 U.S.L.W. 3640 (2002), remanded by 2009 Miss. LEXIS 405 (Miss. Aug. 27, 2009), remanded by 102 So. 3d 1102, 2012 Miss. LEXIS 616 (Miss. 2012).

The act of an officer who has not taken the oath is not void. Rhodes v. McDonald, 24 Miss. 418 (1852); Marshal v. Hamilton, 41 Miss. 229 (1866); Cooper v. Moore, 44 Miss. 386 (1870).

Unless a statute declares them so. McNutt v. Lancaster, 20 Miss. (12 S. & M.) 570 (1848); Pickens v. McNutt, 20 Miss. (12 S. & M.) 651 (1849).

To be eligible for office, one must be qualified at time of election and also when seeking to qualify by taking oath of office. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

Action or nonaction by election officials at or before election will not preclude court from inquiring into right of elector to qualify and discharge duties of office. State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508, 86 A.L.R. 290 (1933).

The act of an officer who has not taken the oath is not void. Rhodes v. McDonald, 24 Miss. 418 (1852); Marshal v. Hamilton, 41 Miss. 229 (1866); Cooper v. Moore, 44 Miss. 386 (1870).

Unless a statute declares them so. McNutt v. Lancaster, 20 Miss. (12 S. & M.) 570 (1848); Pickens v. McNutt, 20 Miss. (12 S. & M.) 651 (1849).

RESEARCH REFERENCES

ALR. Constitutional, statutory, or charter provision as to time of taking oath of office and giving official bond as mandatory or directory. 158 A.L.R. 639.

CJS. C.J.S. Officers and Public Employees §§ 59, 60.

§ 269. Repealed

Repealed.

Editor's Note — Former Section 269 read as follows:

"Section 269. Every devise or bequest of lands, tenements, or hereditaments, or any interest therein, of freehold or less than freehold, either present or future, vested or contingent, or of any money directed to be raised by the sale thereof, contained in any last will and testament, or codicil, or other testamentary writing, in favor of any religious or ecclesiastical corporation, sole or aggregate, or any religious or ecclesiastical society, or to any religious denomination or association of persons, or to any person or body politic, in trust, either express or implied, secret or resulting, either for the use and benefit of such religious corporation, society, denomination, or association, or for the purpose of being given or appropriated to charitable uses or purposes, shall be null and void, and the heir at law shall take the same property so devised or bequeathed, as though no testamentary disposition had been made."

The repeal of Section 269 of the Constitution was proposed by a concurrent resolution passed at the 1938 extraordinary session of the legislature, and, upon ratification of the proposal by the electorate on November 7, 1939, the repeal became effective by virtue of Laws of 1940, ch 325.

§ 270. Repealed

Repealed by Laws, 1992, ch. 614, eff December 8, 1992.
[Laws, 1940, ch. 326; Laws, 1987, ch. 670]

Editor's Note — Former Section 270, as amended in 1987, read as follows:

"Section 270. Any person may, by will, bequeath or devise all or any portion of his estate to any charitable, religious, educational or civil institutions, subject to any statutory rights of surviving spouses and minor children and such other exceptions as may be prescribed by general law; provided that, in all cases, the will containing such bequest or devise must be executed at least one hundred and eighty (180) days before the death of the testator, or such bequest or devise shall be void.

"Provided, however, that any land devised, not in violation of this section, to any charitable, religious, educational, or civil institution may be legally owned, and further may be held by the devisee for a period of not longer than ten (10) years after such devise becomes effective as a fee simple or possessory interest, during which time such land and improvements thereon shall be taxed as any other land held by any other person, unless exempted by some specific statute."

The 1987 amendment was proposed by Laws, 1987, ch. 670 (House Concurrent Resolution No. 7), and upon ratification by the electorate on November 3, 1987, was inserted as part of the Constitution by proclamation of the Secretary of State on December 4, 1987.

The repeal of Section 270 of Article 14 of the Mississippi Constitution of 1890 was proposed by Laws, 1992, ch. 614 (House Concurrent Resolution No. 86), and upon ratification by the electorate on November 3, 1992, was deleted from the Constitution by proclamation of the Secretary of State on December 8, 1992.

§ 271. Consolidation of counties

The Legislature may provide by a two-thirds (⅔) vote of the elected members of the House of Representatives and of the Senate for the consolidation of existing counties of the State, provided, however, that such counties combined must be adjoining.

SOURCES: Laws, 1966, ch 691 eff November 23, 1966.

Editor's Note — The 1966 amendment to Section 271 of the Constitution, which vests the Legislature with exclusive authority to consolidate existing counties, was proposed by House Concurrent Resolution No. 36, adopted at the 1966 regular session of the Legislature, and upon ratification by the electorate on November 8, 1966, was inserted by proclamation of the Secretary of State on November 23, 1966, by virtue of the authority vested in him by Section 273 of the Constitution, as amended.

Cross References — Formation of new counties, see Miss. Const. Art. 14, § 260.

County boundaries generally, see § 19-1-1 et seq.

RESEARCH REFERENCES

CJS. C.J.S. Counties § 19.

§ 272. Repealed

Repealed by Laws, 1990, ch. 691, eff December 19, 1990.
[Laws, 1922, ch. 157]

Editor's Note — Former Section 272 provided for pensions to confederate soldiers and sailors who enlisted and honorably served in the civil war and for the widows thereof.

The repeal of Section 272 of Article 14 of the Mississippi Constitution of 1890 was proposed by Laws, 1990, Ch. 691 (Senate Concurrent Resolution No. 519), and upon ratification by the electorate on November 6, 1990, was deleted from the Constitution by proclamation of the Secretary of State on December 19, 1990.

§ 272A. Retirement systems

(1) All of the assets, proceeds or income of the Public Employees' Retirement System of Mississippi and the Mississippi Highway Safety Patrol Retirement System or any successor systems, and all contributions and payments made to the systems to provide for retirement and related benefits shall be held, invested as authorized by law, or disbursed as in trust for the exclusive purpose of providing for such benefits, refunds and administrative expenses under the management of the board of trustees of the systems, and shall not be encumbered for or diverted to any other purposes.

(2) Legislation shall not be enacted increasing benefits under the Public Employees' Retirement System of Mississippi and the Mississippi Highway Safety Patrol Retirement System in any manner unless funds are available therefor, or unless concurrent provisions are made for funding any such increase in accordance with a prior certification of the cost by the board of trustees of the systems based on accepted actuarial standards.

SOURCES: Laws, 1985, ch. 618, eff November 20, 1986.

Editor's Note — The insertion of Section 272A in Article 14 of the Mississippi Constitution of 1890 was proposed by Laws, 1985, Ch. 618 (Senate Concurrent Resolution No. 518), and upon ratification by the electorate on November 4, 1986, was inserted as part of the Constitution by proclamation of the Secretary of State on November 20, 1986.

Cross References — Computer equipment and software owned by Public Employees' Retirement System as assets of Trust Fund by virtue of this section, see § 25-11-15.

RESEARCH REFERENCES

CJS. C.J.S. Officers and Public Employees §§ 311-320.

ARTICLE 15.

AMENDMENTS TO THE CONSTITUTION.

In General.
Schedule.
Additional Sections of the Constitution of Mississippi Not Being Amendments of Previous Sections.

IN GENERAL

SEC.
273. Amendment process

§ 273. Amendment process

(1) Amendments to this Constitution may be proposed by the Legislature or by initiative of the people.

(2) Whenever two-thirds (⅔) of each house of the Legislature, which two-thirds (⅔) shall consist of not less than a majority of the members elected to each house, shall deem any change, alteration or amendment necessary to this Constitution, such proposed amendment, change or alteration shall be read and passed by two-thirds (⅔) vote of each house, as herein provided; public notice shall then be given by the Secretary of State at least thirty (30) days preceding an election, at which the qualified electors shall vote directly for or against such change, alteration or amendment, and if more than one (1) amendment shall be submitted at one (1) time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately; and, notwithstanding the division of the Constitution into sections, the Legislature may provide in its resolution for one or more amendments pertaining and relating to the same subject or subject matter, and may provide for one or more amendments to an article of the Constitution pertaining and relating to the same subject or subject matter, which may be included in and voted on as one (1) amendment; and if it shall appear that a majority of the qualified electors voting directly for or against the same shall have voted for the proposed change, alteration or amendment, then it shall be inserted as a part of the Constitution by proclamation of the Secretary of State certifying that it received the majority vote required by the Constitution; and the resolution may fix the date and direct the calling of elections for the purposes hereof.

(3) The people reserve unto themselves the power to propose and enact constitutional amendments by initiative. An initiative to amend the Constitution may be proposed by a petition signed over a twelve-month period by

qualified electors equal in number to at least twelve percent (12%) of the votes for all candidates for Governor in the last gubernatorial election. The signatures of the qualified electors from any congressional district shall not exceed one-fifth (⅕) of the total number of signatures required to qualify an initiative petition for placement upon the ballot. If an initiative petition contains signatures from a single congressional district which exceed one-fifth (⅕) of the total number of required signatures, the excess number of signatures from that congressional district shall not be considered by the Secretary of State in determining whether the petition qualifies for placement on the ballot.

(4) The sponsor of an initiative shall identify in the text of the initiative the amount and source of revenue required to implement the initiative. If the initiative requires a reduction in any source of government revenue, or a reallocation of funding from currently funded programs, the sponsor shall identify in the text of the initiative the program or programs whose funding must be reduced or eliminated to implement the initiative. Compliance with this requirement shall not be a violation of the subject matter requirements of this section of the Constitution.

(5) The initiative process shall not be used:

(a) For the proposal, modification or repeal of any portion of the Bill of Rights of this Constitution;

(b) To amend or repeal any law or any provision of the Constitution relating to the Mississippi Public Employees' Retirement System;

(c) To amend or repeal the constitutional guarantee that the right of any person to work shall not be denied or abridged on account of membership or nonmembership in any labor union or organization; or

(d) To modify the initiative process for proposing amendments to this Constitution.

(6) The Secretary of State shall file with the Clerk of the House and the Secretary of the Senate the complete text of the certified initiative on the first day of the regular session. A constitutional initiative may be adopted by a majority vote of each house of the Legislature. If the initiative is adopted, amended or rejected by the Legislature; or if no action is taken within four (4) months of the date that the initiative is filed with the Legislature, the Secretary of State shall place the initiative on the ballot for the next statewide general election.

The chief legislative budget officer shall prepare a fiscal analysis of each initiative and each legislative alternative. A summary of each fiscal analysis shall appear on the ballot.

(7) If the Legislature amends an initiative, the amended version and the original initiative shall be submitted to the electors. An initiative or legislative alternative must receive a majority of the votes thereon and not less than forty percent (40%) of the total votes cast at the election at which the measure was submitted to be approved. If conflicting initiatives or legislative alternatives are approved at the same election, the initiative or legislative alternative receiving the highest number of affirmative votes shall prevail.

(8) If an initiative measure proposed to the Legislature has been rejected by the Legislature and an alternative measure is passed by the Legislature in

lieu thereof, the ballot titles of both such measures shall be so printed on the official ballots that a voter can express separately two (2) preferences: First, by voting for the approval of either measure or against both measures, and, secondly, by voting for one measure or the other measure. If the majority of those voting on the first issue is against both measures, then both measures fail, but in that case the votes on the second issue nevertheless shall be carefully counted and made public. If a majority voting on the first issue is for the approval of either measure, then the measure receiving a majority of the votes on the second issue and also receiving not less than forty percent (40%) of the total votes cast at the election at which the measure was submitted for approval shall be law. Any person who votes for the ratification of either measure on the first issue must vote for one (1) of the measures on the second issue in order for the ballot to be valid. Any person who votes against both measures on the first issue may vote but shall not be required to vote for any of the measures on the second issue in order for the ballot to be valid. Substantially the following form shall be a compliance with this subsection:

INITIATED BY PETITION AND ALTERNATIVE BY LEGISLATURE

Initiative Measure No. __________, entitled (here insert the ballot title of the initiative measure).

Alternative Measure No. __________ A, entitled (here insert the ballot title of the alternative measure).

VOTE FOR APPROVAL OF EITHER, OR AGAINST BOTH:

FOR APPROVAL OF EITHER Initiative No. ____

OR Alternative No. ____ A ....( )
AGAINST Both Initiative No. ____
AND Alternative No. ____ A ....( )

AND VOTE FOR ONE

FOR Initiative Measure No. ____ ....( )

FOR Alternative Measure No. ____ A ....( )

(9) No more than five (5) initiative proposals shall be submitted to the voters on a single ballot, and the first five (5) initiative proposals submitted to the Secretary of State with sufficient petitions shall be the proposals which are submitted to the voters. The sufficiency of petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the state, which shall have original and exclusive jurisdiction over all such cases.

(10) An initiative approved by the electors shall take effect thirty (30) days from the date of the official declaration of the vote by the Secretary of State, unless the measure provides otherwise.

(11) If any amendment to the Constitution proposed by initiative petition is rejected by a majority of the qualified electors voting thereon, no initiative petition proposing the same, or substantially the same, amendment shall be submitted to the electors for at least two (2) years after the date of the election on such amendment.

(12) The Legislature shall provide by law the manner in which initiative petitions shall be circulated, presented and certified. To prevent signature fraud and to maintain the integrity of the initiative process the state has a compelling interest in insuring that no person shall circulate an initiative petition or obtain signatures on an initiative petition unless the person is a resident of this state at the time of circulation. For the purposes of this subsection the term "resident" means a person who is domiciled in Mississippi as evidenced by an intent to maintain a principal dwelling place in Mississippi indefinitely and to return to Mississippi if temporarily absent, coupled with an act or acts consistent with that intent. Every person who circulates an initiative petition shall print and sign his name on each page of an initiative petition, or on a separate page attached to each page, certifying that he was a resident of this state at the time of circulating the petition. The Secretary of State shall refuse to accept for filing any page of an initiative petition upon which the signatures appearing thereon were obtained by a person who was not a resident of this state at the time of circulating the petition, and an initiative measure shall not be placed on the ballot if the Secretary of State determines that without such signatures the petition clearly bears an insufficient number of signatures. The provisions of this subsection (12) shall be applicable to all initiative measures that have not been placed on the ballot at the time this proposed amendment is ratified by the electorate.

(13) The Legislature may enact laws to carry out the provisions of this section but shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people.

SOURCES: 1817 art "Mode of Revising," etc. § 1; 1832 art "Mode of Revising," etc. § 1; 1869 art 13; Laws, 1912 ch 416; Laws, 1959 Ex Sess, ch 78; Laws, 1989, ch. 702; Laws, 1992, ch. 715; Laws, 1998, ch. 619, eff November 30, 1998.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the first sentence of subsection (3). A period was inserted after the first occurrence of "initiative." The Joint Committee ratified the correction at its May 16, 2002 meeting.

Editor's Note — The 1958 amendment to Section 273 of Article 15 the Constitution of 1890 was proposed by Laws, 1958, ch. 629 for submission to the electors of the State in an election held on August 26, 1958, and, upon ratification by the electorate at said election, was inserted by Laws, 1959 Ex. Sess. ch. 78.

The 1989 amendment to Section 273 of Article 15 of the Constitution of 1890 was proposed by Laws, 1989, ch. 702 (Senate Concurrent Resolution No. 513). The electorate, however, rejected the proposed amendment on June 20, 1989.

The 1992 amendment of Section 273 in Article 15 of the Mississippi Constitution of 1890, was proposed by Laws, 1992, ch. 715 (Senate Concurrent Resolution No. 516), and upon ratification by the electorate on November 3, 1992, was inserted as part of the Constitution by proclamation of the Secretary of State on December 8, 1992.

Laws, 1998, ch. 619 (House Concurrent Resolution No. 61), provides in pertinent part:

"BE IT FURTHER RESOLVED, That this proposed amendment shall be submitted by the Secretary of State to the qualified electors at an election to be held on the first Tuesday after the first Monday of November 1998, as provided by Section 273 of the Constitution and by general law.

"BE IT FURTHER RESOLVED, That the explanation of this proposed amendment for the ballot shall read as follows: 'This proposed constitutional amendment provides that only a person who is a resident of this state may circulate an initiative petition or obtain signatures on a initiative petition for the purpose of proposing an amendment to the Mississippi Constitution.'

"BE IT FURTHER RESOLVED, That the Attorney General of the State of Mississippi shall submit this resolution, immediately upon adoption by the Legislature, to the Attorney General of the United States or to the United States District Court for the District of Columbia, in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended."

The 1998 amendment of Section 273 in Article 15 of the Mississippi Constitution of 1890, was proposed by Laws, 1998, ch. 619 (House Concurrent Resolution No. 61), and upon ratification by the electorate on November 3, 1998, was inserted as part of the Constitution by proclamation of the Secretary of State on November 30, 1998.

Cross References — Legislative bills, generally, see Miss. Const. Art. 4, § 59.

Secretary of state generally, see § 7-3-1 et seq.

JUDICIAL DECISIONS

1. Construction of amendments.
2. Action of legislature.
3. Submission to electorate—In general.
4. Multiple amendments, submission to electorate.
5. Adoption of amendments.
6. Number of votes required for adoption.
7. Prohibition.
8. Circulation of initiative petitions.
9. Government revenue impact statement.

1. Construction of amendments.

The onus is upon the legislature to redress economic inadequacies, and Mississippi Constitution Article XV, § 273 provides the exclusive means for amendment of the Mississippi Constitution. Chevron U.S.A., Inc. v. State, 578 So. 2d 644 (Miss. 1991).

The court must consider other sections of the Constitution in construing an amendment thereto, and if possible, harmonize and give effect to all. State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1 (1919).

2. Action of legislature.

It is essential to a valid amendment that two-thirds of the members of each house shall vote in favor of the same on three several days. Green v. Weller, 32 Miss. 650 (1856).

3. Submission to electorate—In general.

The rule of collateral estoppel precluded relitigation of a previous decision that the initiative and referendum amendment to the Mississippi Constitution was not validly enacted under Mississippi Constitution Article XV § 273, and therefore an initiative to repeal the constitutional ban on all lotteries would not be placed on the election ballot. State ex rel. Moore v. Molpus, 578 So. 2d 624 (Miss. 1991).

A court is without powers to enjoin the holding of an election on a proposed constitutional amendment. Barnes v. Barnett, 241 Miss. 206, 129 So. 2d 638 (1961).

The requirement of notice of an election is met by publication in three daily newspapers published in the state capital. Barnes v. Barnett, 241 Miss. 206, 129 So. 2d 638 (1961).

The special election may be held on the same date and with the same officers as a party primary, where separate ballots and separate ballot boxes are used. Barnes v. Barnett, 241 Miss. 206, 129 So. 2d 638 (1961).

Notice given on May 6 of an election to be held June 7 satisfies this requirement. Barnes v. Barnett, 241 Miss. 206, 129 So. 2d 638 (1961).

Whether the submission to the people of an amendment to the Constitution be legal or illegal is a judicial question, and not a political or legislative one. State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927 (1900), overruled on other grounds, Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

4. Multiple amendments, submission to electorate.

Nothing in Mississippi Constitution Article 15 § 273, which proscribes the submission of multiple amendments to the electorate, invalidates House Concurrent Resolution 41 nor its ratification and incorporation into Mississippi Constitution Article 4 § 112. Although H.C.R. 41 authorized the legislature to deny a county the right to levy taxes on a nuclear-powered electrical generating plant and altered the classification system for taxation, it may fairly be read as relating to a single subject matter: classification of property for ad valorem taxation purposes. Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

Proposed amendment to Constitution to provide for initiative and referendum (c 159, Laws 1916) violated this section because it contained more than one separate subject and was not submitted in such manner and form that each subject could be voted upon separately by the people. Power v. Robertson, 130 Miss. 188, 93 So. 769 (1922).

5. Adoption of amendments.

The amendment to § 153 of the Constitution was legally adopted. State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927 (1900), overruled on other grounds, Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988), but see State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927 (1900), holding that the amendment then under consideration was not properly adopted.

Whether the people have or have not adopted a submitted amendment to the Constitution is a judicial question, and not a political or legislative one. State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927 (1900), overruled on other grounds, Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

6. Number of votes required for adoption.

An amendment to the Constitution, under the section, has not been adopted if it failed to receive a majority of the votes cast, including all those voting at the election, whether they vote for or against the amendment or only for candidates for office. State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927 (1900), overruled on other grounds, Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

If a proposed amendment to the Constitution be submitted at an election at which officers are voted for, the double purpose of the election does not make it two elections; and all votes cast at the election are to be counted in determining whether the amendment be or be not adopted, the election on the amendment not being special or separable. State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927 (1900), overruled on other grounds, Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

7. Prohibition.

A court is without power to issue a writ of prohibition to restrain the Secretary of State from proclaiming that a constitutional amendment has received a majority vote. Barnes v. Ladner, 241 Miss. 606, 131 So. 2d 458 (1961).

8. Circulation of initiative petitions.

A requirement that circulators of petitions for ballot initiatives must be residents imposed by way of an amendment to subsection (12) of this section is constitutional because it is narrowly tailored to the aim of preventing campaign fraud; however, a provision making such amendment retroactive to all initiative measures that had not been placed on the ballot at the time of the ratification of the proposed amendment was unconstitutional as it was aimed at one specific initiative and, therefore, amounted to content-based discrimination against a particular political viewpoint. Kean v. Clark, 56 F. Supp. 2d 719 (S.D. Miss. 1999).

9. Government revenue impact statement.

The sponsor established no rational basis for her assertion that her proposed measure to eliminate for-profit gaming would not necessarily require an adverse impact on government revenue in this state and such constitutional deficiency clearly violated subsection (4) the order of the circuit court declaring the measure unconstitutional and therefore null and void was affirmed. In re Proposed Initiative Measure No. 20 v. Mahoney, 774 So. 2d 397 (Miss. 2000).

When a sponsor of an initiative asserts that the initiative will have no negative impact on current funding of state programs and chooses to exclude a government revenue impact statement from the text of the initiative, that sponsor must establish a rational basis to support her assertion that no such adverse impact will occur. Stoner v. Mahoney (In re Proposed Initiative Measure No. 20), 2000 Miss. LEXIS 205 (Miss. Sept. 7, 2000), opinion withdrawn by, substituted opinion at 774 So. 2d 397, 2000 Miss. LEXIS 268 (Miss. 2000).

Notwithstanding that the sponsor of an initiative to prohibit gambling within the state, except gambling sponsored by religious, educational, or wildlife organizations, asserted that the initiative would have no negative impact on current funding of state programs and, therefore, chose to exclude a government revenue impact statement from the text of the initiative, it was clear that legalized gambling had become an important generator of tax revenue in the state and, therefore, the initiative was unconstitutional in the absence of a government revenue impact statement. Stoner v. Mahoney (In re Proposed Initiative Measure No. 20), 2000 Miss. LEXIS 205 (Miss. Sept. 7, 2000), opinion withdrawn by, substituted opinion at 774 So. 2d 397, 2000 Miss. LEXIS 268 (Miss. 2000).

ATTORNEY GENERAL OPINIONS

The sponsor of an initiative must identify in the text of an initiative the amount and source of revenue required to implement the initiative; if the initiative would reduce government revenues or would require a reduction of funds to programs or a reallocation of funds between programs, then the sponsor must set forth in the text of the initiative exactly which program or programs will be cut back or eliminated, and the sponsor must provide sufficient facts so that the voters are informed as to the effect of the initiative on sources of government revenues and current programs; if the sponsor asserts that no adverse impact will occur in sources of government revenues, the sponsor must establish a rational basis to support such assertion. Nunnelee, Mar. 23, 2001, A.G. Op. #01-0738.

The 12-month period for the collection of petitions for an initiative began to run on the date the proponent of the initiative received from the Secretary of State a court order amending the ballot title and summary for the proposed initiative and “finally establishing” same, rather than the earlier date on which the proponent received the original ballot title and ballot summary or the later date on which the appeal of the court order was dismissed. Scott, Sept. 20, 2001, A.G. Op. #01-0586.

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. 2d, Constitutional Law §§ 23-25, 33-46.

CJS. C.J.S. Constitutional Law § 6.

Law Reviews. Draft of New Constitution for State of Mississippi, Constitutional Study Commission, 7 Miss. C. L. Rev. 1, Fall, 1986.

Southwick and Welsh, Methods of Constitutional Revision: Which Way Mississippi? 56 Miss L. J. 17, April, 1986.

SCHEDULE

Sec.	
274.	Laws to remain in force
275.	Repeal of laws repugnant to Constitution
276.	Laws repugnant to franchise and election provisions
277.	Laws repugnant to apportionment provisions
278.	Appointment of persons to draft laws
279.	Continuation of writs, actions and causes of action
280.	Jurisdiction of courts in preexisting actions
281.	Accrual of fines, penalties and forfeitures
282.	Preexisting bonds remain binding
283.	Crimes and misdemeanors
284.	Continuation in office
285.	Abrogated or repealed laws not revived

That no inconvenience may arise from the changes in the Constitution of this state, in order to carry the new Constitution into complete operation, it is hereby declared that—

§ 274. Laws to remain in force

The laws of this State now in force, not repugnant to this Constitution, shall remain in force until amended or repealed by the Legislature, or until they expire by limitation. All statute laws of this State repugnant to the provisions of this Constitution, except as provided in the next three sections, shall continue and remain in force until the first day of April, A. D. 1892, unless sooner repealed by the Legislature.

JUDICIAL DECISIONS

1. Construction and application.

The section suspended § 79 and the right to redeem land from a tax sale made in March, 1891, was limited, under existing statutes (Code 1880 § 531), to one year after the sale. Le Blanc v. Illinois Cent. R. Co., 72 Miss. 669, 18 So. 381 (1895).

The section did not suspend § 171, as to jurisdictional amount. Illinois Cent. R.R. v. Brookhaven Mach. Co., 71 Miss. 663, 16 So. 252 (1894).

The section did not suspend § 104. Adams v. Illinois C.R. Co., 71 Miss. 752, 15 So. 640 (1894).

The section continued in force the existing statute (Code 1880 § 531), fixing the time for redemption from tax sales, until April 1, 1892, notwithstanding § 79. Judah v. Brothers, 71 Miss. 414, 14 So. 455 (1893).

This section suspended § 264. Nail v. State, 70 Miss. 32, 11 So. 793 (1892).

This section did not suspend the operation of § 261. State ex rel. Warren County v. Stone, 69 Miss. 375, 11 So. 4 (1892).

RESEARCH REFERENCES

ALR. What statute of limitations governs creditor's action, under Bulk Sales Act, against purchaser. 61 A.L.R.2d 935.

CJS. C.J.S. Constitutional Law §§ 29, 39 to 45, 51.

§ 275. Repeal of laws repugnant to Constitution

All laws of this State which are repugnant to the following portions of this Constitution shall be repealed by the adoption of this Constitution, to-wit: Laws repugnant to—

(a) All the ordinances of this convention;

(b) The provisions of Section 183, prohibiting counties, cities, and towns from voting subscriptions to railroad and other corporations or associations;

(c) The provisions of Sections 223 [Repealed] to 226, inclusive, of Article 10, prohibiting the leasing of penitentiary convicts.

RESEARCH REFERENCES

CJS. C.J.S. Constitutional Law §§ 29, 39 to 45, 51.

§ 276. Laws repugnant to franchise and election provisions

All laws of the State which are repugnant to the provisions of Sections 240 to 253, inclusive, of Article 12, on the subject of franchise and elections, shall be and remain in force until the first day of January, A. D. 1891, and no longer.

Editor's Note — Sections 241A, 243 and 244, referred to in this section, have been repealed.

RESEARCH REFERENCES

CJS. C.J.S. Constitutional Law §§ 29, 39 to 45, 51.

§ 277. Laws repugnant to apportionment provisions

All laws of this State which are repugnant to the provisions of Article 13, Sections 254 to 256 [Repealed], inclusive, on the subject of apportionment of representatives and senators in the Legislature shall be and remain in force until the first day of October, A. D. 1891, but no longer.

Editor's Note — Sections 255 and 256, referred to in this section, have been repealed.

RESEARCH REFERENCES

CJS. C.J.S. Constitutional Law §§ 29, 39 to 45, 51.

§ 278. Appointment of persons to draft laws

The Governor shall, as soon as practicable, appoint three suitable persons, learned in the law, as commissioners, whose duty it shall be to prepare and draft such general laws as are contemplated in this Constitution, and such other laws as shall be necessary and proper to put into operation the provisions thereof and as may be appropriate to conform the general statutes of the State to the Constitution. Said commissioners shall present the same, when prepared, to the Legislature at its next regular session; and the Legislature shall provide reasonable compensation therefor.

RESEARCH REFERENCES

CJS. C.J.S. Statutes §§ 2, 4.

§ 279. Continuation of writs, actions and causes of action

All writs, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the state, and charters of incorporation shall continue; and all indictments which shall have been found, or which shall hereafter be found, and all prosecutions begun, or that may be begun, for any crime or offense committed before the adoption of this Constitution may be proceeded with and upon as if no change had taken place.

JUDICIAL DECISIONS

1. Rights accrued prior to adoption.
2. Tax exemptions.

1. Rights accrued prior to adoption.

Although § 261 of the Constitution of 1890 abrogated the former constitutional provision whereby certain fines were appropriated to the common school fund, the board of education could sue for fines accrued prior to such abrogation by virtue of this section preserving all existing causes of action. Foote v. Farmer, 71 Miss. 148, 14 So. 445 (1893).

2. Tax exemptions.

Amendment of charter of religious organization, after adoption of Constitution 1890, rendered provision for tax exemption void. City of Biloxi v. Trustees of Miss. Annual Conference Endowment Fund, 179 Miss. 47, 173 So. 797 (1937).

A corporation which, since the adoption of the Constitution, has lost its individual corporate existence by a consolidation with another company, can claim no benefit under the section of a previous exemption from taxation of one of its constituent companies. Adams v. Yazoo & Miss. V.R. Co., 77 Miss. 194, 24 So. 200 (1898), motion denied, 77 Miss. 302, 24 So. 317 (1898), aff'd, 180 U.S. 1, 21 S. Ct. 240, 45 L. Ed. 395 (1901), reh'g denied, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901).

RESEARCH REFERENCES

CJS. C.J.S. Constitutional Law §§ 36 to 38.

§ 280. Jurisdiction of courts in preexisting actions

For the trial and determination of all suits, civil and criminal, begun before the adoption of this Constitution, the several courts of this state shall continue to exercise in said suits the powers and jurisdictions heretofore exercised by them; for all other matters said courts are continued as organized courts under this Constitution, with such powers and jurisdiction as is herein conferred on them respectively.

RESEARCH REFERENCES

CJS. C.J.S. Constitutional Law §§ 36 to 38.

§ 281. Accrual of fines, penalties and forfeitures

All fines, penalties, forfeitures, and escheats, accruing to the State of Mississippi under the Constitution and laws heretofore in force shall accrue to the use of the state of Mississippi under this Constitution, except as herein otherwise provided.

RESEARCH REFERENCES

CJS. C.J.S. Constitutional Law §§ 36 to 38.

§ 282. Preexisting bonds remain binding

All recognizances, bonds, obligations, and all other instruments entered into or executed before the adoption of this Constitution, to the State of Mississippi, or to any state, county, public or municipal officer or body, shall remain binding and valid, and the rights and liabilities upon the same shall be continued, and may be prosecuted as provided by law.

RESEARCH REFERENCES

CJS. C.J.S. Constitutional Law §§ 36 to 38.

§ 283. Crimes and misdemeanors

All crimes and misdemeanors and penal actions shall be tried, prosecuted, and punished as though no change had taken place, until otherwise provided by law.

RESEARCH REFERENCES

CJS. C.J.S. Constitutional Law §§ 36 to 38.

§ 284. Continuation in office

All officers—state, district, county, and municipal—now in office in this State, shall be entitled to hold the respective offices now held by them, except as otherwise herein provided, and until the expiration of the time for which they were respectively elected or appointed, and shall receive the compensation and fees now fixed by the statute laws in force when this Constitution is adopted.

RESEARCH REFERENCES

ALR. Plaintiff's right to bring tort action against municipality prior to expiration of statutory waiting period. 73 A.L.R.3d 1019.

CJS. C.J.S. Constitutional Law §§ 29, 39 to 45, 51.

§ 285. Abrogated or repealed laws not revived

The adoption of this Constitution shall not have the effect, nor shall it be construed, to revive or put in force any law heretofore abrogated or repealed.

This Constitution, adopted by the people of Mississippi in convention assembled, shall be in force and effect from and after this, the first day of November, A.D. 1890.

S. S. CALHOON,
President and Delegate from Hinds County.
R. F. ABBAY, Delegate from Tunica county.
J. L. ALCORN, Delegate from Coahoma county.
R. H. ALLEN, Delegate from Tishomingo county.
D. B. ARNOLD, Delegate from Panola county.
ARTHUR ABBINGTON, Delegate from Jones county.
JNO. A. BAILEY, Delegate from Lauderdale county.
JNO. R. BAIRD, Delegate from Sunflower county.
W. L. BASSETT, Delegate from Neshoba county.
D. R. BARNETT, Delegate from Yazoo county.
T. P. BELL, Delegate from Kemper county.
J. R. BINFORD, Delegate from Montgomery county.
H. I. BIRD, Delegate from Lawrence county.
JOHN A. BLAIR, Delegate from state at large.
B. B. BOONE, Delegate from Prentiss county.
J. B. BOOTHE, Delegate from state at large.
W. A. BOYD, Delegate from Tippah county.
D. BUNCH, Delegate from Yazoo county.
R. B. CAMPBELL, Delegate from Washington county.
J. P. CARTER, Delegate from Perry county.
J. B. CHRISMAN, Delegate from Lincoln county.
C. S. COFFEY, Delegate from Jefferson county.
J. W. CUTRER, Delegate from Coahoma county.
MARYE DABNEY, Delegate from Warren county.

R. A. DEAN, Delegate from Lafayette county.
WALTER M. DENNY, Delegate from Jackson county.
GEO. G. DILLARD, Delegate from Noxubee county.
GEO. L. DONALD, Delegate from Clarke county.
G. W. DYER, Delegate from Panola county.
J. W. EDWARDS, Delegate from Oktibbeha county.
A. J. ERVIN, Delegate from Lowndes county.
W. S. ESKRIDGE, Delegate from Tallahatchie county.
W. S. FARISH, Delegate from Issaquena county.
D. S. FEARING, Delegate from Hinds county.
W. S. FEATHERSTON, Delegate from Marshall county.
J. E. FERGUSON, Delegate from Newton county.
JNO. W. FEWELL, Delegate from state at large.
GEO. J. FINLEY, Delegate from Marshall county.
J. D. FONTAINE, Delegate from Pontotoc county.
T. S. FORD, Delegate from state at large.
J. Z. GEORGE, Delegate from state at large.
F. M. GLASS, Delegate from Attala county.
A. B. GUYNES, Delegate from Copiah county.
D. T. GUYTON, Delegate from Attala county.
F. M. HAMBLET, Delegate from Quitman county.
J. G. HAMILTON, Delegate from Yazoo and Holmes counties.
T. L. HANNAH, Delegate from Choctaw county.
W. P. HARRIS, Delegate from Hinds county.
T. T. HART, Delegate from Hinds county.
N. C. HATHORN, Delegate from Covington county.
JOHN HENDERSON, Delegate from Clay county.
ELLIOT HENDERSON, Delegate from Harrison county.
PATRICK HENRY, Delegate from state at large.
C. K. HOLLAND, Delegate from Calhoun county.
H. S. HOOKER, Delegate from Holmes county.
R. G. HUDSON, Delegate from state at large.
THOS. D. ISOM, Delegate from Lafayette county.
J. H. JAMISON, Delegate from Noxubee county.
D. S. JOHNSON, Delegate from Chickasaw county.
JAMES HENRY JONES, Delegate from state at large.
WALTER L. KEIRN, Delegate from Holmes county.
JAMES KENNEDY, Delegate from Clay county.
J. KITTRELL, Delegate from Greene county.
W. J. LACEY, Delegate from Chickasaw county.
ROBERT CHARLES LEE, Delegate from Madison county.
S. D. LEE, Delegate from Oktibbeha county.
T. P. LEE, Delegate from Yazoo county.
GEO. H. LESTER, Delegate from Yalobusha county.
W. F. LOVE, Delegate from Amite county.
L. W. MAGRUDER, Delegate from state at large.

E. J. MARETT, Delegate from Marshall county.
C. B. MARTIN, Delegate from Alcorn and Prentiss counties.
EDWARD MAYES, Delegate from state at large.
MONROE McCLURG, Delegate from Carroll county.
WILL T. McDONALD, Delegate from Benton county.
T. J. McDONELL, Delegate from Monroe county.
J. H. McGEHEE, Delegate from Franklin county.
G. T. McGEHEE, Delegate from Wilkinson county.
F. A. McLAIN, Delegate from Amite and Pike counties.
WM. C. McLEAN, Delegate from Grenada county.
A. G. McLAURIN, Delegate from Smith county.
A. J. McLAURIN, Delegate from Rankin county.
H. J. McLAURIN, Delegate from Sharkey county.
J. S. McNEILLY, Delegate from state at large.
GEO. P. MELCHOIR, Delegate from Bolivar county.
T. L. MENDENHALL, Delegate from Simpson county.
IRVIN MILLER, Delegate from Leake county.
ISAIAH T. MONTGOMERY, Delegate from Bolivar county.
W. H. MORGAN, Delegate from Leflore county.
J. L. MORRIS, Delegate from Wayne county.
H. L. MULDROW, Delegate from state at large.
J. R. MURFF, Delegate from Monroe county.
T. V. NOLAND, Delegate from Wilkinson county.
J. W. ODOM, Delegate from DeSoto county.
S. E. PACKWOOD, Delegate from Pike county.
J. K. P. PALMER, Delegate from Scott county.
ROBT. C. PATTY, Delegate from Noxubee county.
A. J. PAXTON, Delegate from Washington county.
C. O. POTTER, Delegate from Union county.
SAM POWELL, Delegate from DeSoto county.
J. R. PURYEAR, Delegate from Tate county.
JNO. H. REAGAN, Delegate from Leake and Newton counties.
CHAS. K. REGAN, Delegate from Claiborne county.
L. P. REYNOLDS, Delegate from Alcorn county.
L. J. RHODES, Delegate from Lee county.
W. C. RICHARDS, Delegate from Lowndes county.
S. W. ROBINSON, Delegate from Rankin county.
J. P. ROBINSON, Delegate from Union county.
J. J. ROTTENBERRY, Delegate from Yalobusha county.
J. S. SEXTON, Delegate from state at large.
JNO. M. SIMONTON, Delegate from Lee county.
H. F. SIMRALL, Delegate from Warren county.
JNO. F. SMITH, Delegate from Jasper county.
MURRAY F. SMITH, Delegate from Warren county.
W. F. SPENCE, Delegate from Hancock county.
H. M. STREET, Delegate from Lauderdale county.

T. W. SULLIVAN, Delegate from Carroll county.

E. O. SYKES, Delegate from Monroe county.

ALLEN TALBOTT, Delegate from Benton and Tippah counties.

R. H. TAYLOR, Delegate from Panola county.

R. H. THOMPSON, Delegate from Lincoln and Jefferson counties.

STEVE H. TURNER, Delegate from Itawamba county.

T. S. WARD, Delegate from Madison county.

O. C. WATSON, Delegate from Winston county.

W. C. WILKINSON, Delegate from Copiah county.

FRANK K. WINCHESTER, Delegate from Adams county.

WM. D. WITHERSPOON, Delegate from Lauderdale, Kemper, and Clarke counties.

W. P. WYATT, Delegate from Tate county.

WM. G. YERGER, Delegate from Washington county.

Attest: R. E. Wilson, Secretary.

Delegates Who Refused to Sign the Constitution.-Gen. William T. Martin, of Adams; Frank Burkett, of Chickasaw; and John E. Gore, of Webster.

Delegate Absent and Not Signing.—A. G. Webb of Marion.

Delegate Who Died During the Convention.—N. D. Guerry, of Lowndes.

Total, 134.

ADDITIONAL SECTIONS OF THE CONSTITUTION OF MISSISSIPPI NOT BEING AMENDMENTS OF PREVIOUS SECTIONS

Sec.
286 and 287. Renumbered.

§ 286. and 287. Renumbered

These sections of the Constitution as heretofore published are numbered herein 145A, and 149A, respectively.

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  Cross-examination, US Const Amd 5.
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